

A Labor Paradigm for Human Trafficking

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ABSTRACT

Although human trafficking has gained unprecedented national and international attention and condemnation over the past decade, the legal instruments developed to combat this phenomenon have thus far proved insufficient. In particular, current efforts help an alarmingly small number of individuals out of the multitudes currently understood as falling under the category of trafficked persons, and even in these few cases, the assistance provided is of questionable value. This Article thus calls for a paradigm shift in anti-trafficking policy: a move away from the currently predominant human rights approach to trafficking and the adoption of a labor approach that targets the structure of labor markets prone to severely exploitative labor practices. This labor paradigm, the Article contends, offers more effective strategies for combating trafficking.

After establishing the case for the labor paradigm, the Article suggests how it can be incorporated into existing anti-trafficking regimes. The Article proposes five measures for implementing anti-trafficking policies grounded on the labor approach: prevent the criminalization and deportation of workers who report exploitation; eliminate binding arrangements; reduce recruitment fees and the power of middlemen; guarantee the right to unionize; and extend and enforce the application of labor and employment laws to vulnerable workers. Finally, the Article analyzes why this paradigm has yet to be adopted and responds to some of the main objections to a paradigm shift.

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INTRODUCTION

The last decade witnessed growing interest in human trafficking as a legal category in international and national law. After a long period of seeming indifference, there appears to be rising global willingness to take steps to address this phenomenon.¹ The two central expressions of international willingness to address trafficking have been the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 (Trafficking Protocol)² and the U.S. Trafficking Victims Protection Act of 2000 (TVPA).³ The Trafficking Protocol is the most significant international anti-trafficking instrument to date, while the impact of the TVPA has stretched far beyond U.S. borders to shape foreign anti-trafficking policies.⁴ Over a decade since coming into force, their combined operation has transformed how the world contends with human trafficking.

After ratifying the Trafficking Protocol and in compliance with TVPA minimum standards, many countries passed anti-trafficking legislation and developed anti-trafficking policies. The result has been the rapid development of a remarkably uniform anti-trafficking framework across the globe.⁵ In fact, according to the United Nations Office on Drug and Crime (UNODC), by 2009 as many as

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1. UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 6 (2009) [hereinafter UNODC GLOBAL REPORT] (explaining that after a period of indifference, the world is increasingly mobilizing to combat trafficking).
 2. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, S. TREATY DOC. NO. 108-16, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Trafficking Protocol].
 3. Pub. L. No. 106-386, div. A, 114 Stat. 1466 (codified as amended in scattered sections of 18 U.S.C. & 22 U.S.C.), *amended by* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified at 18 U.S.C. § 1595 & 22 U.S.C. § 7109(a) (2006)), Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified in scattered sections of 18 U.S.C., 22 U.S.C. & 42 U.S.C.), and William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 8 U.S.C., 18 U.S.C. & 22 U.S.C.).
 4. Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 439 (2006) (describing the TVPA as “one of the most comprehensive pieces of domestic anti-trafficking legislation in the world”).
 5. See Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789, 791 (2009) (“This framework is truly remarkable—not just in the speed of its development, but also in its uniformity and relatively high level of consistency with international standards.”); Rhacel Salazar Parreñas, *Trafficked? Filipino Hostesses in Tokyo’s Nightlife Industry*, 18 YALE J.L. & FEMINISM 145, 169–77 (2006) (analyzing the downside of this uniformity and criticizing the “one size fits all” approach).

125 countries had enacted specific anti-trafficking legislation.⁶ The emerging framework, which incorporates elements of the Trafficking Protocol and the TVPA into national anti-trafficking laws, consists of laws that adopt what has become known as the “3 Ps” paradigm—prevention, prosecution, and protection—with anti-trafficking efforts, concentrating mostly on the criminalization of trafficking, but also on creating programs to assist, rehabilitate, and eventually repatriate trafficked persons.

Yet despite this worldwide mobilization against human trafficking, the academic literature on anti-trafficking efforts has been largely critical of the emerging legal paradigm. A central point of criticism is that the implementation of these international and national legal instruments has focused on sex trafficking—the trafficking of women and girls into the sex industry for the purpose of prostitution—while tending to ignore labor trafficking⁷—the trafficking of persons for the purpose of labor exploitation into other labor sectors.⁸ Another commonly voiced contention is that both the Trafficking Protocol and the TVPA reflect a weak commitment to protecting and respecting the human rights of those who are trafficked, instead placing excessive emphasis on strengthening border control and criminalization of the trafficking activity.⁹

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6. UNODC GLOBAL REPORT, *supra* note 1, at 22 (reporting that out of the 155 countries surveyed, 63 percent had passed laws addressing trafficking in persons, while an additional 17 percent had passed laws covering only certain elements of trafficking).
 7. Throughout the Article I use the term human trafficking and trafficking in persons interchangeably. When describing or referring to the ongoing debate about the meaning and scope of human trafficking, I follow the norms of the debate and discuss sex trafficking—trafficking into the sex industry—and labor trafficking—trafficking into all other labor sectors—as separate subcategories of human trafficking. However, I do not view the two as separate. Accordingly, in the rest of the Article I use the term labor trafficking to refer generally to the trafficking of persons for the purpose of exploitation into various labor sectors, such as the sex sector, agriculture sector, domestic work sector, or construction sector.
 8. *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) (suggesting that enforcement agencies focus on sex trafficking and neglect the broader trafficking phenomenon); Janie A. Chuang, *Rescuing Trafficking From Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1657 (2010) (describing the domination of sex-sector trafficking and prostitution on trafficking policies and debates).
 9. *See, e.g.*, Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1144–46 (2003) (arguing that trafficking should be understood first and foremost as a violation of human rights); Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 994 (2001) (describing the border control focus of the protocol and the “far from ideal” protection of human rights it offers). For criticism of the TVPA, see, for example, Chuang, *supra* note 4, at 471 (criticizing the insufficient attention to human rights in the U.S. minimum standards), and Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking*

This Article argues that notwithstanding their merits, both criticisms miss a key flaw in current anti-trafficking efforts: the lack of a labor approach to trafficking and what is in fact an overemphasis of certain individual human rights. Far 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.

The Article argues that human trafficking is better understood as predominantly an issue of economic labor market exploitation, and therefore a labor approach to trafficking is required to deal with the phenomenon's underlying causes. 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.

The paradigmatic contemporary human rights approach to trafficking includes strategies for assisting individual victims through the prohibition of trafficking and the extension of certain rights (such as safe shelter, temporary visas and work permits, and various social rights including health care and counseling) to trafficked persons once they have been rescued.¹⁰ This is an individualistic, victim-centered approach that treats trafficking as an exceptional crime. Its objective is to extricate individuals from harmful work environments and ensure ex post aid, while victims play a relatively passive role in the process of their rescue, rehabilitation, and repatriation. Although the framework certainly extends some assistance to trafficked persons, it fails to deal with the economic, social, and legal conditions that create workers' vulnerability to exploitation and is therefore mostly ineffective in curbing human trafficking. Furthermore, the assistance provided under this paradigm reaches an alarmingly small number of individuals, leaving the rest of the traffickers and trafficked population unaffected.¹¹ Finally, the pre-

Victims Protection Act, 21 GEO. IMMIGR. L.J. 337, 340 (2007) (arguing that practical and political problems as well as political and theoretical concerns impede the United States from protecting victims of human trafficking).

10. See *infra* Part II.B.1 (discussing the current, dominant anti-trafficking paradigm).

11. The numbers cited in relation to the scope of the phenomenon of human trafficking are often questionable estimates of its measure, see, e.g., *Trafficking Statistics Project*, UNESCO, www.unescobkk.org/culture/cultural-diversity/trafficking-and-hiv-aids-project/projects/trafficking-statistics-project (last visited Sept. 23, 2012) (arguing that numbers in this field gain acceptance through repetition without inquiry into their derivation). To the extent that they can be instructive about the phenomenon's scope, however, they indicate the inadequacy of the reach and impact of the human rights framework both in aiding victims of trafficking and in remedying its root causes. The figure most com-

vailing human rights approach to anti-trafficking is not merely acutely limited in its reach but in fact may also be harmful in that it has created the illusion that the international community is taking action against severe forms of exploitation, when in reality, little is being done to address the underlying causes.

In contrast, a labor approach to trafficking seeks not only to assist victims of trafficking after they are removed from the exploitative environment but also to transform the structure of labor markets that are particularly susceptible to trafficking. It thereby has the potential to reach significantly more individuals vulnerable to trafficking by providing them with legal mechanisms for avoiding and resisting exploitation. Adopting a labor approach to anti-trafficking would shift the focus away from individual harms to the power disparities between victims and traffickers and the economic and social conditions that make individuals vulnerable to trafficking. This approach understands workers as agents and rests on the possibility of an ongoing employment relationship and bottom-up change that can occur only by remedying the structural causes of power disparities. The outcome it seeks, therefore, is the *ex ante* transformation of the economic conditions and legal rules that enable severe forms of labor exploitation. A labor approach, accordingly, turns to strategies of collective action and bargaining, protective employment legislation, and contextual standard setting, in its attempt to remedy the unequal power relations in labor sectors susceptible to trafficking. This approach further calls attention to other elements of the legal order that shape power relations in

only quoted to estimate the numbers of trafficked persons is the International Labour Organization's (ILO) 2005 estimate that there are approximately 2.4 million victims of human trafficking around the world. INT'L LABOUR ORG., *A GLOBAL ALLIANCE AGAINST FORCED LABOR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK* 10, 14 (2005) [hereinafter *ILO GLOBAL REPORT 2005*]; INT'L LABOUR ORG., *ILO ACTION AGAINST TRAFFICKING IN HUMAN BEINGS* 3 (2008) [hereinafter *ILO ACTION*] ("Out of 12.3 million forced labour victims worldwide, around 2.4 million were trafficked. The figures present a conservative estimate of actual victims at any given point in time, estimated over a period of ten years."). A 2012 ILO report, using a new methodology, found that there are 20.9 million victims of forced labor around the world. It is interesting to note that this new report does not differentiate between forced labor and human trafficking. *See* INT'L LABOUR ORG., *GLOBAL ESTIMATES OF FORCED LABOR: RESULTS AND METHODOLOGY* 13 (2012) [hereinafter *ILO GLOBAL ESTIMATES 2012*] ("Human trafficking can also be regarded as forced labour, and so this estimate captures the full realm of human trafficking for labour and sexual exploitation . . ."). Despite these large numbers of trafficked persons, the U.S. 2012 Trafficking in Persons Report, which also relies on the ILO's estimate regarding the scope of the phenomenon, stated that in 2011, only 42,291 victims of human trafficking were identified around the world and there were only 7909 prosecutions and 3969 convictions for trafficking worldwide, a mere 278 of which were related to labor trafficking while the rest were related to sex trafficking. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* 44 (2012) [hereinafter *TIP REPORT 2012*] (detailing the numbers of identifications, prosecutions, and convictions around the world).

labor markets, such as the background rules of private law (including, for example, property, contracts, and torts), immigration regimes, relevant trade policies, criminal law, border-crossing practices, and certain welfare policies, to the extent that these elements of the legal order affect the bargaining positions of the parties to a labor contract in various labor sectors.

The Article points to a deep ideological and normative divide between the labor approach to trafficking and the human rights approach. It identifies two main lines of divergence between the two paradigms. The first relates to different assumptions regarding the victimhood and agency of trafficked persons. The predominant human rights conception of trafficking labels them as innocent victims who need to be rescued from criminals. The opposing understanding, which contemplates trafficking as an issue of vulnerable labor rather than a violation of human rights—shifts the focus to the agency potential of the workers, who can be empowered to transform their working conditions. These different premises result in different approaches regarding the needs of trafficked persons.

The second point of divergence between the two paradigms is their differing conceptualizations of exploitation in the context of trafficking. The human rights approach views it as an exceptional and distinct crime. The labor approach, in contrast, regards trafficking to be an instance of severe labor exploitation that shares characteristics with other forms of worker commodification, which is, to some extent, typical of all employment contracts. Accordingly, anti-trafficking efforts under a labor paradigm would focus on labor market inequalities and background rules that shape workers' bargaining positions and facilitate their exploitation. These differences between the two models lead to the pursuit of different outcomes and, consequently, the adoption of different strategies for effecting change. Given the divergences between the two approaches, this Article argues that the labor paradigm cannot simply supplement the existing human rights regime as is. Rather, incorporating the labor approach into the current anti-trafficking approach will require a retooling and renegotiation of some of the regime's basic tenets.

There are various factors that have led to the absence of a labor orientation in anti-trafficking efforts. First, the traditional focus on sex trafficking makes the introduction of a labor discourse highly controversial because of deeply rooted disagreement over the nature of prostitution and its regulation as work. A second factor is the overall decline of the labor movement and its recent attempt to revive its legitimacy and currency by adopting human rights-like absolute and universal proclamations, akin to the human rights-based approach to trafficking. These trends have meant that the movement's relevant bodies, such as the International Labor Organization (ILO) and trade unions, have not introduced or pushed for a

labor-based framework in the global anti-trafficking campaign. Third, the UN Drug and Crime Commission, which is not necessarily sensitive to or interested in labor issues, is the custodian of the Convention Against Transnational Organized Crime and Its Protocols, including the Trafficking Protocol. Accordingly, the Trafficking Protocol mostly bolstered the authority of states through emphasis on border control and criminalization measures. A fourth factor is the array of economic interests pushing against the adoption of a labor framework. On the one hand, national protectionist economic interests work to curb migration in order to protect local workers in certain sectors from competition. To this end, various anti-immigration policies are promoted that exacerbate migrant workers' vulnerability to exploitation and trafficking. On the other hand, there are rent-seeking interests that benefit from flexible, deregulated labor markets. Such interests may be served by worker migration, but need labor to remain informal, thereby reducing the cost of labor and weakening workers' protections and bargaining power while increasing their vulnerability to exploitation. These two sets of economic interests stack up against adopting a labor paradigm to trafficking. Finally, the Article contends that there is a fifth crucial factor contributing to the absence of a labor approach in the current anti-trafficking regime, which has not been accorded sufficient attention: the dominance of the human rights approach in the trafficking field and the deep ideological differences between the labor and human rights paradigms, which obstruct the path to their mutual coexistence.

In spite of these challenges, the Article contends that the long overdue paradigm shift is not only warranted but also possible. The United States, the European Union, and other countries have already shown a commitment to anti-trafficking and have taken extraordinary steps to combat this problem.¹² Directing this international willingness and these resources into a labor-based program against trafficking would significantly increase the potential for reducing the incidence and severity of trafficking.

12. Examples of such commitment are the U.S. trafficking visa (T visa) regime that grants victims of trafficking a path to naturalization, see Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3010–12 (2006) (explaining the criteria for T visa eligibility and the protections offered by the visa), and the broad EU drive to increase awareness and knowledge of sex trafficking, see Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197 (detailing the Council of Europe's commitment to combating trafficking). Additional examples can be found in the willingness of many receiving countries to take steps to implement some of the nonbinding elements of the Trafficking Protocol, such as the establishment of victim shelters and rehabilitation programs for victims of trafficking and the creation of special visas for victims of trafficking. See *infra* text accompanying notes 103–108.

Although the solutions offered by a labor framework would be highly context dependent, varying from country to country and from one labor sector to another, there are some general measures that could be implemented. This would include, for example, ensuring that vulnerable workers have access to national courts without fear of deportation or criminalization and recognizing their right to unionize. Other possible ways of implementing a labor approach include enacting and enforcing protective employment laws and regulations for sectors susceptible to trafficking, eliminating legal schemes that bind workers to specific employers, and introducing regulation that prevents structuring contracts on insurmountable debt. Measures of this type would strengthen workers' bargaining positions and give them—and the nongovernmental organizations and unions that assist them—tools for transforming employment practices, which will significantly reduce their vulnerability to exploitation. Indeed, a decade after the introduction of the Trafficking Protocol, it is high time for the international community, the individual states, the human rights and the labor movements, and all those involved in the anti-trafficking effort to reconsider the necessity for a labor approach in the battle against human trafficking.

Part I introduces the currently accepted legal definition of trafficking and the main components of anti-trafficking policies around the world. Part II describes the human rights approach to trafficking and explains why it fails to combat trafficking adequately. The labor approach to trafficking is then presented, and this Part discusses its potential for contending with the root causes of trafficking and the means for its implementation. A case study of trafficking in agricultural workers in Israel illustrates the deficiencies of the current anti-trafficking framework and demonstrates the promise of the labor alternative. Finally, Part III considers several significant challenges to the incorporation of the labor paradigm into the anti-trafficking regime and responds to them.

I. THE LAW OF HUMAN TRAFFICKING

A. The U.N. Trafficking Protocol

Human trafficking has garnered significant national and international attention in the last decade. Yet the legal interest in trafficking is by no means a new trend. In 1904, an international treaty on trafficking was adopted, followed by conventions signed in 1910, 1921, 1933, and 1950.¹³ This first generation of anti-

13. International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83. Later international instruments dealing with trafficking include the following:

trafficking conventions reflected an understanding of trafficking that differs from the term's contemporary application. Albeit refraining from an explicit definition of human trafficking, these instruments sought to address what was known at the time as the "white slave trade"¹⁴: the movement of women and girls across borders for the purpose of prostitution. The second, contemporary wave of anti-trafficking instruments began in the 1990s, culminating in the introduction of the Trafficking Protocol under the aegis of the UNODC in 2000.¹⁵ The protocol adopted a comprehensive and broad definition of trafficking,¹⁶ covering the experiences of both men and women in forced labor, servitude, slavery or slavery-like practices, and organ removal, within or beyond the borders of their countries of origin.

Under article 3 of the protocol, trafficking comprises three components: (1) a particular *action*—"the recruitment, transportation, transfer, harbouring or receipt of persons"; (2) certain *means* for carrying out the action—"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"; and (3) the end *purpose* of exploitation.¹⁷ The protocol defines exploitation sweepingly to 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."¹⁸ This broad definition is considered one of the protocol's most significant achievements in that it is

International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 98 U.N.T.S. 101; International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 53 U.N.T.S. 39; International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271.

14. E.g., Jo Doezema, *Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women*, 18 GENDER ISSUES 23, 25–30, 47 n.2 (2000) (explaining the cultural myth of white slavery); Mary Ann Irwin, "White Slavery" as Metaphor: *Anatomy of a Moral Panic*, 5 EX POST FACTO 1 (1996), available at http://userwww.sfsu.edu/~epf/journal_archive/volume_V_1996/irwin_m.pdf (detailing the history of the white slave trade and its moral framework).
15. Trafficking Protocol, *supra* note 2.
16. *Id.* art. 3; see also ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 12–25 (2010) (describing the history of the definition).
17. Trafficking Protocol, *supra* note 2, art. 3(a); see also GALLAGHER, *supra* note 16, at 29–42 (discussing each of the three elements of the definition).
18. Trafficking Protocol, *supra* note 2, art. 3(a).

gender neutral and extends beyond sex trafficking to include various types of labor market exploitation, even when within the borders of the victim's own country.¹⁹

Although the protocol's trafficking definition attempts to clarify the forms trafficking can take, there is still some ambiguity regarding the purpose and means components of the definition. To begin with, the term "exploitation" is not defined in the protocol, creating uncertainty as to the conditions under which exploitation amounts to trafficking. Likewise, the elements listed under the means component are not defined, raising the question of the level of coercion and abuse of power required to satisfy this factor of the definition.²⁰ It is quite clear, of course, that not all detrimental employment practices should be identified as trafficking, and that a certain "seriousness" threshold, accepted by the majority of activists and scholars, must be met for a practice to be considered trafficking.²¹ Yet the precise contours of this threshold are unclear, and so uncertainty remains as to what exactly constitutes trafficking.

Despite this definitional vagueness, the national and international experience with applying the international definition has given content to the means element of the definition. For example, it is now quite clear that physical coercion is not required for a practice to constitute trafficking and that relatively subtler forms of intimidation suffice. Indeed, the practices of withholding wages or identification papers, continually threatening to expose a worker's undocumented status to authorities, and using indebted labor²² (bonded labor²³ or indentured

19. See Gallagher, *supra* note 5, at 791 (noting the broad scope of the trafficking definition as the main achievement of the protocol).

20. See Beate Andrees & Mariska N.J. van der Linden, *Designing Trafficking Research From a Labour Market Perspective: The ILO Experience*, in DATA AND RESEARCH ON HUMAN TRAFFICKING: A GLOBAL SURVEY 55, 58 (Frank Laczko & Elzbieta Gozdziaik eds., 2005) (explaining that there is no standard definition of exploitation in international law).

21. GALLAGHER, *supra* note 16, at 49 (arguing that among activists and scholars in this field there is wide acceptance of some kind of seriousness threshold beyond which "the lines remain blurred").

22. I use the term "indebted labor" to refer broadly to labor performed by a worker who borrowed heavily in the hope of repaying the debt after a certain period of employment. This is the situation of many migrant workers who take on large debts to pay inflated sums to official or unofficial migration intermediaries. Such debts make migrant workers particularly vulnerable to exploitation because they fear losing their jobs or being deported before they manage to repay their debts. See Dovelyn Rannveig Agunias, *Guiding the Invisible Hand: Making Migration Intermediaries Work for Development 2*, 22–23 (United Nations Dev. Programme, Human Dev. Research Paper 2009/22, 2009).

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

labor²⁴) are all understood to satisfy the means element.²⁵ Moreover, abduction or deception regarding the type and nature of work (for example, a false promise that upon arrival the woman will work as a waitress when actually she is forced into prostitution) are not the only behaviors that may lead to human trafficking. In fact, many migrant workers who were trafficked appear to have voluntarily embarked on their journeys, seeking paid employment in a line of work they had agreed to join in advance.²⁶ Trafficking is often recognized in circumstances of exploitation and manipulation that relate not only to the type of work one is made to engage in but to the working conditions in an agreed upon type of work. This includes situations in which a worker agrees to do a certain job, yet does not consent to some of the working conditions, such as restrictions on freedom of movement, long working hours, excessive wage deductions, delayed payment, and low wages.²⁷ Human trafficking emerges, therefore, as a combination of labor rights violations, where each one alone might not amount to trafficking.²⁸

There is a great diversity of human trafficking contexts. Indeed, various labor sectors, such as construction, agriculture, domestic work, and sex work, have been identified in the last decade as tending to include trafficked labor.²⁹ Trafficking can be found in private homes in the United Kingdom in the abuse of Filipina

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24. Indentured servitude was defined by legal historian Christopher Tomlins as “a contract committing one party to make a series of payments to or on behalf of the other—settlement of transport debt, subsistence over the (negotiable) contractual term, and final payment in kind or, less usually, cash at the conclusion of the term. In exchange the payee agrees to be completely at the disposal of the payor, or the payor’s assigns, for performance of work, for the term agreed.” Christopher Tomlins, *Reconsidering Indentured Servitude: European Migration and the Early American Labor Force, 1600–1775*, 42 LAB. HIST. 5, 6–7 (2001). While such transactions were historically secured by law, indenture is currently understood to be a form of forced labor.
 25. INT’L LABOUR ORG., THE COST OF COERCION: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 13 (2009) [hereinafter ILO GLOBAL REPORT 2009] (describing the Delphi indicators of human trafficking, according to which trafficking can occur without severe forms of physical abuse).
 26. Kathy Richards, *The Trafficking of Migrant Workers: What Are the Links Between Labour Trafficking and Corruption?*, 42 INT’L MIGRATION 147, 154 (2004) (suggesting that many trafficked workers embark on their journey voluntarily in search of paid work).
 27. BANGL. THEMATIC GROUP ON TRAFFICKING, REVISITING THE HUMAN TRAFFICKING PARADIGM: THE BANGLADESH EXPERIENCE, PART I: TRAFFICKING OF ADULTS 23–27 (Int’l Org. for Migration 2004) [hereinafter REVISITING THE PARADIGM], available at <http://www.iom.org.bd/publications/16.pdf> (noting various factors that constitute the harm caused by trafficking).
 28. See ILO GLOBAL REPORT 2009, *supra* note 25, at 13 (“While a small number of strong indicators are considered sufficient to identify a likely situation of human trafficking, an accumulation of larger numbers of the weak indicators can lead to the same result.”).
 29. Additional sectors prone to trafficking are fisheries, manufacturing, service, in-home healthcare provision, and begging. See UNODC GLOBAL REPORT, *supra* note 1, at 73–74 (listing forced prostitution, as well as work in certain labor-intensive sectors, such as the agricultural, manufacturing, or service sectors, begging, and domestic work, as prone to trafficking).

domestic workers employed through special guest worker visas.³⁰ It includes the situations of workers in traditional debt bondage systems in South Asia, in which repayment of the debts incurred by previous generations is part of the workers' terms of employment.³¹ Children forced to beg in the streets of Senegal³² and the age-old practice of enslaving men, women, and children in Mauritania are also manifestations of human trafficking.³³ Other trafficked persons are the male Thai workers on pineapple farms in the state of Washington, who are forced to live in inhumane conditions and are effectively imprisoned,³⁴ and South Asian migrant construction workers in Bahrain, whose wages are often withheld and passports confiscated and who are exposed to unsafe housing and physical abuse.³⁵ Trafficking can be found in the French sex industry, in which Eastern European women are held in debt bondage,³⁶ as well as on Thai fishing boats, where Cambodian workers are subjected to violence, intimidation, imprisonment, and precarious working conditions.³⁷ Yet despite this breadth of contexts and the multifaceted manifestations of trafficking, global attention and enforcement efforts remain focused to a large extent on the movement of women and girls across borders into the sex industry. Indeed, the term "trafficking" is often conflated with prostitution.³⁸

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30. HOUSE OF COMMONS HOME AFFAIRS COMM., THE TRADE IN HUMAN BEINGS: HUMAN TRAFFICKING IN THE UK, 2008–09, H.C. 23-I, at 16–17, 26–27 (U.K.) (discussing the exploitation of domestic workers in the United Kingdom and trafficking within this sector).
 31. See U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 9, 28 (2010) [hereinafter TIP REPORT 2010].
 32. See U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 13 (2011) [hereinafter TIP REPORT 2011]; INT'L ORG. OF MIGRATION, *Street Boys Returning Back to Society Through "Springboard,"* GLOBAL EYE ON HUM. TRAFFICKING, Dec. 2010, at 3 (discussing anti-trafficking programs involving child beggars in Senegal).
 33. *Slavery in Mauritania*, ANTI-SLAVERY INT'L, http://www.antislavery.org/english/what_we_do/antislavery_international_today/award/2009_award_winner/slavery_in_mauritania.aspx (last visited Sept. 24, 2012) (estimating that 18 percent of Mauritania's population lives in slavery today and discussing its "slave caste" and the origins of this inherited status).
 34. Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Files its Largest Farm Worker Human Trafficking Suit Against Global Horizons, Farms (Apr. 20, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/4-20-11b.cfm>.
 35. TIP REPORT 2011, *supra* note 32, at 8 (describing the Human Rights Watch report on the abuse suffered by Asian migrant workers in Bahrain).
 36. VERONIKA BILGER ET AL., INT'L CTR. FOR MIGRATION POLICY DEV., STUDY ON THE ASSESSMENT OF THE EXTENT OF DIFFERENT TYPES OF TRAFFICKING IN HUMAN BEINGS IN EU COUNTRIES 145–53 (2010) (describing cases of trafficking in France and anti-trafficking measures taken there).
 37. *Cambodia–Thailand: Men Trafficked Into "Slavery" at Sea*, HUMANITARIAN NEWS & ANALYSIS (Aug. 29, 2011), <http://www.irinnews.org/report.aspx?ReportId=93606> (suggesting that thousands of Cambodian men work in exploitative working conditions on long-haul trawlers).
 38. See REVISITING THE PARADIGM, *supra* note 27, at 12 (arguing that the weakness of the present human trafficking paradigm is its disproportionate emphasis on sex trafficking); UNODC GLOBAL

The Trafficking Protocol's provisions, including its definition of trafficking itself, were the product of deliberations between states, intergovernmental organizations, nongovernmental organizations (NGOs), and a coalition of various UN agencies that took place in Vienna during the meetings of an ad hoc committee (under the auspices of the UNODC) known as the Vienna Process.³⁹ The most well-documented struggle in the Vienna Process was waged among different feminist NGOs over the protocol's view of consent in relation to prostitution.⁴⁰ The battle over the nature of prostitution—whether it is work like any other work or violence against women—completely engaged the feminist bloc and diverted NGO attention away from other critical aspects of the protocol being negotiated—in particular, issues of human rights and labor rights.⁴¹ The NGOs' preoccupation with prostitution distracted their lobbying efforts away from other issues and enabled the states' security interest in curbing illegal migration to determine most elements of the protocol.⁴²

The protocol sets three main categories of state obligations, commonly referred to as the "3 Ps": prevention of trafficking, protection of victims from trafficking, and prosecution of traffickers.⁴³ The protocol's strongest obligatory language refers to the criminalization of trafficking, the protection of borders, and the collaboration between state parties on victim repatriation.⁴⁴ With regard to victim protection, the protocol uses mostly nonbinding formulations.⁴⁵ Its em-

REPORT, *supra* note 1, at 51 (discussing the reasons for the international focus on sex trafficking and the low level of detection of labor trafficking).

39. See Dimitri Vlassis, *The Global Situation of Transnational Organized Crime, the Decision of the International Community to Develop an International Convention and the Negotiation Process*, in UNAFEL, ANNUAL REPORT FOR 2000 AND RESOURCE MATERIAL SERIES NO. 59, at 475, 492 (2002) (describing the negotiations in the years prior to the Convention against Transnational Organized Crime and the protocol and the positions taken by various countries during negotiations).
40. For descriptions of this dispute between the two main feminist blocs in the Vienna process and their different positions, see Chuang, *supra* note 8, at 1663–77, and Melissa Ditmore & Marjan Wijers, *The Negotiations on the UN Protocol on Trafficking in Persons*, NEMESIS, July/Aug. 2003, at 79, 79–80.
41. Ditmore & Wijers, *supra* note 40, at 87 (“[T]he division between NGOs did have serious consequences, the most disturbing of which was that it effectively blocked a concerted advocacy to protect the rights of trafficked persons.”).
42. See Gallagher, *supra* note 5, at 790–91 (“[T]he end result confirmed the harsh truth that these negotiations had never really been about human rights. Any victories on our side were both hard won and incomplete.”).
43. See Trafficking Protocol, *supra* note 2, art. 4 (“This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.”).
44. *Id.* arts. 5, 8, 11.
45. The one exception is the obligatory language prescribing that trafficking victims be eligible to receive private law remedies. *Id.* art. 6(6) (“Each State Party shall ensure that its domestic legal system

phasis on a transnational crime framework greatly influenced state behavior and led to the proliferation of laws criminalizing trafficking⁴⁶ and, possibly, to the strengthening of border control.⁴⁷ In fact, the criminalization of trafficking was the most common measure undertaken by states after ratifying the protocol.⁴⁸ This reflects the fact that states were chiefly concerned with transnational crime and illegal migration and not human rights or workers' rights. Accordingly, the protocol's most impactful component ended up being the transnational crime framework it established, which focuses on the challenge faced by states in dealing with criminal networks that cross national borders.⁴⁹

Alongside this transnational crime framework, however, the protocol also promoted a human rights framework to anti-trafficking, particularly in its implementation dynamics. As explained above, its language allowed for a broad definition of trafficking that encompasses many, if not most, contemporary forms of labor exploitation. Moreover, during the Vienna Process, a coalition of NGOs and UN agencies managed to ensure that the protocol set standards regarding the protection and support of trafficking victims.⁵⁰ In contrast to the strong obligatory language relating to criminalization and border control, however, the victim protection and assistance clauses are formulated in mostly discretionary language.⁵¹ Government delegates from destination countries (countries to which persons are trafficked) rejected proposed mandatory obligations to safeguard the human rights of nonnationals, preferring instead to leave such protections to states' discretion.

contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.”)

46. Paulette Lloyd et al., *The Global Diffusion of Law: Transnational Crime and the Case of Human Trafficking* 7–8 (Feb. 9, 2012) (unpublished manuscript), available at <http://www.yale.edu/leitner/resources/papers/LloydSimmonsStewart.pdf> (creating a model that explains the reasons for the broad criminalization of human trafficking in national law).
47. James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 26 (2008) (arguing that the anti-trafficking campaign has served as justification for countries to pursue border control measures under the guise of promoting human rights). Anne Gallagher’s response to this, however, argues that it was not the Trafficking Protocol but rather the structure and orientation of national migration regimes that led to the strengthening of border control. Gallagher, *supra* note 5, at 833–34.
48. See UNODC GLOBAL REPORT, *supra* note 1, at 22 (stating that 125 countries of the 155 surveyed had criminalized trafficking).
49. See Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 COMP. LAB. L. & POL’Y J. 405, 437 (2011) (explaining that in the Trafficking Protocol, “state control and security are paramount, with individual rights operating as the limiting factor”).
50. Gallagher, *supra* note 9, at 1003 (explaining that the sustained pressure brought to bear by the interagency group and NGOs led to states’ decision to include victim protections in the protocol).
51. Examples of the language used in these articles are “in appropriate cases” and “to the extent possible under its domestic law.” Trafficking Protocol, *supra* note 2, art. 6(1).

And indeed, the central victim protection and assistance clauses in the protocol (articles 6, 7, and 9) use discretionary, nonbinding language.⁵²

Although the protocol's human rights victim-centered framework contains important preventive and protective measures directed at both the pretrafficking and posttrafficking stages, it fails to address in any meaningful way the working conditions in the labor sectors in which people are trafficked or the structural labor market components that enable trafficking. Indeed, in the negotiations over the Trafficking Protocol, there was almost no representation of a labor approach to trafficking,⁵³ which is thus similarly almost completely absent in its implementation.

B. The U.S. Trafficking Victims Protection Act of 2000

Several weeks before the adoption of the protocol on the international level, the U.S. Congress passed the Trafficking Victims Protection Act of 2000 (TVPA).⁵⁴ The TVPA served to reinforce the criminalization and border protection aspects of the protocol and its focus on sex trafficking, as well as the protocol's weak commitment to human rights and labor and employment rights.⁵⁵ The TVPA gave the protocol's main provisions teeth by creating an international monitoring scheme accompanied by financial sanctions against countries that fail to meet certain minimum standards for the elimination of "severe forms of trafficking."⁵⁶

To determine compliance with these standards, the U.S. State Department prepares an annual Trafficking in Persons (TIP) report on foreign anti-trafficking measures, which includes "an assessment of the efforts by the government of [the

52. See *id.* arts. 6, 7, 9 (using nonbinding language in relation to the following elements of the Protocol: protection of victims' privacy and identity; assistance to victims of trafficking that facilitate victims' physical, psychological, and social recovery, including offering victims adequate housing, counseling, medical and psychological care, material assistance, employment, educational and training opportunities, and information about their legal rights, *id.* art. 6; adoption of legislation that permits trafficking victims to remain in the destination country's territory, either temporarily or permanently, *id.* art. 7; and the implementation of comprehensive policies, programs, and other measures to prevent trafficking and protect its victims, *id.* art. 9).

53. During the negotiations, members of the Human Rights caucus included a labor dimension in their recommendations. See, e.g., NGO CONSULTATION WITH UN/IGOs ON TRAFFICKING IN PERSONS, PROSTITUTION AND THE GLOBAL SEX INDUSTRY, TRAFFICKING AND THE GLOBAL SEX INDUSTRY: NEED FOR A HUMAN RIGHTS FRAMEWORK 11, 30–38 (1999) (calling for the recognition of sex work as labor and of women's work in the informal sector and for humane working conditions for all). These recommendations were not included in the protocol.

54. TVPA, Pub. L. No. 106-386, div. A, 114 Stat. 1466.

55. See Chuang, *supra* note 4, at 439 ("The sanctions threat arguably elevates U.S. norms over international norms by giving the former the teeth the latter so often lack.")

56. 22 U.S.C. §§ 7102(8), 7106, 7107(d)(1)(A)(i) (2006).

given] country to combat such trafficking.”⁵⁷ The Report categorizes countries’ efforts into one of three tiers of compliance: countries fully complying with the minimum standards (tier one); countries that are not yet fully complying with these standards but are making significant efforts to bring themselves into compliance (tier two); and countries that do not fully comply with the minimum standards and are not taking any significant steps to comply (tier three).⁵⁸ A country that receives a noncomplying assessment (tier three) risks the withholding of financial assistance from the United States that is not humanitarian or trade related, as well as American opposition to the same assistance from the International Monetary Fund and multilateral development banks.⁵⁹ The ambitious reach of the TVPA was felt across the world, leading many countries to pass laws that criminalize trafficking and offer assistance and support to victims.⁶⁰

From 2001 to 2008, under the Bush administration and under pressure from a coalition of evangelical Christians, neoconservatives, and radical feminists, the TIP reports regularly conflated trafficking with prostitution and, therefore, classified steps taken toward the criminalization of prostitution as anti-trafficking measures.⁶¹ In 2006, however, following personnel changes in the State Department’s Trafficking in Persons Office,⁶² the report paid significant attention to labor trafficking for the first time. This new development was most prominent in the 2011 TIP report, which dedicated entire sections to agricultural and domestic workers and the regulation of labor recruiting.⁶³

Yet despite this expansion of the reports’ scope, most of the monitoring attention continues to be directed at trafficking in the sex industry. Data on the current

57. *Id.* § 2151n(f)(1)(B).

58. *Id.* § 7107(b)(1).

59. *Id.* § 7107(d)(1)(B).

60. See TIP REPORT 2011, *supra* note 32, at 15 (describing how the TVPA increased governmental understanding of the tools required to stop human trafficking, increased the rise of the criminalization of trafficking, and increased public awareness and commitment to the 3Ps paradigm); see also Anne T. Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports*, 12 HUM. RTS. REV. 381, 387–90 (2011) (discussing the difficulty of evaluating the impact of the TIP report); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 362–65, 370 (2006) (discussing the impact of the TVPA and the TIP reports in Israel and India).

61. See Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Anti-trafficking Campaigns*, 36 SIGNS 45, 46–47 (2010) (describing this coalition and its influence on U.S. national and international policy).

62. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2006) (explaining that the report focuses on “[s]lave [l]abor and [s]exual [s]lavery”).

63. TIP REPORT 2011, *supra* note 32, at 22, 42.

operation of national anti-trafficking policies suggest that the TVPA/Protocol-based international anti-trafficking regime tends to lead to the designation of trafficked persons and the provision of assistance and protection mostly to women and girls⁶⁴ in the context of the sex industry.⁶⁵ Although it may well be the case that women are more vulnerable to trafficking than men, the extremely low number of designated male trafficking victims raises the suspicion that male trafficking and other forms of labor trafficking are not appropriately addressed under the prevailing regime.⁶⁶

The dominant approach to anti-trafficking that emerged in the past decade in fact assists only a small amount of trafficked persons.⁶⁷ Thus, it appears that despite the seemingly strong international commitment to combat trafficking, the prevailing framework fails to address the full breadth of the trafficking phenomenon and to uproot the underlying causes of this practice.

II. THE CASE FOR A LABOR PARADIGM

The current dominant approach to anti-trafficking can be characterized as a combination of the transnational crime framework that spread around the world rapidly after the introduction of the Trafficking Protocol and the TVPA and the

64. See UNODC GLOBAL REPORT, *supra* note 1, at 11 (suggesting that it is likely that labor exploitation and male victims are underdetected).

65. See *id.* at 6, 10–11, 51 (suggesting that law enforcement agencies often view human trafficking only in the context of sexual exploitation and therefore that enforcement focuses on women and girls in the sex sector, and explaining that “sexual exploitation is by far the most commonly identified form of human trafficking,” “sexual exploitation has become the most documented type of trafficking, in aggregate statistics,” and that “[i]n comparison, other forms of exploitation are under-reported”).

66. While there is no research that suggests that women are more vulnerable to trafficking than men, it is clear that women’s sexual exploitation is the most commonly identified form of human trafficking and that as a result it seems as if “a disproportionate number of women are involved in human trafficking.” Yet this may be the case because male trafficking is underdetected. See UNODC GLOBAL REPORT, *supra* note 1, at 6, 11. Various scholars have noted the gender bias in trafficking discourse. See LAURA MARÍA AGUSTÍN, SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS, AND THE RESCUE INDUSTRY 39 (2007) (arguing that in the 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 trafficking is closely related to gender and that countries overlook the possibility that men may be trafficked); Thérèse Blanchet, *Beyond Boundaries: A Critical Look at Women Labour Migration and the Trafficking Within* 4–6 (Paper Submitted to USAID, 2002), available at <http://walnet.org/csis/papers/BEYOND.DOC> (explaining that a common assumption that trafficking is associated with a kind of vulnerability inherent in women corresponds to invulnerability in men).

67. See *supra* note 11.

human rights approach to trafficking that, as described above, has gained significant momentum over the last decade. During the Vienna Process, the negotiating states rejected attempts initiated predominantly by NGOs and the coalition of UN agencies to include in the protocol binding provisions for the creation of protection, rehabilitation, and visa schemes for trafficked persons.⁶⁸ In the years since, however, because of the lobbying efforts and assistance of human rights NGOs, many of the signatory states have adopted legislation and policies advancing a victim-centered human rights approach to trafficking.⁶⁹ Yet the effectiveness of this approach is questionable. Out of the 2.4 million people estimated to be victims of trafficking across the world,⁷⁰ only a small fraction (42,291) were identified as such in 2012 and assisted under the current trafficking framework.⁷¹ Although the human rights framework may have great rhetorical power, it helps few and, even for those few, to a doubtful extent.

In its present form, the human rights approach does not address and contend with the underlying economic and social relations that lie at the foundation of trafficking. In contrast, a labor approach to trafficking focuses attention on elements of the legal order that shape workers' bargaining power, such as labor and employment laws, national immigration regimes, criminal law, welfare law, and private law background rules. Its rhetoric may be less compelling, but the labor approach has the potential to alter fundamentally the conditions that cause workers' vulnerability and enable human trafficking. Given the ineffectiveness of the current anti-trafficking regime, it is vital to reconsider the significance and potential of the labor approach for preventing trafficking and assisting trafficked persons.

A. Human Rights Versus Labor Rights

Are labor rights a subset of human rights? The labor movement and human rights movement share significant goals and strategies: the commitment to distributive justice, the promotion of the interests of the structurally disadvantaged,

68. Gallagher, *supra* note 9, at 990–91.

69. See, e.g., Halley et al., *supra* note 60, at 362–65 (describing NGO involvement in developing victim-centered, anti-trafficking policies in Israel).

70. ILO GLOBAL REPORT 2005, *supra* note 11, at 14 (stating that the minimum number of trafficked persons is 2.4 million, which is 20 percent of all forced labor).

71. TIP REPORT 2012, *supra* note 11, at 45; see also U.S. AGENCY FOR INT'L DEV., THE REHABILITATION OF VICTIMS OF TRAFFICKING IN GROUP RESIDENTIAL FACILITIES IN FOREIGN COUNTRIES: A STUDY CONDUCTED PURSUANT TO THE TRAFFICKING VICTIM PROTECTION REAUTHORIZATION ACT, 2005, at 6–7 (2007) [hereinafter USAID], available at http://pdf.usaid.gov/pdf_docs/PNADK471.pdf (presenting the low numbers of trafficked persons served by victim shelters in various countries).

and the centrality of rights claims in their efforts to realize these ends. Yet there are also considerable differences in their construction of disadvantage and the strategies used to remedy it.⁷²

Conceptually, the two sets of rights target different spheres of power. Whereas human rights have traditionally focused on curbing the state's power, labor rights have been used to equalize the power balance in the market. Consequently, 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").⁷³ These conceptual differences have led to a significant divergence in how these movements work to achieve their goals. The labor movement, mostly in the form of trade unions, emphasizes class struggle, solidarity, and social and economic concerns. It holds the right to unionize, collective bargaining, and contextualized and bargained-for regulation to be the main avenues for improving working conditions for labor and for increasing workers' share of profits.⁷⁴

The human rights movement, in contrast, has focused on identity-based struggles, civil and political rights, absolute universal values, and entrenching human rights in national constitutions and legislation.⁷⁵ Although the freedom of association and the right to a decent wage were recognized in the 1948 Universal Declaration of Human Rights,⁷⁶ unions and collective bargaining were generally regarded by human rights activists as primarily economic issues that are peripheral, if not exogenous, to the human rights project.⁷⁷ Thus, the two movements have traditionally taken paths that are parallel but rarely overlapping.⁷⁸

72. See Kevin Kolben, *Labor Rights as Human Rights?*, 50 VA. J. INT'L L. 449, 450, 474–84 (2010) (describing the similarities and differences between the movements).

73. See *id.* at 452 (listing the conceptual differences between the two movements); see also Lance Compa, *Trade Unions and Human Rights*, in 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS 209, 209–10 (Cynthia Soohoo et al. eds., 2008) (discussing the divergent goals and strategies of human rights and labor rights advocates).

74. Harry Arthurs, *Labour Law After Labour*, in THE IDEA OF LABOUR LAW 13, 13–22 (Guy Davidov & Brian Langille eds., 2011) (discussing the ideas that animate labor and labor law).

75. Lance Compa, *Legal Protection of Workers' Human Rights: Regulatory Changes and Challenges: The United States*, in HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION 293, 325 (Colin Fenwick & Tonia Novitz eds., 2010) (describing the position of those skeptical about the potential of human rights to strengthen labor).

76. G.A. Res. 217 (III) A, art. 23, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

77. See James A. Gross, *A Long Overdue Beginning: The Promotion and Protection of Workers' Rights as Human Rights*, in WORKERS' RIGHTS AS HUMAN RIGHTS 1, 3–4 (James A. Gross ed., 2003) (explaining that traditionally human rights advocates paid little attention to workers' rights).

78. Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22, 22 (Lance A. Compa & Stephen F. Diamond eds., 1996) (noting that the movements operate on parallel tracks).

Since the 1990s, however, both the human rights movement and the labor movement have undergone significant transformations, and certain points of convergence have emerged despite the historical divergence in objectives and methods.⁷⁹ The international human rights movement has become increasingly concerned with social and economic rights, particularly material inequality and global solidarity between individuals and groups in the global North and global South.⁸⁰ This began in the wake of three developments that occurred more or less simultaneously: the collapse of communism in Eastern Europe and the end of the Cold War, which made the inclusion of social and economic rights in capitalist democracies less threatening; the exploding wealth disparities within and between countries across the globe, which directed global attention to poverty and North–South distribution; and the emerging critique of human rights as a Eurocentric project that camouflages age-old colonial power dynamics, which was launched by activists and scholars from developing countries.⁸¹

The transformation of the labor movement was instigated by the decline in trade union membership, economic globalization, and the global consolidation of the neoliberal socioeconomic agenda.⁸² These developments sent the labor movement searching for new sources of legitimacy, new modes of operation, and a new membership base.⁸³ One way it responded to these challenges was by adopting the fundamental-rights discourse, which is much akin to discourse under the human rights paradigm.

Perhaps the most pronounced turning point in the convergence between the movements was the ILO's 1998 Fundamental Declaration of Principles and Rights

79. See Kolben, *supra* note 72, at 455–61 (describing the path of convergence between the movements).

80. *Id.* at 459–61 (discussing the work of Human Rights Watch, Human Rights First, and Amnesty International on labor issues); Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUMAN RIGHTS Q. 63, 63–65 (2004) (discussing the increased attention to social and economic rights by human rights organization).

81. See, e.g., MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002) (discussing the relationship between the human rights movement and the West and calling for a new theory of internationalism and human rights that will respond to the inequities of the international order).

82. See, e.g., Irfan ul Haque, *Globalization, Neoliberalism and Labour* 2–3, 8 (U.N. Conference on Trade & Dev., Discussion Papers, No. 173, 2004), available at http://www.unctad.org/en/docs/osgdp20047_en.pdf (characterizing the neoliberal agenda as advocating for free markets, deregulation, privatization, minimized state roles, and labor market flexibility, and as viewing trade unions as a source of market rigidity).

83. See, e.g., Nari Rhee & Carol Zabin, *Aggregating Dispersed Workers: Union Organizing in the "Care" Industries*, 40 GEOFORUM 969, 971–72 (2009) (arguing that in the United States, declining union density made trade unions seek new organizing strategies suited to the changing labor market).

at Work.⁸⁴ In the spirit of the human rights tradition, the declaration identified four categories of core labor rights that are universal, absolute, and noncontextual and that all member states should strive to realize: freedom of association and collective bargaining, abolition of forced labor, elimination of child labor, and freedom from discrimination.⁸⁵ Imbued with the moral content of human rights and dignity, the declaration sought renewed normative legitimacy for labor rights. In line with the human rights model and in a departure from the traditional ILO approach, the declaration aimed to prohibit practices rather than setting or raising labor standards as a method for transforming labor market institutions and outcomes.⁸⁶

Thus, the growing interest of the human rights movement in socioeconomic rights on the one hand and the labor movement's embracing of a small set of fundamental universal rights and prohibitions on the other set the two movements on their path of convergence. The outcome of this convergence will be determined primarily by the scope and content of social and economic rights within the human rights framework. Protection of workers' rights based on human rights is feasible only if human rights are understood to encompass the economic claims of workers and their trade unions. Such an interpretation is not likely to be readily embraced in the current neoliberal economic and political environment since these claims often challenge employers' property rights and impose costs on them.⁸⁷

Second, the outcome depends on the willingness and ability of actors within the labor movement to supplement the emerging universal rights paradigm with strategies sensitive to state and market contexts for dealing with endemic labor market problems. If it fails to do so, the convergence in approaches can result in considerable costs, not the least of which being the undermining of the advantages and effectiveness of the traditional labor approach in remedying labor market inequalities.⁸⁸ Indeed, the convergence could significantly inhibit the capacity of labor

84. INT'L LABOUR ORG., ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998), available at http://www.ilocarib.org.tt/projects/cariblex/pdfs/ILO_Declaration_Work.pdf.

85. *Id.* art. 2.

86. Guy Mundlak, *The Transformative Weakness of Core Labor Rights in Changing Welfare Regimes*, in THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW 231, 232–33 (Eyal Benvenisti & Georg Nolte eds., 2004) (arguing that the relatively ambiguous scope and contents of the core labor rights are insufficient to deal with processes of globalization and transnational, flexible production and that more clearly defined standards are required).

87. Tonia Novitz & Colin Fenwick, *The Application of Human Rights Discourse to Labour Relations: Translation of Theory Into Practice*, in HUMAN RIGHTS AT WORK, *supra* note 75, at 1, 37 (explaining the limitations of protecting workers' rights as human rights in the current ideological climate).

88. See Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?*, 36 N.Y.U. J. INT'L L. & POL. 221 (2004) (detailing the dangers and costs of the core-labor standards approach to labor rights).

activists to challenge society's fundamental economic relations and material distribution patterns between labor and capital and to achieve their goals via direct and collective action.⁸⁹

The international anti-trafficking regime proves to be a case in point of this convergence and its ramifications. Today, the majority of both human rights and labor rights organizations support the human rights-based approach to human trafficking.⁹⁰ Applying the human rights-based approach, however, exemplifies the dangers it poses to labor issues. To construct an effective alternative to this model, it is vital to reintroduce the labor movement's fundamental notions regarding contextual understanding of power dynamics in market settings, attention to the operation of background rules, and the role of direct collective action in transforming economic market inequalities. There would be a distinct conceptual difference between such a labor approach to trafficking and the human rights approach: They pursue different goals, function under different assumptions, and resort to different strategies.

B. A Critical Account of the Human Rights Anti-trafficking Paradigm

1. The Paradigm

Despite its general transnational crime framework, the Trafficking Protocol has served as the blueprint for a human rights approach to anti-trafficking. Indeed, articles 6, 7, and 9 of the protocol, although not formulated in binding language, set up a victim-centered, human rights-based framework that offers protection and assistance to victims after they have been rescued from exploitation. These provisions have had a considerable impact on the infiltration of a human rights approach into the international anti-trafficking regime.⁹¹ Human rights groups and other NGOs advanced and successfully disseminated this framework across the globe. This pushed states to complement the binding elements of the protocol with a

89. See Kolben, *supra* note 72, at 484 (arguing that the adoption of human rights strategies can be debilitating to the efforts of labor activists, primarily because this approach fails to examine basic economic relationships in society and is not committed to direct action and workplace democracy).

90. See, for example, the various NGO reports reviewed *infra* note 93, and the labor position discussed *infra* text accompanying note 205.

91. See *supra* text accompanying notes 50–52.

human rights-based approach by invoking the looming TVPA financial sanctions.⁹²

Recent best-practices reports of various public and private NGOs and state anti-trafficking initiatives show the integral influence of the human rights approach in the anti-trafficking regime today and the crucial role NGOs played in this approach's successful diffusion and implementation. These reports document the best practices for combating trafficking around the world.⁹³ They expose a wide array of global anti-trafficking programs and policies that conform to the goals and policies set out in articles 6, 7, and 9 of the protocol: emphasis on victims' human rights in the process of posttrafficking identification, protection, assistance, and (preferably voluntary) repatriation. The best-practices reports demonstrate that the victim-centered, human rights-based anti-trafficking efforts are grounded on policies attending to the individual victim's situation (mostly after exploitation) through rescue, rehabilitation, repatriation, and reintegration programs. They do not relate to structural labor market conditions and practices that shape workers' vulnerability and inferior bargaining power in the workplace during trafficking and prior to their rescue and identification by the authorities.⁹⁴

92. GALLAGHER, *supra* note 16, at 284 (“[E]fforts to encourage States to include a provision on this issue were not accepted. However, developments since the adoption of the Protocol indicate that States are moving toward a rejection of status-related criminalization and prosecution.”).

93. I reviewed the following reports and documents from the European Union, India, Africa, Eurasia, and the United States to extract the dominant best practices of NGOs and others committed to the protection of victims' human rights: Comm'n of the European Cmty's., *Evaluation and Monitoring of the Implementation of the EU Plan on Best Practices, Standards and Procedures for Combating and Preventing Trafficking In Human Beings*, CEC Doc. COM (2008) 657 final (2008) [hereinafter EC Evaluation 2008]; Comm'n of the European Cmty's., *Fighting Trafficking in Human Beings—An Integrated Approach and Proposals for an Action Plan*, CEC Doc. COM (2005) 514 final (2005); CLAUDIA ARADAU, DANISH RED CROSS, *GOOD PRACTICES IN RESPONSE TO TRAFFICKING IN HUMAN BEINGS: COOPERATION BETWEEN CIVIL SOCIETY AND LAW ENFORCEMENT IN EUROPE* (2005); ARTI BADAMI ET AL., BENTLEY UNIV. SERV.-LEARNING CTR. & UNIV. HONORS PROGRAM, *ASSESSMENT OF POLICIES AND PROGRAMS TO COMBAT HUMAN TRAFFICKING: A REPORT PREPARED FOR THE MASSACHUSETTS GOVERNOR'S COUNCIL TO ADDRESS DOMESTIC VIOLENCE AND SEXUAL ASSAULT* (2011); THANH-DAM TRUONG & MARIA BELEN ANGELES, *SEARCHING FOR BEST PRACTICES TO COUNTER HUMAN TRAFFICKING IN AFRICA: A FOCUS ON WOMEN AND CHILDREN 42–59* (2005); UNITED NATIONS OFFICE ON DRUGS & CRIME & GOV'T OF INDIA, *COMPENDIUM OF BEST PRACTICES ON ANTI HUMAN TRAFFICKING BY NON GOVERNMENTAL ORGANIZATIONS* (2008) [hereinafter INDIA BEST PRACTICES]; STEPHEN WARNATH, NEXUS INST., *BEST PRACTICES IN TRAFFICKING PREVENTION IN EUROPE & EURASIA* (2009).

94. For a similar focus on the human rights, rescue, and rehabilitation of individual victims, see the anti-trafficking frameworks introduced by the UNODC in recent years. UNITED NATIONS OFFICE ON DRUGS & CRIME, *INTERNATIONAL FRAMEWORK FOR ACTION TO IMPLEMENT THE TRAFFICKING IN PERSONS PROTOCOL* (2009), available at http://www.unodc.org/documents/human-trafficking/Framework_for_Action_TIP.pdf; UNITED NATIONS OFFICE ON DRUGS &

These nongovernmental efforts were facilitated not only by the protocol but also by the TVPA. The country-by-country compliance ranking in the TIP reports enforced by the TVPA's sanction regime generated "willingness" on the part of countries ranked in the lower tiers to commit to combating trafficking beyond the relatively narrow obligations of the protocol. This brought about the diffusion of a broad international anti-trafficking legal regime, which includes regional treaties and an array of state legislation, practices, and policies that supplement criminalization with a human rights approach.⁹⁵ While the central measure implemented by states was criminalization of trafficking in persons,⁹⁶ many states also established victim assistance programs and provided funding to human rights groups to supply rescue model services.⁹⁷ Indeed, a majority of the 155 states surveyed in the 2009 UNODC Global Report took steps toward the protection of trafficked persons, prescribing many measures that were not obligatory under the protocol. These measures included the provision of housing, medical services, work permits, and access to legal remedies.⁹⁸ While some have criticized these efforts as inadequate, incomplete, and at times harmful, they did ensure some measure of assistance and protection for severely exploited workers where none existed before.⁹⁹

Three particularly important practices have become commonplace and are considered the backbone of the human rights approach to anti-trafficking: granting trafficking victims immunity from criminalization because of their undocu-

CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS (2008) [hereinafter UNODC TOOLKIT], available at [http://www.unodc.org/documents/human-trafficking/Toolkit-files/0789375_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/0789375_Ebook[1].pdf).

95. See Gallagher, *supra* note 5, at 791 (commenting on the surprising uniformity of standards); Lloyd et al., *supra* note 46, at 4 (discussing the rational policy diffusion of the criminalization of human trafficking).
96. See *supra* text accompanying note 48.
97. See TIP REPORT 2011, *supra* note 32, at 17, 44–45 (stating that the last decade was characterized by building the framework and passing laws that focused largely on the criminalization of human trafficking and the creation of victim assistance mechanisms and discussing the value of partnering with NGOs). For a critique of the rescue model, see Aziza Ahmed & Meena Seshu, "We Have the Right Not to Be Rescued . . .": When Anti-trafficking Programmes Undermine The Health and Well-Being of Sex Workers, ANTI-TRAFFICKING REV., June 2012, at 149, 153–56.
98. See UNODC GLOBAL REPORT, *supra* note 1, at 78–292 (detailing the services provided to victims in the 155 reporting countries); see also Seo-Young Cho et al., *The Spread of Anti-trafficking Policies—Evidence From a New Index* 8, 33 (Ludwig-Maximilians Univ. Ctr. for Econ. Studies & Ifo Inst. for Econ. Research, Working Paper No. 3376, 2011) (detailing the types of victim protections and suggesting a measure that demonstrates countries' increasingly strong efforts to protect victims of trafficking).
99. Jyoti Sanghera, *Preface: Lessons From the Poetry of Departures*, in COLLATERAL DAMAGE, *supra* note 66, at vii (arguing that anti-trafficking efforts, even if well meaning and at times well doing, often end up harming trafficked persons).

mented status,¹⁰⁰ operating victim shelters,¹⁰¹ and instituting special visa regimes for trafficked persons.¹⁰² Although most receiving countries that participated in the Vienna Process negotiations opposed NGOs' attempts to include provisions prescribing these measures in the protocol, many states have since adopted laws and policies promoting all three.¹⁰³

A trafficked person under a generous human rights regime can expect the following treatment: After she is identified as a trafficking victim, she is usually granted a reflection period to consider whether she wants to be involved in criminal proceedings and testify against her traffickers. During this time, she is given housing, often in a designated victims' shelter,¹⁰⁴ where she is purportedly rehabilitated and provided with medical care, psychological counseling, and legal aid, as well as the option to receive occupational training.¹⁰⁵ In most states, if the victim chooses not to assist in the prosecution of the traffickers, she is repatriated,¹⁰⁶ but under those schemes that are most attentive to human rights, the victim's privileges are not revoked even if she does not cooperate.¹⁰⁷ The best schemes grant victims residence and working permits for the period of the trial and sometimes offer a gradual path to naturalization.¹⁰⁸ In most countries, however, a trafficking victim is allowed to remain in the country until the end of her traffickers' trial, at which point she is usually repatriated. This set of privileges is significantly more

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100. GALLAGHER, *supra* note 16, at 284 (“[D]evelopments since the adoption of the Protocol indicate that States are moving toward a rejection of status-related criminalization and prosecution.”).
 101. See Anne Gallagher & Elaine Pearson, *The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking*, 32 HUM. RTS. Q. 73, 73 (2010) (stating that it is common practice around the world to place victims of trafficking in shelters).
 102. *Id.* at 78 n.16 (“[A]n increasing number of the major destination countries for trafficked persons . . . now provide special visa arrangements for victim[s].”).
 103. See GALLAGHER, *supra* note 16, at 284 (discussing status); *id.* at 307 (discussing shelter protection); *id.* at 321–23 (discussing the right to remain).
 104. Gallagher & Pearson, *supra* note 101, at 76–78 (describing the various formats of victims' shelters).
 105. USAID, *supra* note 71, at 26–27 (stating that best rehabilitative practices include education, economic opportunities, psychosocial support, healthcare, and nutrition).
 106. See GALLAGHER, *supra* note 16, at 298–99 (explaining that most countries condition assistance on cooperation with authorities, but some provide assistance even without cooperation).
 107. See, for example, the reports for Israel and the Netherlands in TIP REPORT 2011, *supra* note 32, at 201, 273 (reporting that Israel and the Netherlands grant visas to victims of trafficking independent of cooperation with authorities).
 108. See, e.g., 22 U.S.C. § 7105(b)–(c) (2006); 8 U.S.C. § 1184(p)–(q). In the United States, a victim who received a T visa can, after several years, begin a process of naturalization and bring her family into the country as well. Between 2002 and 2009, only 1591 T visas were granted. ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS, FISCAL YEAR 2009, at 37–38 (2010). For a discussion of life with a T visa in the United States, see Denise Brennan, *Key Issues in the Resettlement of Formerly Trafficked Persons in the United States*, 158 U. PA. L. REV. 1581 (2010).

generous than any other current arrangement for undocumented workers, smuggled persons, asylum seekers, or other exploited workers.¹⁰⁹

Yet this is, of course, a best-case scenario. The reality is often tragically different: There are many cases of nonidentification of trafficking victims, human rights violations and abuse in shelters, victims treated as mere witnesses for the purpose of prosecuting traffickers, bureaucratic hurdles to receiving assistance, obstacles to visas because of highly restrictive policies and lengthy administrative procedures, and involuntary repatriation of victims.¹¹⁰ Despite this, the mere existence of this anti-trafficking regime is an impressive achievement in its extension of previously unrecognized rights to certain severely exploited workers.

2. The Critique

As explained above, the incorporation of the human rights paradigm into the international anti-trafficking regime resulted in new legal arrangements for providing protection, assistance, and rehabilitation to victims after they are removed from harmful environments. Yet this pervasive paradigm is inadequate for contending with the phenomenon's underlying causes: worker vulnerability resulting from structural labor market inequalities in bargaining positions.¹¹¹

The first deficiency of the human rights paradigm derives from its narrow impact. Because of its focus on victim rescue rather than on transforming structural causes of worker vulnerability, the paradigm succeeds in assisting only an alarmingly small number of individuals designated as trafficking victims and offers little to the rest of the trafficked population.¹¹²

109. For a detailed discussion of international law in relation to these groups, see DAVID WEISSBRODT, *THE HUMAN RIGHTS OF NON-CITIZENS* 110–53, 182–206, 218–40 (2008). For a discussion of the convergence and divergence of international law in relation to the different categories of migrant workers, see Thomas, *supra* note 49, at 408–33.

110. See Chacón, *supra* note 12, at 3017–21 (describing the shortcomings of the TVPA); Dottridge, *supra* note 66, at 1, 13–16 (discussing key findings of the report regarding the negative consequences of anti-trafficking policies).

111. Cf. Kamala Kempadoo, *Introduction: From Moral Panic to Global Justice: Changing Perspectives on Trafficking*, in *TRAFFICKING AND PROSTITUTION RECONSIDERED: NEW PERSPECTIVES ON MIGRATION, SEX WORK, AND HUMAN RIGHTS*, at vii, xvi (Kamala Kempadoo et al. eds, 2005) (“Because the global governance paradigm on trafficking does not address the root causes for the undocumented movement and employment of people around the world, it also fails to significantly reduce ‘trafficking.’”).

112. See *supra* text accompanying note 48; *infra* Part II.B.3.

Second, in providing remedies for only the most extreme cases of exploitation, this approach normalizes the harsh realities of exploitation experienced by many migrant and nonmigrant workers in labor sectors prone to trafficking.¹¹³

Third, under the human rights anti-trafficking approach, *ex post* help is offered to certain severely exploited workers. Thus, focus is placed on the *post*exploitation situation, and *ex ante* tools are not provided to trafficked persons to improve their working conditions or change widespread harmful employment practices in certain labor sectors. The human rights model therefore has little to offer to severely exploited workers wishing to transform their work situation rather than be removed from it.

Furthermore, it is questionable whether this approach even properly responds to the needs of the small group of individuals it does assist.¹¹⁴ The human rights paradigm assumes that trafficked persons need to be extracted from their exploitative work situation and rehabilitated through treatment of their physical and psychological injuries. This therapeutic approach does, indeed, attend to important needs, and when accompanied by social rights (housing, clothing, and education) and legal immigration status (even if temporary), it grounds an anti-trafficking regime that upholds trafficked persons' dignity and humanity. Yet the emphasis on rehabilitation diverts crucial attention away from the trafficked person's economic needs and aspirations and from addressing the economic relations that underlie her vulnerability.

Moreover, the particular kind of rehabilitative assistance the current anti-trafficking regime offers raises questions about its gender and cultural assumptions regarding trafficked persons.¹¹⁵ As noted, on the global level, the most significant anti-trafficking efforts have been directed at women and girls in the sex industry.¹¹⁶ This has resulted in emphasis on the alleged rehabilitative needs of female victims of sex trafficking and has infused the anti-trafficking campaign with gendered suppositions about women's lives, preferences, and capabilities. The focus on the per-

113. Cf. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 118 (2002) ("Human rights remedies, even when successful, treat the symptoms rather than the illness, and this allows the illness not only to fester, but to seem like health itself.")

114. See AGUSTÍN, *supra* note 66, at 152, 186–87 (questioning the value of the rescue industry for sex workers); Sanghera, *supra* note 99, at vii–viii (explaining that a rescued victim of trafficking may be further removed from her goals because of anti-trafficking programs and will most likely be shipped back home).

115. See Dottridge, *supra* note 66, at 17 (arguing that trafficking is so closely related to gender that countries overlook the possibility that men may be trafficked).

116. See *supra* text accompanying notes 64–65.

ceived needs of women and girls exploited in the sex industry is exemplified by the generally applied model for victims' shelters.

As discussed in Part II.B.2, one of the most common best practices for supporting trafficking victims is the establishment of shelters to house victims during rehabilitation until repatriation. The prevailing shelter model is premised on a victim in need of psychological and physical rehabilitation and aid. Presumptions regarding women's needs and desires direct shelter rehabilitation toward psychological counseling and away from economic needs. Yet studies of such shelters suggest that many victims (of both labor trafficking and sex trafficking) are in fact principally interested in finding employment with decent working conditions.¹¹⁷ This is particularly true of both sex and labor trafficking victims who migrated voluntarily to find work but whose undocumented status made them vulnerable to exploitation.¹¹⁸ Thus, a shelter model constructed on a very particular perception of the trafficking context and the needs and desires of victims will have little to offer many male as well as female trafficked persons.¹¹⁹ The fact that trafficking victims may be interested in finding nonexploitative work does not mean that they did not suffer any harm or have no need for treatment. What it does suggest is that support measures (such as victim shelters) that are promoted and implemented in line with the human rights approach to trafficking respond only to a limited subset of the problems faced by trafficked persons.

Finally, the broad acceptance and prominence of the human rights anti-trafficking paradigm creates the impression that the international community is deeply committed to eradicating severe forms of labor exploitation. Yet the fact that only a small proportion of trafficked persons are actually identified as trafficked, on the one hand, and the sweeping persistence of extreme exploitation in labor markets across the globe, on the other, suggests an end result of little more than a clear conscience. Incorporating a labor approach into the prevailing anti-trafficking framework will fix many of the current deficiencies in contending with human trafficking.

117. See, e.g., DAFNA HACKER & ORNA COHEN, *THE SHELTERS IN ISRAEL FOR SURVIVORS OF HUMAN TRAFFICKING* 87–89, 93–98 (2012).

118. Dottridge, *supra* note 66, at 12 (stating that most people who are trafficked left home to make a living elsewhere and are, in fact, economic migrants).

119. See Chuang, *supra* note 8, at 1716 (discussing the fact that many “rescued” victims of sex trafficking escape their rescuers and return to work, preferring this to eventual deportation).

3. The Labor Paradigm

As noted, the current anti-trafficking regime, infused with a human rights approach, addresses only a limited number of extreme cases of exploitation and leaves the majority of severely exploited workers unassisted. Under this regime, ex post rehabilitation is provided to those it does help, but the structural aspects of the labor market that cause workers' vulnerability and exploit workers' empowerment are neglected. A labor approach to trafficking has the potential to succeed where the human rights framework falls short in these respects.

Article 3(a) of the Trafficking Protocol defines the end purpose of trafficking to be "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."¹²⁰ But despite the centrality of labor exploitation in this definition, little or no attention is paid to labor market realities and the economic forces that drive exploitation in the protocol's other provisions,¹²¹ the TVPA, the anti-trafficking regime that has evolved since the protocol's introduction,¹²² or NGO policy recommendations.¹²³ This is particularly surprising given that many trafficked persons who enter into a precarious working situation in search of gain-

120. Trafficking Protocol, *supra* note 2, art. 3(a).

121. See *supra* text accompanying note 53.

122. See UNODC GLOBAL REPORT, *supra* note 1; TIP REPORT 2012, *supra* note 11 (containing state-by-state reports that reveal the almost complete absence of a labor framework from policy responses to trafficking worldwide); see also Chuang, *supra* note 8, at 1715–18, 1726; Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 42–44 (2009) (pointing to the absence of a labor protection framework from current anti-trafficking efforts).

123. See *supra* text accompanying notes 93–94. However, there are a few important counterexamples. The Rights Work Initiative, a project of the Program on Human Trafficking and Forced Labor at the American University Washington College of Law's Center for Human Rights and Humanitarian Law in Washington, D.C., "seeks to promote evidence-based research, rights-based policies and lively debate on issues relating to human trafficking and forced labor." *About*, RTS. WORK, <http://www.rightswork.org/about-2> (last visited Sept. 24, 2012). The Global Alliance Against Traffic in Women emphasizes labor trafficking and the importance of a labor perspective in all its work. See, e.g., ELAINE PEARSON, GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, HUMAN RIGHTS AND TRAFFICKING IN PERSONS: A HANDBOOK (2000); Xenia Commandeur, *Beyond Borders: Exploring Links Between Trafficking and Labour* 19–20 (Global Alliance Against Traffic in Women, GAATW Working Paper Series, 2010); GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, <http://www.gaatw.org> (last visited Sept. 24, 2012). See also the work of Anti-slavery International, *What Is Trafficking in People?*, ANTI-SLAVERY INT'L, http://www.antislavery.org/english/slavery_today/trafficking.aspx (last visited Aug. 24, 2012), and Human Rights Watch Project on Trafficking and Domestic Work, for example, NADIM HOURY, HUMAN RIGHTS WATCH, WITHOUT PROTECTION: HOW THE LEBANESE JUSTICE SYSTEM FAILS MIGRANT DOMESTIC WORKERS (2010), available at http://www.hrw.org/sites/default/files/reports/lebanon0910webw_cover.pdf.

ful employment and economic opportunity are fully aware of what kind of work they will be engaging in but then find themselves subjected to harsh working conditions and exploitation.¹²⁴ The tools of labor and employment law would thus be most appropriate for dealing with the exploitative conditions in labor sectors that are prone to trafficking and, consequently, for combating trafficking.

A labor framework is premised on the understanding that the trafficked individual is a worker who is exploited in a market context. It therefore addresses the individual's weak bargaining power, substandard working conditions, and lack of workers' rights. A worker's vulnerability to exploitation and trafficking is determined by a combination of some or all of the following factors: belonging to an ethnic, racial, or national minority; undocumented status and the legal consequences of being undocumented in a particular system, including lack of access to the legal system; limited market mobility because of visa restrictions or contractual or social constraints, such as binding arrangements or caste systems; debts to be repaid, including debts to the employer, a middleman, or a recruitment agency; employment in a labor sector characterized by *de jure* or *de facto* exclusion from protective employment and labor law; lack of alternative income sources because of welfare ineligibility or the absence of family or community resources; and isolation from one's social network.¹²⁵ A number of these factors are structural and derive from the particular immigration, labor, employment, welfare, and criminal legal regimes in the destination country. The labor approach understands the power disparity caused by these factors to lie at the root of trafficking. Accordingly, a labor perspective on anti-trafficking would call attention to what factors affect an exploited worker's bargaining position and would focus on ameliorating his or her vulnerability with economic, social, and legal solutions beyond individual "rescue."

One of the two principal lines of divergence between the labor anti-trafficking framework and the human rights framework relates to how they construe the trafficked person—as a passive victim (the human rights approach) or as an agent who can change her situation (the labor approach). The second point on

124. See REVISITING THE PARADIGM, *supra* note 27, at 37 (“[M]any trafficking events are defined by the endpoint of a migratory process—if the outcome of this process is positive, it is called migration; if the outcome of this process is negative and results in the excessive exploitation . . . , it is often considered trafficking . . .”).

125. See, e.g., ILO ACTION, *supra* note 11, at 2 (calling for the elimination of the underlying causes of trafficking such as poverty, lack of employment, and inefficient labor migration systems and labor inspections); Marjan Wijers & Marieke van Doorninck, Only Rights Can Stop Wrongs: A Critical Assessment of Anti-trafficking Strategies (Sept. 2002) (unpublished manuscript), available at <http://www.nswp.org/sites/nswp.org/files/WIJERS-ONLYRIGHTS.pdf> (discussing the root causes of trafficking in relation to migrants from a labor approach).

which the two paradigms diverge is in their conceptualization of exploitation in trafficking—as an exceptional and distinct crime (the human rights approach) or as one of a range of labor market practices (the labor approach). These differing constructions of trafficked persons and their situations result in the development and adoption of different strategies for achieving change. The human rights approach tends to focus on individual litigation and rights claims and on the representation of victims by civil society NGOs. In contrast, a labor orientation emphasizes direct collective action, contextualized standard setting, and democratic representation of workers' interests.

a. Agency Versus Victimhood

Understanding trafficking as an issue of vulnerable labor rests on a conception of vulnerable workers as agents. The current anti-trafficking regime, which treats trafficking as a crime and a human rights violation, treats the trafficked person as an innocent victim who must be rescued from the hands of criminals.¹²⁶ This human rights-based framework requires an ostensible complete victim, whose needs and suffering it privileges over those whose victimhood is more ambivalent and tainted because they knowingly entered the destination country illegally and, in the case of sex workers, to engage in what may be illegal activities.¹²⁷ Thus, following this approach, anti-trafficking policies are directed at identifying and rescuing only those who are perceived to be innocent, helpless victims, assuming their passive roles in the trafficking, rescue, rehabilitation, and repatriation processes.

The image of the powerless and innocent victim in need of rescue stands in complete opposition to the notion of the worker-agent who has the ability to bargain for improvement of her working conditions and wages. The human rights framework does not allow for the possibility of direct action by the worker and her empowerment within her work situation. The labor framework, in contrast, conceptualizes trafficked persons as agents of change who can negotiate better

126. See, e.g., AGUSTÍN, *supra* note 66, at 39 (arguing against the common view of trafficked persons as passive and mute sufferers who need to be saved); Helen Schwenken, "Domestic Slavery" Versus "Workers Rights": *Political Mobilizations of Migrant Domestic Workers in the European Union* 11 (Ctr. for Comparative Immigration Studies, Univ. of Calif., San Diego, Working Paper No. 116, 2005) ("The dominant identity of the migrant women within the concept of trafficking is the one of a victim.").

127. See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 14–15 (2004) (arguing that the focus on innocent victims in human rights discourse delegitimizes the suffering of more typical people in need of protection); MUTUA, *supra* note 81, at 10–14, 29 (discussing the "savage-victims-savior (SVS) construction" and the construction of the innocent and sympathetic victim in human rights discourse (footnote omitted)).

working conditions rather than be limited to exiting their workplaces.¹²⁸ The labor approach therefore advocates for policies of worker empowerment using such labor and employment tools as protective employment legislation and the rights to unionize and to collective action, which bolster workers' bargaining power.¹²⁹

A labor framework is further distinct from the human rights framework in that it carries with it the unique promise of industrial citizenship. While under the human rights model, victims of trafficking are represented by lawyers, NGOs, and other civil society organizations, in which they have little say; when organized into and represented by trade unions, trafficked workers can determine their own agendas and paths of action. Representation of trafficked workers' interests and preferences through direct action and democratic processes is likely to produce different priorities from those currently dominating the human rights-based trafficking approach. For example, a case study of a group of Filipina migrant domestic workers in Europe showed that when that particular group of workers organized and voiced their priorities, the workers rejected the notion of victimhood and the strategies of rescue and rehabilitation, preferring instead to secure decent, dignified, and safe working conditions through the empowerment to claim their rights.¹³⁰

b. Exception Versus Escalation

The second line of divergence between the human rights paradigm and the labor paradigm revolves around whether trafficking should be understood as a distinct phenomenon or as one of a whole spectrum of labor market practices. A commonly heard objection to the human rights framework is that human rights norms legitimate "everyday" evils by highlighting extreme evils. They thereby "[e]xcuse" and "[j]ustify [t]oo [m]uch."¹³¹ David Kennedy explained:

128. See Commandeur, *supra* note 123, at 14–15 (suggesting that instead of talking about workers as though they have an inherently vulnerable identity, they would be better understood as making choices, exercising their agency, and claiming rights, despite limited options).

129. See the detailed discussion of these and additional labor anti-trafficking policies *infra* Part II.B.4.

130. Schwenken, *supra* note 126, at 11 (discussing the rejection of the trafficking framework by a network of migrant domestic workers in Europe). When faced with the decision to define themselves as victims of trafficking seeking protection or as workers struggling for their rights, workers in RESPECT (the European network of migrant domestic workers) opted for the latter and rejected the former. They reached this decision because they felt that the trafficking framework undermines their long-term goal of "overcoming the feeling of powerlessness among the migrants" and working toward "[t]he regularization of undocumented migrants as workers." *Id.*

131. KENNEDY, *supra* note 127, at 25 (presenting the argument that the legal regime of human rights does more to produce and excuse violations than to prevent and remedy them).

The vague and conflicting norms, their uncertain status, the broad justifications and excuses, the lack of enforcement, the attention to problems which are peripheral to a broadly conceived program of social justice—all these may, in some contexts, place the human rights movement in the uncomfortable position of legitimating more injustice than it eliminates.¹³²

In this respect, the dichotomous distinction under the human rights framework between exceptional exploitation that amounts to trafficking, on the one hand, and ordinary exploitation that does not, on the other, is particularly problematic. Beyond its legitimation of various forms of economic coercion, the human rights characterization of trafficking also serves to blind policymakers to the potential effectiveness of strategies traditionally used to address the unequal power relations between employers and employees—namely, labor strategies. The need to bolster workers' bargaining position vis-à-vis their employers and reduce their commodification through protective legislation, labor rights, and welfare rights may seem trivial when compared to the atrocities of the most extreme cases of exploitation. This distracts policymakers and human rights activists from the pervasive and systemic economic, legal, and social factors that commonly contribute to patterns of labor exploitation.

A structural labor market analysis takes into account the background rules that shape workers' bargaining positions and facilitate their exploitation. Under this view,¹³³ most workers enter into a work contract under some form of economic compulsion and, in many cases, with the sense that they have few other options. In labor sectors where there is a surplus of labor, workers are in a relatively weaker bargaining position and, therefore, are more vulnerable to exploitation and commodification. A worker who is strongly dependent on her job for income and fears losing her livelihood may avoid stirring up trouble at her workplace by complaining or turning to the authorities to lodge a formal complaint. This general depiction of the reality of the inequality between capital and labor lies at the heart of the ILO motto that "labor is not a commodity."¹³⁴

The structural power imbalance between the parties to the labor contract characterizes the work experience of almost all workers and constitutes the

132. *Id.*

133. This view is based on the Marxist understanding of the commodification of all workers in capitalist systems. See Karl Marx, *Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER 66, 70 (Robert C. Tucker ed., 2d ed. 1978) (discussing estranged labor and the relationship between capitalism, labor, and the production of the worker as a commodity).

134. Constitution of the International Labour Organisation, Annex, May 10, 1944 (concerning the aims and purposes of the ILO).

normative justification for protective employment legislation prescribing, for example, minimum wages, overtime regulation, and safety standards, as well as protection for workers seeking to unionize.¹³⁵ From this perspective, there is an entire spectrum of forms of economic coercion and commodification,¹³⁶ and trafficking and slavery appear on its extreme coercive end. Understanding the background legal, market, and social conditions that shape workers' bargaining power along the spectrum of commodification is required to conceive of effective ways to combat the forms of exploitation on the more coercive end.¹³⁷

From a labor perspective, the difference between exploitation of workers and trafficking is a matter of degree and not kind. All forms of labor entail some degree of human commodification; forced labor and trafficking are perhaps its most extreme manifestations. This conception of trafficking as escalated exploitation of worker vulnerability looks to the pervasive labor market dynamics that enable the exploitation and commodification of trafficked workers and allows for the possibility of arriving at less exploitative working conditions. This approach results in more effective treatment of the background economic and legal conditions that facilitate and produce labor trafficking.

Workers in informal labor sectors are generally considered the most vulnerable workers. In the case of undocumented migrant workers, their vulnerability to exploitation is compounded by the underground nature of their work and, consequently, by the partial application of the law to their work relations.¹³⁸ Indeed, undocumented, unskilled migrant workers experience, more than any other group of workers, the raw power of an unfettered market in which their bargaining position is almost the sole determinant of their pay and working conditions, mostly unmediated by protective social legislation. This does not mean that the law has no impact on their situation: Protective legislation that excludes migrant workers from

135. See CLAUS OFFE, *The Political Economy of the Labour Market*, in DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATION OF WORK AND POLITICS 10, 14–20 (John Keane ed., 1985) (discussing the main factors that distinguish the labor market from other markets and that justify distinct regulation and protections to workers).

136. Note that coercion in labor markets is not unidirectional. See, e.g., Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470, 474 (1923) (noting that what employees get beyond the bare minimum is the result of counter coercion).

137. Cf. Jens Lerche, *A Global Alliance Against Forced Labour? Unfree Labour, Neo-liberal Globalization and the International Labour Organization*, 7 J. AGRARIAN CHANGE 425, 430–31 (2007) (arguing that the ILO's approach to forced labor tends to regard this as an isolated phenomenon without analyzing its roots in capitalist–production relations and the prevailing driving forces of globalization).

138. See, e.g., Chantal Thomas, *Migrant Domestic Workers in Egypt: A Case Study of the Economic Family in Global Context*, 58 AM. J. COMP. L. 987, 1015 (2010) (discussing bargaining in the relative absence of law in a legally constructed zone of informality).

its application, underenforcement of labor and employment law in the informal market in general and in relation to undocumented migrant workers in particular, and migration regimes restricting migrant workers' market mobility are all contributing factors to their vulnerability. Moreover, their fear of deportation makes them reluctant to complain to the authorities about violations of their human rights and workers' rights, exacerbating their exposure to exploitation. The looming deportation threat and resulting reluctance to contact the authorities can also explain the low numbers of designated victims of trafficking under the human rights regime. As noted above, however, the legal system itself exacerbates their vulnerability since even when workers do come forward they may be formally ineligible to benefit from the protective legislation, either because they are migrants¹³⁹ or because they work in sectors that have been excluded from the law's application.¹⁴⁰

Another factor adding to documented and undocumented migrant workers' vulnerability is the large debts they incur during the process of migration. Many migrant workers pay large sums of money to private recruitment agencies to facilitate migration and help with job placement.¹⁴¹ The large debt burden increases workers' fear of losing their jobs and accordingly increases their willingness to work, even under poor working conditions, to repay their debts. This is particularly acute in the case of documented migrant workers under guest worker visa regimes that are time restricted. The time restrictions, coupled with the large debt, incentivizes migrants to stay with their employer, even if abusive, so as not to risk unemployment during the precious little time they have in the destination country.¹⁴²

139. See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was fired for union organizing).

140. Domestic work and agriculture are two labor sectors that are traditionally excluded from various protections under labor and employment law. See INT'L LABOUR ORG., DECENT WORK FOR DOMESTIC WORKERS 31, 40 (2010) [hereinafter ILO DECENT WORK REPORT], available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_104700.pdf (listing the countries that exclude domestic workers from protective employment and labor legislation); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers From Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 577–94 (2001) (discussing the ways in which the law limits farm workers' rights and impedes the enforcement of those rights); Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, 30 BERKELEY J. EMP. & LAB. L. 404, 450–51 (2009) (discussing the distributive effects of the exclusion of domestic workers in the United States).

141. See ILO GLOBAL REPORT 2009, *supra* note 25, at 2, 24–25; Agunias, *supra* note 22, at 18, 20–23.

142. See, e.g., TIP REPORT 2012, *supra* note 11, at 23–24 (discussing the ways in which documented migration may give rise to trafficking situations); Haynes, *supra* note 122, at 29–33 (describing the labor market vulnerabilities that result from the U.S. guest worker programs).

The incentive to stay with the employer is further bolstered under guest worker regimes that bind the worker to one designated employer (a “binding arrangement”) and effectively ensure that leaving that employer entails losing the documented status.¹⁴³

An anti-trafficking regime that construes trafficking as resulting from such structural labor market vulnerabilities, rather than from the aberrant criminal actions of deviant traffickers, will pursue a distinct set of goals from those sought by the current regime. While certain elements of the latter—namely, prosecution and protection—may be useful to deter and to encourage trafficked persons to cooperate with the authorities, they do not contend with the structural elements of the labor market in the destination country that lead to workers’ vulnerability. In contrast, under a labor perspective, this vulnerability and the power disparities between workers and employers are seen as common to many workers, with the level of inequality produced by, among other things, the limited reach or inapplicability of protective legislation to the more vulnerable worker. Accordingly, a labor perspective places emphasis on policies that address the power disparities between workers and employers.

4. Implementing the Labor Approach to Anti-trafficking

Labor-based anti-trafficking policies seeking to affect the balance of bargaining power between workers and employers need to be context sensitive. The various components contributing to worker vulnerability can vary from country to country and from sector to sector. Thus, anti-trafficking policy may need to take into account both the specific employment patterns in a given labor sector (the common forms of workplace supervision, the health and safety risks of a particular occupation, and the common modes of wage payment, for example) and the de jure and de facto legal regimes in a given country (labor, employment, welfare, migration, and criminal law, as well as the relevant aspects of private law). For example, the inclusion or exclusion of a given labor sector from the scope of protective employment legislation or the application of the right to unionize in that sector would be relevant to policymaking. Effective policy will also vary from country to

143. See, e.g., RHACEL SALAZAR PARREÑAS, *ILLCIT FLIRTATIONS: LABOR, MIGRATION, AND SEX TRAFFICKING IN TOKYO* 25–57 (2011) (describing how the Japanese immigration regime intensifies the vulnerability of Filipina hostesses in Japan); Adrianna Kemp, *Reforming Policies on Foreign Workers in Israel* 19–20 (OECD Soc., Emp’t & Migration Working Papers, No. 103, 2010) (explaining that Israel’s binding arrangement, which was later declared unconstitutional, subjected migrant workers to violations of their labor rights).

country depending on the restrictions on migrant workers under the applicable visa regime, relating, for example, to their market mobility or permitted duration of stay in the destination country. The types of debts migrant workers and other workers incur toward employment agencies or employers and the methods and rates of debt repayment will be relevant factors. Policies will need to address the criminalization of status and occupations, as well as workers' access, or lack thereof, to the authorities and the courts. The policy solutions for each of these issues, as well as many others, need to be tailored to the specific contexts of the governing legal rules and prevailing economic conditions. One-size-fits-all policies generally will not do.¹⁴⁴

Yet there are some factors that work to increase worker vulnerability to trafficking that are common to many labor sectors and legal systems and that can be addressed by uniform measures. Five specific measures would enable the implementation of a labor approach to trafficking: ensure that vulnerable workers have access to the justice system without fear of deportation or criminalization; ensure that the applicable visa regime does not formally or effectively bind workers to one specific employer; regulate against work contracts structured around insurmountable debt; extend the application of protective employment law to sectors susceptible to trafficking; and guarantee the right to unionize for vulnerable workers. This list of measures is by no means exhaustive. But when operating in tandem, these factors can strengthen the bargaining position of vulnerable workers and provide them with the tools for transforming employment practices to reduce instances of exploitation and trafficking significantly. Currently, anti-trafficking policies tend to include only one of these measures: protecting trafficked persons from criminalization and deportation because of undocumented status. These policies fail to address any of the other fundamental causes of trafficking, which would be tackled by the suggested general measures for implementing a labor-oriented effort against trafficking.

The first measure—refraining from criminalizing and deporting workers who turn to the law enforcement authorities—is fairly common practice today.¹⁴⁵ To enable exploited workers to complain about the abuse of their employers and traffickers, they must be granted immunity from arrest and prosecution for illegal activities they might have engaged in, such as entering the destination country

144. Parreñas, *supra* note 5, at 169–77 (criticizing the one-size-fits-all approach to anti-trafficking measures); *see also* PARREÑAS, *supra* note 143, at 56 (illustrating the need for a close sector-specific analysis to explain worker exploitation).

145. PARREÑAS, *supra* note 143, at 284 (noting that states are moving away from the criminalization and prosecution of trafficked persons).

without documents or working in an illegal sector such as the sex industry.¹⁴⁶ This should work to reduce their vulnerability to abuse but not eliminate it. For even when access to the justice system and immunity are ensured, undocumented workers or workers in illegal occupations may still be reluctant to come forth because of, for example, distrust of the authorities, fear of not finding other employment, time restrictions or limitations regarding number of employers in their visas, or the social stigma attaching to their situation.¹⁴⁷ Therefore, guaranteeing immunity to exploited workers is not alone a sufficient measure for combating trafficking but rather a necessary first step.

The second suggested measure under a labor approach is the elimination of binding arrangements that tie documented migrant workers to a sole employer. For workers to have some measure of control over their working conditions and to strengthen their bargaining power, they need to be able either to voice their concerns to their employers without fear of dismissal or to exit the work relationship.¹⁴⁸ The former option is ensured mostly through the right to unionize (discussed in greater detail below); the latter option can be guaranteed by allowing workers to terminate their employment contracts at will without financial or other penalty.¹⁴⁹ Even if relatively weak, the ability of workers to “vote with their feet” and resign is considered a minimal necessary means of protection against exploitation.¹⁵⁰ It is weak because it does not provide workers with the ability to change their working conditions at their present workplace; it is necessary because one of the lessons learned from slavery and feudalism is that, at a minimum, workers must be able to

146. GALLAGHER, *supra* note 16, at 283 (explaining the importance of not prosecuting and detaining victims of trafficking).

147. See NAT'L EMP'T LAW PROJECT, ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS 5 (2009), available at http://nelp.3cdn.net/75a43e6ae48f67216a_w2m6bp1ak.pdf (suggesting that immigration enforcement enabled employers to violate workers' rights, ensuring that workers are too “terrified to complain about substandard wages, unsafe conditions, and lack of benefits”); Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 44 (2008) (arguing that undocumented migrants often choose to remain silent in the face of egregious workplace violations); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships With Workers' Organizations*, 38 POL. & SOC'Y 552, 555 (2010) (stressing that immigration enforcement increases migrant workers' vulnerability to workplace violations).

148. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 7–11, 94 (1984) (describing exit and voice as two mechanisms for dealing with problems in the labor markets).

149. *Id.* at 94–101 (describing the effect of union voice on workers' ability to exit the work relationship).

150. See, e.g., Bin Jiang et al., *An Analysis of Job Dissatisfaction and Turnover to Reduce Global Supply Chain Risk: Evidence From China*, 27 J. OPERATIONS MGMT. 169, 170–72 (2009) (identifying operational and reputational risks for businesses with high employee turnover).

move from one employer to another to bargain effectively for improved working conditions.¹⁵¹

Binding arrangements, which are common in the guest worker regimes of many countries, deprive migrant workers of the ability to leave their employers at will.¹⁵² Under these systems, the worker is tied to one specific employer, usually based on a clear stipulation in her visa. Leaving that employer for any reason is considered a violation of the terms of her worker visa and places her at risk of deportation. States that have opted for binding arrangements have done so chiefly for protectionist reasons: They seek to control and limit the entry of migrant workers into their labor markets and to regulate the eligibility of the various labor sectors to employ migrant workers. Addressing this allegedly legitimate concern with the adoption of binding arrangements has led to the excessive dependence of migrant workers on specific employers and a resulting extreme vulnerability to exploitation. Moreover, this risk of exploitation is exacerbated when workers have incurred substantial debt because of the high recruitment fees many are required to pay in their home countries prior to their arrival in the receiving country.¹⁵³ This makes them even more fearful of deportation, especially when they have been granted a time-restricted work visa and there is an actively enforced deportation policy.

From a labor perspective, binding arrangements contribute to workers' vulnerability to being trafficked and thus should be either abolished or restructured to ensure market mobility and exit options. The state's protectionist interests, which underlie binding arrangements, can be served by other means, such as by guaranteeing migrant workers the same labor and employment protections granted to resident workers, thereby decreasing the economic incentives for employers to hire migrant workers. Another alternative would be to loosen the existing arrangement significantly so that workers are restricted to employment in a particular sector

151. See Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 *INDUS. L.J.* 84, 86 (2007) (discussing the origins of the employment-at-will rule and the freedom and autonomy it gave unskilled workers for the first time).

152. See, e.g., PHILIP L. MARTIN, *MANAGING LABOR MIGRATION: TEMPORARY WORKER PROGRAMS FOR THE 21ST CENTURY* 12 (2003), available at <http://www.ilo.org/public/english/bureau/inst/download/migration3.pdf> (noting that the United Kingdom has one of the few guest worker programs that allows foreigners to be free agents in its labor market); Martin Ruhs, *Migrant Rights, Immigration Policy and Human Development*, 11 *J. HUM. DEV. & CAPABILITIES* 259, 268 (2010) (discussing the *kafala*, or sponsorship, system in the Gulf countries, under which migrants can work only for their sponsors, and its harsh effect on workers' rights and market mobility).

153. See Agunias, *supra* note 22, at 52–53 (stating that some migration intermediaries increase the cost of migration and that migrants often find themselves in overborrowed situations that severely affects their wellbeing).

rather than with a specific individual employer and are guaranteed easy mobility within their designated sector.

A third measure that would be implemented under a labor anti-trafficking framework is the regulation of so-called recruitment fees. Many migrant workers, documented and undocumented alike, incur massive and at times insurmountable debt in the process of their migration.¹⁵⁴ The debt may be owed to informal middlemen and smugglers or to more formal recruitment agencies.¹⁵⁵ This debt, which traps workers in what is akin to debt bondage, is a convenient means for employers to ensure a docile and controllable workforce that is, consequently, easily exploited. For this reason, the 2011 U.S. TIP Report, as part of its slow and piecemeal recognition of the importance of a labor approach to anti-trafficking, suggested that the optimal regulatory approach would put a cap on the labor recruiting fee at, for example, no more than one month's wages abroad for a twelve-month contract.¹⁵⁶ Regulating recruitment fees would inhibit intermediaries' abuse of power and reduce the risk faced by migrant workers if they lose their jobs after complaining against an abusive employer or attempting to negotiate better working conditions.

The fourth measure that a labor anti-trafficking regime would require is guaranteeing vulnerable workers the right to unionize. The ability to engage in collective action and collective bargaining is considered the single most effective way to give workers a voice in the workplace.¹⁵⁷ The ability to exit the employment relationship may enable workers to change employers and find employment with better working conditions, as well as increase the competition among employers for quality workers. Collective action, however, empowers workers to demand better working conditions within their workplace, even from a hostile employer, and thereby deeply transforms working conditions and employment practices within a sector.¹⁵⁸

In the industrial-relations literature, the aggregation of workers' voices in the framework of a trade union that can declare a strike is considered an effective means

154. See INT'L LABOUR ORG., TOWARDS A FAIR DEAL FOR MIGRANT WORKERS IN THE GLOBAL ECONOMY 44–45 (2004) (noting that in many sectors migrants pay large sums to recruitment agencies and are subjected to virtual debt bondage).

155. See Asmita Naik et al., *Migration and Development: Achieving Policy Coherence* 27 (IOM Migration Research Series No. 34, 2008) (explaining that unregulated recruitment markets expose migrants to debt bondage and exploitation).

156. TIP REPORT 2011, *supra* note 32, at 22.

157. FREEMAN & MEDOFF, *supra* note 148, at 8–9 (explaining why collective bargaining is necessary for an effective voice in the workplace).

158. *Id.* at 9–10 (explaining that the collective nature of trade unionism alters the operation of labor markets and the nature of the labor contract).

for leveling the playing field and equalizing, to some extent, the power disparity between employers and employees.¹⁵⁹ A dissatisfied worker who is not of great value to the workplace risks being fired if he or she complains or tries to negotiate better working conditions. However, the collective of workers, protected by their right to form a union and their ability to strike, can transform management's practices and, consequently, improve working conditions and change wealth distribution patterns.¹⁶⁰ A strong, active trade union may even succeed at creating a rights enforcement mechanism where no effective state mechanism exists.¹⁶¹ Indeed, studies suggest that labor trafficking occurs less frequently in sectors in which workers are unionized.¹⁶²

The key features of unions are that they are member based, are accountable to that membership, and include elected bodies. The presence of unions in a particular sector or workplace does not, of course, guarantee worker agency and democratic participation or the emergence of industrial citizenship.¹⁶³ The interests of vulnerable workers may be discounted and underrepresented in the framework

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159. See OFFE, *supra* note 135, at 11–12, 19–20 (explaining the importance of unions for employees to represent their interests to employers).
 160. David Card et al., *Unions and Wage Inequality*, 25 J. LAB. RES. 519, 555–56 (2004) (finding that unions have an equalizing effect on the dispersion of wages in the United States, Canada, and the United Kingdom).
 161. See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 533–34 (2000) (arguing that when coercive systems are inaccessible to the weak, direct action, from the bottom up, has the potential of transforming significant power imbalances); Daniel Adler & Michael Woolcock, *Justice Without the Rule of Law? The Challenge of Rights-Based Industrial Relations in Contemporary Cambodia*, in *HUMAN RIGHTS AT WORK*, *supra* note 75, at 529, 552–53 (discussing the role of unions when law is not formally enforceable).
 162. See GALLAGHER, *supra* note 16, at 439 (suggesting that organized workplaces and monitored and enforced labor rights reduce trafficking); ILO GLOBAL REPORT 2009, *supra* note 25, at 56 (describing the potential of trade union involvement for combating labor exploitation).
 163. For a discussion of labor law regimes in which union representation is not determined by majority support of those being represented considering the cases of Brazil, Italy, Russia, Hungary, and Israel, see “*Competing Conceptions of Representational Legitimacy*,” 32 COMP. LAB. L. & POL’Y J. 841 (2011), and the five articles that follow: Ana Virginia Gomes & Mariana Mota Prado, *Flawed Freedom of Association in Brazil: How Unions Can Become an Obstacle to Meaningful Reforms in the Labor Law System*, 32 COMP. LAB. L. & POL’Y J. 843 (2011); Erika Kovács, *Hungarian Unions: How Representative? How Effective?*, 32 COMP. LAB. L. & POL’Y J. 891 (2011); Itai Svirski, *Moving to Bottom-Up Representation: A Comment on Gomes and Prado, “Flawed Freedom of Association in Brazil,” From the Perspective of the Developing New Unionism in Israel*, 32 COMP. LAB. L. & POL’Y J. 915 (2011); Gian Guido Balandi, *From Corporatism to Freedom of Association: A Note About Italy*, 32 COMP. LAB. L. & POL’Y J. 925 (2011); Nikita Lyutov, *Freedom of Association: The Case of Russia*, 32 COMP. LAB. L. & POL’Y J. 933 (2011). See also IMMANUEL NESS, *IMMIGRANTS, UNIONS, AND THE NEW U.S. LABOR MARKET* 181–84 (2005) (discussing unions’ concessionary bargaining and two-tier wage hierarchies—which benefit some members at the expense of others—and its effect on unions, specifically migrant workers’ unionization today).

of large unions. Yet trade unions do at least have the potential to establish a unique form of industrial democracy and citizenship that promotes active membership in a community, solidarity, political agency, and direct participation. Perhaps such a prospect may seem farfetched and not easily obtainable for vulnerable populations and precarious labor sectors, but it is far from impossible.¹⁶⁴ Indeed, some unions are already creating a path for vulnerable workers to identify, frame, prioritize, and represent their interests and bargain for improved working conditions.¹⁶⁵

A fifth and final recommended measure for implementing a labor-based anti-trafficking framework is the extension of the scope of labor and employment law and regulation throughout the labor market. Long working hours, poor health and safety protections, the withholding of wages, excessive wage deductions, and the absence of vacation or sick leave are all common features of human trafficking.¹⁶⁶ In most countries, labor and employment legislation protects against such working conditions, but either because of enforcement problems or because of legislated exclusions, the protection does not reach all workers. The nonapplication and nonenforcement of labor standards in certain sectors or for certain workers makes workers in these sectors particularly vulnerable to trafficking. Domestic work and sex work are two such examples, with the legal systems in many countries exempting them from protective labor legislation.¹⁶⁷ The same is often true for undocumented migrant workers when their undocumented presence in the destination country excludes them de jure or de facto from the application of protective labor and employment laws.¹⁶⁸ Deprived of labor and employment rights, workers have no legal recourse when exploited and, therefore, are more vulnerable to trafficking.

164. See, e.g., ILO GLOBAL REPORT 2009, *supra* note 25, at 17 (describing the improvement in working conditions brought about by the unionization of brick-kiln workers in India).

165. See, e.g., Guy Mundlak & Hila Shamir, *Organizing Migrant Care-Workers: Industrial Citizenship and the Trade Union Option* (forthcoming 2013) (on file with author) (describing the unionization of migrant care workers in the Israeli labor union Power to the Workers and assessing the advantages and challenges of promoting the interests of migrant care workers through a trade union rather than a workers' rights center); Melanie Samson et al., *Combining Forces—Networks and Federations of Waste Picker Organisations*, in REFUSING TO BE CAST ASIDE: WASTE PICKERS ORGANISING AROUND THE WORLD 33 (Melanie Samson ed., 2009) (describing the achievements of waste pickers' unions in Brazil, Colombia, India, and South Africa).

166. UNODC TOOLKIT, *supra* note 94, at 261–62 (listing indicators of labor trafficking).

167. See ILO DECENT WORK REPORT, *supra* note 140, at 25–28 (describing the common practice of formally excluding domestic workers from protective legislation in many countries); Prabha Kotiswaran, *Born Unto Brothels—Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area*, 33 LAW & SOC. INQUIRY 579, 617–24 (2008) (revealing the complex operation and distributive effects of criminal law in sex markets).

168. See Hila Shamir, *What's the Border Got to Do With It: How Immigration Regimes Affect Familial Care Provision—A Comparative Analysis*, 19 AM. U. J. GENDER SOC. POL'Y & L. 601, 616–20 (2011)

A labor anti-trafficking perspective would strive to extend and apply labor and employment law protection and rights to migrant workers and workers in informal sectors by formally including them in the scope of the relevant legislation.¹⁶⁹ Yet since national labor inspection bodies tend to suffer from underfunding, this formal inclusion will not suffice alone. An effective labor-based framework for anti-trafficking would thus require providing more backing and funding to labor inspectors in their work and, more generally, require establishing effective monitoring frameworks to ensure the enforcement of the workers' labor and employment rights.¹⁷⁰ Given the inveterate insufficiency of central monitoring bodies,¹⁷¹ however, direct enforcement by workers through trade unions—which ensures relatively high rates of compliance¹⁷²—and access to the justice system for the individual worker remain essential for ensuring the enforcement of workers' employment and labor rights.

These measures represent the different anti-trafficking tools a labor framework would offer, which are lacking in the prevailing human rights-based regime. Adopting these measures would significantly enhance workers' bargaining positions by, among other things, providing them with the means to and creating the conditions for making their voices heard in the workplace beyond the mere ability to exit an exploitative situation. Unlike the human rights approach, then, which supplies only ex post assistance to individuals designated trafficked persons, the labor approach can potentially diminish workers' vulnerability to abuse, exploitation, and trafficking in entire labor sectors.

(analyzing the effect of the law's limited reach, due to formal and informal exclusion, on migrant workers' vulnerability to exploitation).

169. See GALLAGHER, *supra* note 16, at 440 (discussing the role of states, through immigration and employment policies, in shaping demand for trafficked labor).

170. See ILO GLOBAL REPORT 2009, *supra* note 25, at 45–46 (discussing the important role of labor inspection in preventing forced labor and trafficking).

171. See David Weil, *A Strategic Approach to Labour Inspection*, 147 INT'L LAB. REV. 349, 349–50 (2008) (discussing the labor inspection crisis governments face and stating that labor inspectorates are challenged not only by diminishing budgets and insufficient staff but also by a more complicated regulatory environment, a changing workplace, and the decline of trade unions).

172. See ILO GLOBAL REPORT 2009, *supra* note 25, at 59–60 (discussing the effective involvement of trade unions in organizing migrants and in detecting and preventing forced labor); Trevor Colling, *What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights*, 35 INDUS. L.J. 140, 144–45 (2006) (discussing the potential of unions as a remedy for the deficiencies of individual enforcement).

C. The Case of Migrant Agricultural Workers

1. Regulating Migrant Agricultural Work

A concrete illustration of the clear and persistent insufficiency of the human rights approach to trafficking and the pressing need for the infusion of a labor approach into the current regime is the case of migrant Thai workers in the Israeli agriculture sector.

In the early 1990s, Israel created a guest worker visa for various labor sectors, including the agricultural sector, to enable the replacement of Palestinian workers from the Occupied Territories in its secondary labor market.¹⁷³ Today, there are approximately 30,000 migrant workers employed in agriculture in Israel; the majority of who are from Thailand.¹⁷⁴ The workers enter Israel on a guest worker visa for a maximum period of five years¹⁷⁵ and are formally protected under all Israeli labor and employment laws. Thus, *de jure*, workers are granted, among other rights, the right to unionize, and to minimum wages, to overtime compensation, to vacation leave, and to occupational safety.¹⁷⁶ Furthermore, under Israeli law, an employer of migrant workers must provide them with health insurance and decent accommodations for the entire duration of their employment.¹⁷⁷

Private agencies and employers carry out the screening, recruitment, and employment of migrant workers, with government agencies playing only a minimal supervisory role in the process. To secure legal employment in Israel, migrant workers pay large sums of money (on average, approximately US\$10,000) to intermediaries in their countries of origin, often incurring considerable debt to do so.¹⁷⁸ The middleman industry is rife with corruption in the sending countries, with a large share of the recruitment fees finding their way into the pockets of the Israeli

173. Kemp, *supra* note 143, at 7 (explaining that Palestinian workers were the main labor force in the agriculture and construction sectors since the early 1970s but that following the Palestinian Intifada in 1987, Israel sealed the borders with the Occupied Territories and workers were no longer allowed to cross into Israel).

174. KAV LAOVED, AGRICULTURAL MIGRANT WORKERS IN ISRAEL (2009), *available at* http://salsa.democracyinaction.org/o/677/images/agricultural_migrant_workers.pdf (presenting figures about migrant workers' employment in the agricultural sector).

175. Entry into Israel Law, 1952, Amendment No. 11, 5763-2003, § 3A (Isr.).

176. *See* Kemp, *supra* note 143, at 21–22 (stating that under Israeli law, a migrant worker is entitled to the same working conditions as an Israeli resident).

177. Foreign Workers Law, 1991, Amendment No. 3, 5751-2000, §§ 1D–1E (Isr.).

178. GILAD NATHAN, KNESSET RESEARCH CTR., COPING WITH THE ILLEGAL FEES CHARGED BY INTERMEDIARIES FROM FOREIGN WORKERS 7 (2011), *available at* <http://www.knesset.gov.il/mmm/data/pdf/m02782.pdf> (providing information about excessive fees charged by intermediaries).

agencies in contravention of Israeli law.¹⁷⁹ Israeli law has set a cap on the fee amounts,¹⁸⁰ but Israeli enforcement agencies can do little to intervene in what happens in the sending countries and, moreover, have been relatively impotent in Israel as well.¹⁸¹ As a result, in practice, the recruitment fees remain exorbitant for migrant workers seeking employment in Israel, increasing their vulnerability to trafficking.

Until 2010, there was a binding arrangement in force in Israel as part of the guest worker visa regime.¹⁸² Under this system, when a worker's employment for the stipulated employer was terminated, regardless of the reason, the worker lost his or her legal status. This severely limited the market mobility of these workers in Israel, undercut their bargaining power, and made them significantly dependent on their employers. The workers thus became more vulnerable to exploitation since leaving their employer, even in the event of a violation of their rights, would result in the revocation of their work permits.

The binding system, which was declared unconstitutional in 2006,¹⁸³ was reformed in 2010,¹⁸⁴ with sectoral binding replacing individual employer binding.¹⁸⁵ Under the amended system, workers are bound to an approved employment agency, which places them in a particular sector. Further, they can switch employers by request to the agency, which is required by regulation to facilitate such requests. This new system has resulted in little actual change, however, for workers are now dependent on the employment agencies to reassign them a new employer. In practice, employment agencies are reluctant to honor such transfer requests, presumably because they can gain far more by satisfying employers' demand for labor by importing a new worker—and collecting a percentage of the recruitment fee—than by reassigning a worker already in Israel.¹⁸⁶

179. *Id.* at 3–4 (describing Israeli law and its common contravention by recruitment agencies).

180. Employment Service Regulations (Payments from Work Applicants in Relation to Placements) 2006, § 2 (Isr.) (limiting fees to a total amount of NIS 3401.68, which is approximately US\$800).

181. NATHAN, *supra* note 178, at 9–10 (suggesting that despite recent reforms, there is no increase in enforcement against excessive recruitment fees).

182. GILAD NATHAN, KNESSET RESEARCH CTR., STATUS, RECRUITMENT AND EMPLOYMENT OF FOREIGN WORKERS 2–4 (2006), *available at* <http://www.knesset.gov.il/mmm/data/pdf/m01728.pdf> (describing the binding arrangement and proposals for its reform).

183. HCJ 4542/02 Kav LaOved Worker's Hotline v. Gov't of Israel [2006] (1) IsrLR 260 (declaring the binding arrangement unconstitutional).

184. Government Policy in Foreign Workers, Government Decision 1274, Jan. 24, 2010 (Isr.) (declaring that the immigration authority will begin to implement a sectoral binding arrangement).

185. Kemp, *supra* note 143, at 30–31 (stating that the old binding system was replaced by a system that restricts workers to a particular sector rather than to a single employer).

186. KAV LAOVED, ENFORCEMENT (OR THE ABSENCE THEREOF) IN THE EMPLOYMENT OF MIGRANT WORKERS IN THE AGRICULTURAL SECTOR 4 (2010), *available at* <http://www.kavla>

Although sex trafficking was criminalized in Israel in 2003, only in 2006 was labor trafficking criminalized with the legislation of the Law Against Human Trafficking.¹⁸⁷ This anti-trafficking legislation follows the lines of the prevalent international anti-trafficking approach: a transnational crime framework coupled with a human rights-based model. The law criminalized sex and labor trafficking, established shelters for male and female victims of trafficking where they receive healthcare, counseling, legal aid, and occupational training, and granted victims a special visa that allows them to remain and, in some circumstances, work in Israel.¹⁸⁸ This legislation marked a change in the official Israeli approach to trafficking. The 2001 U.S. TIP report placed Israel in its third and lowest tier of noncompliance with anti-trafficking standards.¹⁸⁹ Under the U.S. sanctions regime, this put Israel at risk of being denied nonhumanitarian, non-trade-related U.S. funding.

Mindful of these economic consequences, the Israeli government began to treat the phenomenon of trafficking more seriously. And its efforts bore fruit: The 2002 TIP report upgraded Israel to the second tier of compliance, and in 2012 it placed Israel in the first tier.¹⁹⁰

2. A Case Study: Trafficking in Migrant Agricultural Workers

What does Israel's anti-trafficking framework offer severely exploited workers? A recent Israeli labor trafficking case can serve as an illuminating case in point.

A group of thirty-four Thai migrant workers were employed by a farmer in the village of Yesha in the far south of Israel. In late 2009, the workers contacted the Israeli workers' rights NGO *Kav LaOved* ("Workers Hotline") and reported the details of abuse by their employer: Their passports had been confiscated; they had been forced to work extremely long hours without being allowed a day of rest or any vacation leave; they were being paid below minimum wage, and large sums of money were being deducted from those meager wages supposedly to cover the cost of basic living supplies; their employer had repeatedly threatened them with vio-

oved.org.il/UserFiles/File/Agriculture2010(1).pdf (describing the ongoing binding of workers to one employer caused by manpower agencies' actions and incentives).

187. Law Against Human Trafficking, 5766–2006, SH No. 2067 (Isr.).

188. Halley et al., *supra* note 60, at 363 n.92 (describing the main characteristics of Israel's anti-trafficking measures).

189. See U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 88 (2001) (classifying Israel as a tier 3 country).

190. See U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 63 (2002) (elevating Israel to tier 2); TIP REPORT 2012, *supra* note 11, at 194 (elevating Israel to tier 1).

lence; and they had not been provided decent housing accommodations.¹⁹¹ *Kav LaOved* turned the matter over to the police, who raided the site and took the workers to a shelter for trafficking victims. Despite repeated petitions filed on their behalf by *Kav LaOved*, the workers were not issued temporary permits as victims of trafficking. They were instead reassigned to new employers, who were apparently not much better than the previous employer. Many of the workers called *Kav LaOved* to report the exploitative working conditions at their new employment: cramped accommodations, low wages, and large wage deductions. As a result, they left their new work assignments and returned to the victims' shelter. Eventually, the workers were again reassigned to new employers, with whom they remained.

These agricultural workers are not alone in their experience. Reports by Israeli NGOs and the Israel State Comptroller have revealed that many migrant agricultural workers suffer the same labor rights violations and abuse.¹⁹² *Kav LaOved* reports suggest that repeat offenders are generally not sanctioned. Moreover, it was found that even after *Kav LaOved* files complaints with the police and labor-trafficking investigations and forced-labor prosecutions are initiated, there is no revocation of the employment permits granted to the abusive employers. Thus, these employers can, and do, continue their pattern of exploitative employment, each time with new workers.¹⁹³

This story exemplifies the insufficiency of the prevailing anti-trafficking paradigm. Even had the Thai migrant workers been treated well by the authorities, which they were not,¹⁹⁴ the best that the victim-centered, human rights framework had to offer was removal from the exploitative work situation, provision of shelter, food, and healthcare, and, eventually, if they wanted, reassignment to a new employer for the rest of their visa period. This set of rights, albeit limited in scope, is *not* insignificant. Consider that without their designation as trafficked persons, the Thai workers would have had very little bargaining power under the binding

191. Hanny Ben Israel, Letter to the Ministry of Justice Regarding Failures in Handling the Transfer of Victims of Human Trafficking to New Employers (Dec. 3, 2009), *available at* <http://www.kavlaoved.org.il/media-view.asp?id=2702> (describing the authorities' mistreatment of migrant agricultural workers who were trafficked).

192. GILAD NATHAN, KNESSET RESEARCH & INFO. CTR., ISSUES RELATING TO THE EMPLOYMENT OF FOREIGN WORKERS IN AGRICULTURE (2010) (describing common violations of workers' rights in the Israeli agricultural sector).

193. Press Release, *Kav LaOved* Petitioned the Court: The Government Must Act to Revoke Employment Permits of Abusive Employers (Mar. 10, 2011), <http://www.kavlaoved.org.il/media-view.asp?id=3309> (describing the main arguments in the petition). The petition is still pending.

194. *Id.* (reporting that the workers were given visas only several weeks after their arrival at the shelter, were not given the opportunity to retrieve their personal belongings from the employer, and were not consulted before being transferred to a new employer).

arrangement that was in force at the time and given the extensive deportation campaigns of undocumented workers that were in place in Israel.¹⁹⁵ Even if it were physically possible for them to leave their employer (likely without their passports) to try to find another job, they would have lost their documented status and become exposed to the risk of deportation. Significantly, this would have meant losing the opportunity to earn money to repay the large sums they borrowed to travel and work in Israel. The anti-trafficking framework does, therefore, provide exploited workers with a safe exit option—the ability to leave their abusive employer with their passports in hand and move to a new employer. However, it provides them *only* with an exit strategy. This regime, lacking a labor approach and infused only with the human rights approach, does practically nothing to improve workers' working conditions or to prevent either a recurrence of abuse once workers are re-assigned or the abuse of other employees of the same employer. While effective criminal prosecution of the employer or revocation of his or her permit to employ migrant workers could possibly have a deterrent effect and, therefore, constitute a more significant remedy, it would still do little to alter the patterns of employment that are the root causes of trafficking in such cases.

The vulnerability of migrant agricultural workers in Israel to trafficking is the result of employers' ability to take advantage of a system that significantly weakens workers' bargaining position—a system characterized by binding arrangements that hinder exit from abusive work situations; excessive recruitment fees that ensure a docile, risk-averse workforce; and nonenforcement of employment and labor rights. The current set of widespread anti-trafficking policies implemented in Israel does not contend with any of these issues, implying that these anti-trafficking tools are essentially ineffective for uprooting trafficking as an overall phenomenon.

In what way would a labor anti-trafficking framework make a difference? In the context of the Thai agricultural workers, it would understand their exploitation as part of the wider problem of the power imbalance in labor contracts in general as well as in their specific circumstances as migrant farm workers. It would therefore employ labor and employment strategies to prevent such exploitation. The workers are regarded as agents of change who, if given the tools to do so, can bargain for better working conditions and ultimately transform the employment practices and patterns in their work sector without any need to be rescued by either NGOs or the authorities.

195. See Kemp, *supra* note 143, at 19–20 (explaining that under the binding arrangement, migrant workers who left their employers lost their residence permits and became subject to arrest and deportation).

The Israeli legal system does include some labor-based measures. Migrant agricultural workers enjoy the protection of all Israeli labor and employment laws, including recognition of their right to unionize.¹⁹⁶ If they are designated victims of trafficking following their complaint of abuse, they will not be deported. This is not adequate, however, and additional measures are necessary to transform the exploitative agricultural sector in Israel. These measures include abandoning the current binding system, effectively regulating the sector through monitoring and enforcing employment laws, conditioning employment permits on proper employment practices, and setting effective restrictions on excessive recruitment fees. These combined measures will enhance and ensure workers' market mobility and voice and facilitate the proper enforcement of their employment and labor rights so as to decrease the incidence of trafficking in agricultural workers significantly.

To some extent, these crucial changes are beginning to occur: In 2006 the Israeli Supreme Court declared the most restrictive form of the binding system unconstitutional,¹⁹⁷ and in 2010 Israel signed a trilateral agreement with the Thai government and the International Organization for Migration (IOM) to ensure a reduction of recruitment fees, though this has yet to be implemented.¹⁹⁸ The pace of change, however, is excruciatingly slow. On the one hand, Israel's quick response to its tier-three categorization in the 2001 TIP report suggests great potential for bringing about change with anti-trafficking measures. Yet, on the other hand, as demonstrated in the case of the Thai agricultural workers, a human rights, victim-centered approach to trafficking of the type promulgated by the protocol and TVPA is inadequate for assisting victims of trafficking and preventing severely exploitative employment practices.

196. There are some signs that these rights can be effectively exercised by migrant workers. See Tani Goldstein, YNET News, *Thai Workers in the South Go on Strike*, KAV LAOVED (Apr. 12, 2010), http://www.kavlaoved.org.il/media-view_eng5e85.html?id=2804 (describing how striking Thai agricultural workers in the town of Ohad in southern Israel demanded decent wages).

197. HCJ 4542/02 Kav LaOved Worker's Hotline v. Gov't of Israel [2006] (1) IsrLR 260 (declaring the binding arrangement unconstitutional).

198. Press Release, Immigration Auth., *The Bilateral Agreement Between Israel and Thailand for the Recruitment of Thai Migrant Workers* (May 11, 2011), <http://piba.gov.il/SpokesmanshipMessagess/Pages/2011-9410.aspx>.

III. OBJECTIONS AND RESPONSES

A. Why Is a Labor Approach Absent From Prevailing Anti-trafficking Measures?

If a labor anti-trafficking framework makes so much sense, then why is it yet to be adopted? Several factors can explain the absence of a labor perspective from the international anti-trafficking regime. One possible cause is the strong association of trafficking with the sex industry.¹⁹⁹ The intense debate during the Vienna Process over whether all prostitution constitutes trafficking made it politically challenging to include in the Trafficking Protocol provisions mandating the guarantee of labor and employment rights in labor sectors prone to trafficking. The moral outrage that seems to accompany any discussion of trafficking for the purpose of prostitution, alongside the refusal to label prostitution as work and, accordingly, contend with questions of legality, working conditions, social protections, and access to the legal system, have traditionally impeded the adoption of a labor approach to trafficking.²⁰⁰ In fact, the ILO, which is the agency most suited to introducing a labor perspective into the protocol, was reluctant at the time of the negotiations to propose labor protections for trafficking victims because of internal debate over whether sex workers should be granted social and labor protections.²⁰¹ Thus, in the years since the implementation of the protocol, anti-trafficking policies have continued to focus on the sex industry²⁰² and ignore structural labor market issues.

A second reason for the failure to adopt a labor framework for anti-trafficking is the decline of the labor movement²⁰³ and the movement's shift to human rights—

199. See discussion *supra* Part II.B.2.

200. Kempadoo, *supra* note 111, at xxii (describing the sex-related moral panic that leads to restrictive rather than empowering policies).

201. See THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA (Lin Lean Lim ed., 1998) (recognizing the increasing economic importance and expanding international dimension of sex work and recommending the economic recognition and extension of labor rights to sex workers). Lim's report was heavily criticized by feminists who call for the abolition of prostitution. See, e.g., Janice G. Raymond, *Legitimizing Prostitution as Sex Work: UN Labour Organization (ILO) Call for Recognition of the Sex Industry*, COALITION AGAINST TRAFFICKING IN WOMEN, <http://action.web.ca/home/catw/readingroom.shtml?x=16741> (last visited Sept. 23, 2012) (criticizing the ILO for its de facto support of violence against women).

202. See *supra* notes 64–67 and accompanying text.

203. Union membership is declining around the world, the rise of the neoliberal agenda is leading to a decrease in labor regulation, and the rate of ratification of ILO conventions has never been lower. See Alan Hyde, *The Idea of the Idea of Labour Law: A Parable*, in *THE IDEA OF LABOUR LAW* 88, 90–92 (Guy Davidov & Brian Langille eds., 2011) (arguing that the three pillars of labor law have eroded: (1) a decline of labor laws and regulations; (2) a decline in union membership; and (3) a reduction in trade barriers and globalization); Alan Hyde, *The International Labor Organization in the Stag Hunt*

like absolute, universal principles.²⁰⁴ This can explain the absence of a labor approach to trafficking even in those bodies best suited to introduce such an approach—namely, the ILO and trade unions. Indeed, the ILO and trade unions have emerged as marginal players in the campaign against trafficking. Until the Vienna Process and the drafting of the Trafficking Protocol, trafficking was of no particular interest to the ILO, presumably because of its narrow view of the phenomenon as limited to the context of sex work. Since the introduction of the protocol, however, the ILO has systematically incorporated trafficking into its reports and agenda. Yet, until recently, the organization's conception of trafficking remained narrower than its definition in the Protocol, limiting trafficking to a form of forced labor, which is prohibited under its core labor rights,²⁰⁵ that involves border crossing.²⁰⁶ And even once trafficking had been recognized as a matter of concern for the ILO, the organization refrained from adopting a comprehensive labor approach to trafficking.²⁰⁷

In 2008, the ILO issued a report detailing its plan for Action Against Trafficking in Human Beings, which on its face, seemed to herald a move in the direction of a labor perspective to trafficking.²⁰⁸ In the report, the ILO explained its new approach to trafficking as follows: “[T]he ILO addresses trafficking from a labour market perspective. It thereby seeks to eliminate the root causes, such as poverty, lack of employment and inefficient labour migration systems.”²⁰⁹ The report sets out policies aimed at making migration safe, calling for the regulation

for Global Labor Rights, 3 LAW & ETHICS HUM. RTS. 153, 158 (2009) (finding the average number of member states that ratified ILO conventions in the last 25 years to be a low 20.1 out of the possible 180 member states).

204. See discussion *supra* Part II.A.

205. See ILO GLOBAL REPORT 2005, *supra* note 11, at 10 (defining forced labor and explaining that trafficking is a subset of forced labor); INT'L LABOUR ORG., STOPPING FORCED LABOR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, at ix (2001) (discussing trafficking as a “burgeoning phenomenon” related to border crossing).

206. ILO GLOBAL REPORT 2009, *supra* note 25, at 11 (defining forced labor and explaining that trafficking is a category of forced labor that arises from migration). A 2012 report, estimating the number of victims of forced labor globally, does not distinguish between forced labor and trafficking but rather states that “there is . . . a clear link between the Protocol and ILO Convention No. 29. The only type of exploitation specified in the Protocol's definitional article that is not also covered by ILO Convention No. 29 is trafficking for the removal of organs.” ILO GLOBAL ESTIMATES 2012, *supra* note 11, at 20. Yet the exact nature of this “link” is not clarified further. This recent change in approach is not yet reflected in the ILO's anti-trafficking agenda.

207. See Andrees & van der Linden, *supra* note 20, at 55–56 (noting that the ILO is well positioned to develop an understanding of the labor dimension to trafficking but has barely begun to do so).

208. ILO ACTION, *supra* note 11 (integrating the ILO's anti-trafficking approach, research, and strategies).

209. *Id.* at 2.

of monitoring and recruitment processes and for the involvement of various stakeholders in anti-trafficking: the business sector, financial institutions, and trade unions. While this report does present an alternative to the human rights approach, it addresses only issues related to migrant workers, thereby neglecting a large proportion of the trafficked population. Moreover, the approach to trafficking represented in this document seems to focus on the formal labor sector, disregarding the fact that trafficking often happens in informal sectors. As development scholar Jens Lerche has argued, the ILO stresses traditional models of forced labor that overlook the complex reality of power disparities in the informal sector and the ambiguous line between free and unfree labor within that sector.²¹⁰

Trade unions have also failed to embrace a labor perspective to trafficking. They tend to be secondary players and often show little interest in anti-trafficking efforts.²¹¹ There are several possible explanations for this. First, trade unions have a weak history in terms of protecting migrant workers, women, and workers in informal sectors, making unions particularly less likely to prioritize anti-trafficking goals.²¹²

Second, many of the large trade unions are struggling worldwide for membership.²¹³ They may fear that taking an active part in anti-trafficking campaigns could drain their already limited resources. Third, anti-trafficking campaigns are led principally by NGOs and other civil society organizations with which unions often have a tense relationship. Moreover, unions may “lose [the] trust of companies or governments if they have NGO allies.”²¹⁴ It is worth noting, however, that despite the general lack of union involvement in anti-trafficking efforts, a few labor unions did become involved in trafficking in labor sectors in which they already

210. Lerche, *supra* note 137, at 446–47 (discussing an Indian case to show the relationship between neoliberal globalization, informality, and unfree labor, and criticizing the ILO’s approach for separating the three).

211. Commandeur, *supra* note 123, at 19–20 (explaining the reasons why trade unions did not become significant players in anti-trafficking initiatives).

212. See Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 213 (2002) (“Historically, the labor movement served the interests of workers who were race- and gender-privileged.”).

213. See, for example, in Europe and the United States, Keith P. Forrester, In Search of a New Societal Paradigm; Trade Union Renewal Strategies and Citizenship Learning in an Enlarged Europe (n.d.) (unpublished manuscript), available at http://llw.acs.si/ac/09/cd/full_papers_plenary/Forrester.pdf (discussing the decline in European trade unions and suggesting new strategies for unions to expand their membership), and Kate Bronfenbrenner et al., *Introduction*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 1, 2–8 (Kate Bronfenbrenner et al. eds., 1998) (discussing the decline in U.S. union density and the importance of revitalizing union organizing).

214. Commandeur, *supra* note 123, at 19–20 (explaining that relations between unions, governments, business, and NGOs may explain the relative absence of unions from anti-trafficking measures).

have or seek to have presence. For example, the Dutch trade union Abvakabo FNV is involved in promoting labor rights for trafficked domestic workers,²¹⁵ and the European Coalition of Trade Unions and NGOs created a coalition to prevent trafficking.²¹⁶ Yet over all, union involvement in anti-trafficking can still be described as minimal.

A third reason for the lack of a labor anti-trafficking framework is the dominance of the transnational crime framework.²¹⁷ States have predominantly been interested in the Trafficking Protocol and its implementation as an instrument for reinforcing national sovereignty through tightened borders and the criminalization and prosecution of traffickers. Any other interest, including the protection of human rights, is secondary to their objective of bolstering state authority. Thus, if the somewhat less-controversial human rights framework was on shaky ground during the protocol negotiations, then the prospects of the adoption of a labor perspective, which challenges states' immigration and economic policies, were even bleaker.

A fourth factor for the labor approach's failure to gain a foothold in the international anti-trafficking framework is the dominance of the human rights approach.²¹⁸ This Article suggests that the absence of labor rights from the current regime is not solely due to the fact that prostitution captured the anti-trafficking discourse, nor to the prevalence of the strong transnational crime frame. Rather, no less important have been the dominance of the human rights paradigm itself and the inherent ideological divergences between the two paradigms. The human rights framework is individualistic and victim centered; it treats trafficking as an exceptional crime and looks to legislatures and courts as the main agents of change. The labor framework, in contrast, focuses on structural causes of power disparities. It exposes a continuum of labor commodification with trafficking at its extreme end and holds collective action, bargaining, and standard setting to be the main avenues for effecting change. The tense relations between the two frameworks

215. See, e.g., EVA CREMERS ET AL., ABVAKABO FNV, YOUR RIGHTS AS A DOMESTIC WORKER IN A PRIVATE HOUSEHOLD 20–21 (2008), available at <http://www.abvakabofnv.nl/PDF/downloads/folder-rechten-als-huishoudelijke-hulp/193055/.pdf> (brochure directed at domestic workers written by the union, which includes a recommendation to become a union member as a way to improve one's work situation).

216. For a description of the project, see *Creating a European Coalition of Trade Unions and NGOs to Prevent Violence and Protect Women and Young People in the Workplace, With a Specific Focus on Trafficking*, INT'L TRADE UNION CONFEDERATION, http://www.ituc-csi.org/IMG/pdf/PERC-ETUC_project_brief_1_.pdf (last visited Sept. 23, 2012). It should be noted, however, that this project focuses on identifying victims rather than on unionizing them.

217. See discussion *supra* Part I.

218. See discussion *supra* Parts II.B.2, II.C.

suggest that incorporating a labor approach into the current human rights-based anti-trafficking framework would entail significant adjustments to the regime.

Finally, however promising a labor framework may be for combating trafficking, there are strong protectionist and rent-seeking economic interests that push against its adoption. States have an interest in curbing migration to protect local workers in certain sectors from competition. This protectionism underlies the drive for stronger border protection and the deportation and criminalization of undocumented migrant workers. Seemingly in conflict with the protectionist interests are rent-seeking interests, which push for a greater supply of cheap labor. Rent-seeking interests are served by importing an easily controlled labor force that is significantly cheaper than local workers to begin with and can be even cheaper because of the lax enforcement of employment and labor rights or their *de jure* or *de facto* inapplicability. Yet the protectionist and rent-seeking interests do converge on the desire for restrictive policies toward migrant workers once they are in the country. Thus, schemes such as binding arrangements serve both types of interests. These interests stack up against the adoption of a labor perspective on trafficking, whereas the current human rights-infused regime is more compatible with the interests of states and corporate actors. The prevailing framework allows the international community to appear to take action against severe forms of exploitation, on the one hand, while sidestepping the need to deal with the structural labor market problems that enable trafficking and the entrenched interests that benefit from it, on the other.

B. Regulation Is Insufficient for Fighting Modern-Day Slavery

A labor approach to trafficking can seem farfetched to some: How can labor rights help slaves? This objection to a labor anti-trafficking framework suggests that the only effective way of responding to modern-day slavery is by working for its abolition through criminal prohibition. This is the position taken, for example, by certain feminists, particularly in relation to sex trafficking.²¹⁹ Under this stance, certain lines of work are inherently abusive and cannot be transformed or redeemed through regulation. Therefore, anything short of criminal prohibition amounts to

219. See, e.g., KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 6–13 (1979) (arguing that prostitution is a form of sexual slavery and should be abolished); Melissa Farley, *Preface: Prostitution, Trafficking, and Traumatic Stress*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS, at xi, xiv (Melissa Farley ed., 2003) (arguing that a women's "self, her individuality, [and] her humanness [are] systematically . . . destroyed in prostitution"); Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 27–28 (1993) (arguing that prostitution cannot result from women's choices and that it is a violation of women's human rights).

toleration and legitimates the violence, rape, coercion, and violation of human dignity that are an integral part of trafficking.

Indeed, it might certainly be true that a labor perspective is unhelpful in situations in which the legal structure as a whole does not recognize a person's humanity, such as in the cases of African Americans under slavery in the United States and of Jews in concentration camps in Nazi Germany. In these circumstances, the recognition of a person's human rights and humanity is a prerequisite for improving his or her situation and for recognizing his or her workers' rights. The international definition of trafficking, however, encompasses a much wider spectrum of cases of exploitation than these extreme ones, and the type of legal denial of humanity in the latter is not typical of the large majority of trafficking victims around the world today.

The abolition of the legal category of slavery, in the United States and around the globe, did not lead to the complete disappearance of slavery-like practices. What it did accomplish, however, is that one person could no longer legally own another, meaning that legal remedies were, or could be, made available to severely exploited and commodified workers. In fact, it can be argued that once the legal category of ownership of another human being was abolished, the contractual remedies under labor and employment rights became the tools for regulating unfree labor. And they have operated ever since to limit its occurrence.²²⁰ A labor approach to trafficking seeks to make such remedies accessible to and effective for all workers in all labor sectors.

The labor perspective is relevant to the large majority of trafficking cases, which are predominantly forms of severe workers' rights violations. The ILO 2009 Global Report asserted the significantly underutilized potential of traditional labor and employment mechanisms and measures for national programs to eliminate forced labor and human trafficking.²²¹ Research suggests that labor trafficking occurs less frequently where workers are organized and labor standards are monitored and enforced.²²² Thus, a labor approach can offer solutions even to the most extreme cases of exploitation no less than to the wider spectrum of exploitative

220. See ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE 1350-1870*, at 9 (1991) ("Achieving legal autonomy represented a real gain for laboring people, but it also helped to obscure the systemic ways in which law continued to contribute to their oppression through the operation of the ordinary rules of property and contract in a world in which productive assets were unequally distributed.")

221. ILO GLOBAL REPORT 2009, *supra* note 25, at 59-60 (describing the challenges and potential of unionizing migrant workers and of union involvement in detecting and preventing forced labor).

222. See GALLAGHER, *supra* note 16, at 439 (citing research about the effects of unionization and labor inspections on trafficking).

situations. Moreover, under the anti-trafficking labor framework presented in this Article, no trafficking case is too extreme to be effectively addressed with labor tools and mechanisms. It may be arguable as to whether a certain income-producing practice (farm work, construction work, sex work, surrogacy, or organ donations) is in fact “work.” From a pragmatic standpoint, however, increasing individual choice and workers’ control over the terms of their employment contract and the circumstances of its fulfillment will significantly reduce exploitation in all of the cases. The claim that prohibition alone is a sufficient solution and that regulation legitimates trafficking collapses in the face of the reality that criminal prohibitions do not end all exploitation and that in fact their outcomes may very likely impair the options and bargaining power of exploited workers.²²³

The labor model described here promotes labor market regulation, among other things, but at the same time it does not require abolishing the criminal prohibition on severely exploitative employment. Labor and employment rights often attach criminal sanctions to employers’ violations of protective laws.²²⁴ What this approach does entail, however, are measures that pay heed to a larger set of concerns than those addressed through criminalization so as to effectively prevent the undesired behavior.²²⁵

One illustrative example of this dynamic is the case of child labor. Child labor is prohibited by international law and constitutes a criminal offense in many national jurisdictions. Yet researchers and policymakers have long observed that in developing countries, prohibiting child labor per se has severe negative consequences. When child labor is required for families’ economic survival, introducing a criminal prohibition may lead to increased poverty among families and children and may drive child labor underground, leading to even more precarious jobs and worse working conditions.²²⁶ Efforts to combat child labor in many developing

223. See, e.g., JULIA O’CONNELL DAVIDSON, PROSTITUTION, POWER AND FREEDOM 91–106 (1998) (describing the power and control of a sex worker in a transaction, including the impact of illegality); Lin Lean Lim, *The Economic and Social Bases of Prostitution in Southeast Asia*, in THE SEX SECTOR, *supra* note 201, at 1, 20–22 (suggesting that abolitionist views of prostitution may push it underground and further marginalize those most in need of protection).

224. For example, in many countries, violations of the prohibition on slavery and child labor can have criminal consequences. Likewise, in various countries, violations of minimum wage laws, certain occupational safety standards, and even some antidiscrimination laws constitute a criminal offense. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992) (providing a general theory of the complementarity of criminal and civil sanctions).

225. See *supra* Part II.B.4 (discussing measures that can be taken under a labor anti-trafficking approach).

226. See, e.g., David M. Smolin, *Conflict and Ideology in the International Campaign Against Child Labor*, 16 HOFSTRA LAB. & EMP. L.J. 383, 394–99 (1999) (criticizing the mainstream movement for

countries have, to some extent, shifted from implementing criminal prohibitions to attending to structural economic and social issues such as education, job training, regional economic development, labor market regulation, and regulation of children's work. Accordingly, in numerous developing countries today, the criminal prohibition on child labor is accompanied by some of the following measures: higher spending on education; mandating primary education; economic benefits to families who send their children to school; incorporation of components compatible with market needs in school curriculums; increased regulatory and enforcement efforts in industries prone to child labor; and collaboration with trade unions, transnational corporations, civil society organizations, and financial institutions.²²⁷ It is now well understood in the context of child labor that effective prevention cannot rely solely on criminalization or rehabilitation of the children but rather requires close attention to economic and labor market realities. A labor approach offers just such a pragmatic, market-based analysis to contend with the problem of trafficking.

C. The Risk of Undermining the Current Anti-trafficking Paradigm

A third possible objection to introducing a labor anti-trafficking framework is the concern that this would undermine most of the achievements of the human rights approach. While the first objection to a labor framework was based on moral commitments, the objection here is pragmatic in nature: It asks which framework is more likely to be accepted by states to combat trafficking and asserts that a human rights approach is a more likely contender because adopting the labor framework would require states to fundamentally amend hard-seated economic and migration policies. According to this position, the existing anti-trafficking framework may not be perfect, but it is working. The framework significantly increased awareness of the problem of trafficking, and its flexibility has enabled the majority of countries across the globe to take action against trafficking. The diverging premises and understandings of the two paradigms regarding workers' agency and the nature of trafficking as either an escalated form of labor exploitation or a

eliminating child labor and arguing for partial abolition with regulation rather than a pure abolitionist goal).

227. See FARKHANDA ZIA MANSOOR, WORKING TOWARDS THE ERADICATION OF CHILD LABOUR? AN ANALYSIS OF THE LEGAL FRAMEWORK WITH CASE-STUDIES OF PAKISTAN, INDIA, INDONESIA, CHINA, UK AND USA 17–30 (2011) (describing the common practices to combat child labor beyond prohibition).

unique and distinct phenomenon could undermine the astounding support for the current anti-trafficking regime across the world.

Indeed, construing trafficked workers as agents, as dictated by the labor paradigm, has a significant strategic downside. Assuming volition and willful migration into destination countries for work purposes taints the premise of innocence that plays such a vital role in human rights narratives in general and in trafficking narratives in particular. Despite the fact that the Trafficking Protocol's definition clearly provides that a victim's consent is irrelevant when traffickers use prohibited means (such as coercion, deception, and abuse of power), special protection and support measures offered under national anti-trafficking regimes often hinge on and are justified by the victim's alleged passivity and innocence.²²⁸ Adopting a labor framework and treating workers as active agents who, given supportive background rules, can take control of their working conditions could, therefore, put a dent in popular national support for the extension of rights to victims of trafficking.

Similarly, perceiving trafficking as part of a spectrum of labor market exploitation entails its share of strategic costs: It complicates the narrative of trafficking as "modern-day slavery," a phenomenon that can allegedly be identified and confined easily, and it exposes the commonalities between trafficking and other more frequent but perhaps less blatantly immoral exploitative labor practices. As such, it implies that trafficking is not always a case of criminal villains doing evil but sometimes a situation brought on by market actors, affected by market forces, and shaped by social norms and legislation. This, too, may undermine popular acceptance of extending unique and expansive rights to trafficking victims. Specifically, governments' willingness to establish visa regimes for trafficking victims rests on the premise that human trafficking is a relatively rare and marginal phenomenon, so that establishing special visa arrangements for its victims does not risk transforming the country's immigration policy. A labor perspective that suggests that trafficking may be caused by structural features common to significant parts of entire labor sectors, however, would challenge the assumption that trafficking is a rare and extreme occurrence that arises on an individual basis.

Yet the labor framework has a significant upside as well. Focusing on agency rather than victimhood brings the myth of trafficking closer to the reality of labor

228. See, for example, in the United States, Haynes, *supra* note 122, at 47 ("To invoke the 'benefits' available to trafficked persons, the person requesting the benefit must describe herself as a 'victim' and tell the victim story.").

exploitation in the lives of many migrant workers.²²⁹ Complicating the human rights picture of trafficking brings with it a clearer understanding of the root causes of trafficking and, therefore, a clearer vision of how to prevent it. A labor approach to trafficking, moreover, shows that criminal law supplemented by generous rehabilitation measures is an insufficient tool to deal with those root causes and that labor and employment law, as well as labor migration policies, need to be part of the solution. The labor framework, therefore, opens up a plethora of new and possibly effective ways for transforming precarious and exploitative labor sectors and for improving working conditions through the direct action and involvement of workers or with the help of third parties such as trade unions and workers' rights centers.

CONCLUSION

The dominant anti-trafficking regime, as it currently stands, helps a very small proportion of trafficked persons. By focusing on purportedly saving victims from the hands of traffickers and rehabilitating them *ex post*, it does little to deal with the underlying causes of trafficking. The prevailing human rights-based anti-trafficking regime has little to offer a great many of the workers being severely exploited across the world, particularly those who seek empowerment in their workplace and improved and decent working conditions rather than rescue, rehabilitation, and repatriation. This Article has argued that current anti-trafficking policies are unsuccessful because, among other reasons, they are dominated by a human rights approach to trafficking and they lack a labor perspective. The fixation on sex trafficking, with its supposedly clear-cut victims and villains, the focus on extreme cases, and the disregard for structural labor market inequalities hamper the development of effective anti-trafficking policies. This calls into doubt the justification for the currently implemented anti-trafficking regime and raises the question of whether it actually obscures the main causes of, and solutions to, severe forms of labor exploitation.

Incorporating a labor framework into current anti-trafficking efforts is crucial for effectively addressing the roots of trafficking and realizing the potential for transforming labor markets. The time is ripe for the international community, the labor movement, and the human rights movement to translate their declared commitment to combating human trafficking into better, more effective policies against

229. See, e.g., TIP REPORT 2010, *supra* note 31, at 6 (“[Trafficking] is less often about the flat-out duping and kidnapping of naïve victims than it is about the coercion and exploitation of people who initially entered a particular form of service voluntarily or migrated willingly.”).

severe labor market exploitation and to reconsider the significance of the labor approach and its tools for reducing workers' vulnerability and exploitation. If the international willingness and resources channeled to the current anti-trafficking paradigm were applied toward implementing a labor approach, there would finally be potential for these efforts to bear fruit.