

Human Rights, Labor, and the Prevention of Human Trafficking: A Response to *A Labor Paradigm for Human Trafficking*



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ABSTRACT

This Essay responds to an article by Hila Shamir previously published in the *UCLA Law Review*, in which she suggests that human rights has failed as a framework for addressing human trafficking and that instead a labor model would be more successful. Although her article identifies potentially important benefits of a labor perspective, the binary framework it establishes, pitting human rights and labor against each other, is counterproductive. Her article mischaracterizes the current antitrafficking framework and undervalues the importance of rights to a robust response to human trafficking. This Essay discusses the value of Professor Shamir's labor paradigm and the role of human rights in antitrafficking responses. It then suggests that labor-based and human rights-based responses are not mutually exclusive, and that, ultimately, a successful response to human trafficking will need to incorporate strategies and methodologies from a range of perspectives.

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TABLE OF CONTENTS

INTRODUCTION.....	144
I. THE VALUE OF A LABOR PARADIGM	145
II. THE CURRENT ANTITRAFFICKING FRAMEWORK AND HUMAN RIGHTS	147
A. Criminal Law Trumps.....	148
B. Understanding the Human Rights Approach.....	152
III. TOWARD A MULTI-PERSPECTIVE APPROACH TO HUMAN TRAFFICKING.....	156
CONCLUSION	158

INTRODUCTION

Hila Shamir's recent article, *A Labor Paradigm for Human Trafficking*, critiques the current response to human trafficking, arguing that it has failed to make meaningful progress in reducing the prevalence of human trafficking.¹ Her article asserts that to achieve greater success in preventing human trafficking, a labor approach is necessary to address "structural labor market conditions and practices that shape workers' vulnerability and inferior bargaining power in the workplace."² Professor Shamir and I agree that the current framework is not optimal and that too little has been done to address the root causes of human trafficking, including both supply and demand factors.³ We also agree that a labor perspective, which incorporates labor rights, has value in the human trafficking context. Yet her article suffers from a dichotomous view that may actually be counterproductive: She positions labor approaches in opposition to human rights approaches.⁴ However, in both theory and practice, they overlap and actually can be mutually reinforcing.⁵

Her article places the blame for the failures of current antitrafficking efforts foremost on human rights, arguing that "the prevailing 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 . . . when in reality, little is being done to address the underlying causes."⁶ This leads her to conclude that a labor paradigm should replace, not supplement, a human rights framework.⁷ However, her article mischaracterizes the prevailing response to human trafficking and misstates what a human rights-based approach would offer. This Essay addresses these aspects of her article and

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1. Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76 (2012).
 2. *Id.* at 99.
 3. See Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C.L. REV. 447, 450–51 (2011).
 4. See Shamir, *supra* note 1, at 80.
 5. See *infra* notes 41–44 and accompanying text.
 6. Shamir, *supra* note 1, at 80–81 ("Far from being marginalized, a human rights approach to trafficking . . . has actually become part of the problem."). I would argue that the criminal law-based response to trafficking is what really suggests to the public that progress is being made; when a trafficker is convicted, the public perceives the problem as being addressed. In reality, most traffickers are not apprehended. Even successful prosecutions, while important, reflect a failure to prevent the underlying harm.
 7. *Id.* at 82 ("[T]he labor paradigm cannot simply supplement the existing human rights regime as is."). Although Shamir notes the potential convergence of the human rights and labor movements in addressing human trafficking, she concludes that human rights and labor "pursue different goals, function under different assumptions, and resort to different strategies." *Id.* at 98.

highlights the value of incorporating aspects of both a labor paradigm and a human rights-based approach. Ultimately, addressing human trafficking successfully will require policymakers and advocates not to swap one framework for another but rather to draw on a range of approaches and methodologies to tackle different components of the problem.

This response proceeds in three parts. Part I briefly discusses Shamir's labor-based proposal for addressing the shortcomings in current antitrafficking responses. This approach has the potential to strengthen efforts to address human trafficking, and Shamir makes a valuable contribution by bringing labor perspectives into the dialogue. Part II addresses the basis for the claim that a paradigm shift is necessary because a human rights-based approach has failed. As I discuss, Shamir is correct that a paradigm shift is needed but incorrect that the human rights framework is to blame. As Part II explains, the current approach to human trafficking is not a human rights framework, but rather it is a criminal law framework. Part II explicates the current framework and discusses briefly what a human rights framework offers. Finally, in Part III, I bring together Shamir's proposal with other perspectives and suggest a multifaceted response to the problem of human trafficking, in which a labor paradigm, a human rights framework, and other approaches all play an important role.

I. THE VALUE OF A LABOR PARADIGM

Shamir writes, "A labor framework is premised on the understanding that the trafficked individual is a worker who is exploited in a market context."⁸ In this regard, Shamir's use of a labor lens in the human trafficking context helps reinforce four important lessons regarding human trafficking. First, human trafficking is a form of exploitation, a phenomenon that is sadly not at all new. Second, and related, a labor approach helps show that this exploitation occurs on a continuum. This is an essential point, as many individuals who end up trafficked start out by migrating in search of work.⁹ Understanding trafficking on a spectrum of labor—ranging from safe, secure employment settings, where rights

8. *Id.* at 106.

9. See Karen E. Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 *TRANSNAT'L L. & CONTEMP. PROBS.* 545, 559 (2009) ("[I]f human beings need jobs and those jobs are unavailable in their domestic markets, they will attempt to access transborder markets where jobs are available. Moreover, if the demand for labor cannot be satisfied by legitimate distribution networks, then unauthorized networks will emerge to supply the labor market."); Kinsey Alden Dinan, *Globalization and National Sovereignty: From Migration to Trafficking*, in *TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS* 58, 71 (Sally Cameron & Edward Newman eds., 2008).

and safety are ensured, to sites where trafficking and other severe forms of exploitation occur and rights are nullified—helps counter the notion that either an individual is a victim or he or she made a choice and therefore can never be a victim. The reality is far more complex. A labor spectrum helps to illuminate this point and to reveal that all exploitation—whether it is trafficking, forced labor, or another form—is harmful and should be addressed.

Third, human trafficking occurs in a market context, in which profits are the primary motivator. Traffickers are pursuing financial gain.¹⁰ Equally important, private sector actors, many of which are well positioned to respond to human trafficking, are concerned about bottom line issues.¹¹ Understanding human trafficking in a market context can contribute to a better grasp of supply and demand issues and to a better understanding of how new laws and policies affect the market and can create unintended consequences for vulnerable individuals.

Finally, a labor paradigm helps bring labor trafficking out of the shadows of sex trafficking, as the latter has garnered most of the attention to date.¹² For these reasons, Shamir's suggestion of a labor paradigm offers value in understanding the issues.¹³

To advance a labor paradigm, her article proposes five specific measures:

[E]nsure 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.¹⁴

Each of these measures has potential benefits. For example, trafficking of domestic workers has received too little attention to date, and in many locales,

10. See INT'L LABOUR ORG. DIR.-GEN., THE COST OF COERCION: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 1 (2009), available at http://www.ungift.org/docs/ungift/Steering-committee/ILO_Report_2009.pdf (estimating the annual profits from human trafficking to be \$32 billion).

11. See Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CALIF. L. REV. CIRCUIT 80, 86 (2012) ("[F]rom a temporal perspective, the private sector might be better positioned than law enforcement to prevent slave-like practices in their industries." (emphasis omitted)).

12. See, e.g., Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137, 152 (2006) (reviewing various countries' practices and finding "an over-emphasis on sex trafficking, to the neglect or exclusion of labor trafficking").

13. Other scholars have explored aspects of a labor model for human trafficking. See, e.g., Bravo, *supra* note 9; James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849 (2010).

14. Shamir, *supra* note 1, at 113.

domestic work remains a largely unregulated industry with limited enforcement mechanisms.¹⁵ Extending labor law protections in such areas could provide important safeguards against abuse of workers and ensure both better pay and improved working conditions.

Her article suggests that “[a]n 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.”¹⁶ Setting aside the fact that such an approach has the same ex post problem she highlights with the current approach (that is, most labor inspectors will uncover issues after the harm has occurred), the challenge with each of these proposals, much like with a human rights agenda, is to convince governments to change the law and ensure that it is effectively implemented and enforced. A labor approach, including several of her article’s specific proposals, implicates immigration law and border control issues.¹⁷ Such issues merit attention; however, they are also areas in which both labor activists and human rights advocates have struggled to persuade governments to make meaningful change. Shamir’s proposals are potentially beneficial, but they may encounter some of the same resistance that human rights agendas confront.

II. THE CURRENT ANTITRAFFICKING FRAMEWORK AND HUMAN RIGHTS

As noted in the Introduction, Shamir is right to critique the current framework. Numerous other scholars, including myself, have analyzed its shortcomings.¹⁸ What is surprising is her characterization of the prevailing response to

15. See generally HUMAN RIGHTS WATCH, LONELY SERVITUDE: CHILD DOMESTIC LABOR IN MOROCCO (2012), available at http://www.hrw.org/sites/default/files/reports/morocco1012ForUpload_2_0.pdf; HUMAN RIGHTS WATCH, WORKERS IN THE SHADOWS: ABUSE AND EXPLOITATION OF CHILD DOMESTIC WORKERS IN INDONESIA (2009), available at http://www.hrw.org/sites/default/files/reports/indonesia0209_web.pdf.

16. Shamir, *supra* note 1, at 119.

17. Shamir’s first two proposals, while important, implicate immigration law. In addition, her fourth proposal could also implicate immigration law if it reaches sectors that have a significant number of migrant workers.

18. See, e.g., Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609 (2010); Janie A. Chuang, *Rescuing Trafficking From Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010); Mike Dottridge, *Introduction*, in COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 1, 1 (Mike Dottridge, Global Alliance Against Traffic in Women eds., 2007) [hereinafter COLLATERAL DAMAGE] (“[T]he priority for governments around the world in their efforts to stop human

human trafficking. Although her article makes passing reference to the idea that the “current dominant approach to anti-trafficking can be characterized as a combination of the transnational crime framework . . . and the human rights approach to trafficking[.]”¹⁹ it asserts that a human rights approach is the core of today’s response to human trafficking: “[C]urrent anti-trafficking policies are unsuccessful because, among other reasons, they are dominated by a human rights approach to trafficking”²⁰ In this Part, I discuss how that assessment of the prevailing antitrafficking framework is incorrect. First, it misreads the Trafficking Protocol and Trafficking Victims Protection Act (TVPA) as establishing a human rights framework, when in fact both the treaty and the TVPA create a criminal law–centered approach.²¹ Second, in attributing current failings to the human rights framework, it provides a distorted view of human rights law and the human rights framework, and it positions labor and human rights in opposition to each other, which I believe is counterproductive.

A. Criminal Law Trumps

Although many scholars have critiqued the current antitrafficking framework as being too criminal law–centric,²² Shamir argues that the “Trafficking Protocol has served as the blueprint for a human rights approach to anti-trafficking.”²³ She writes: “Indeed, articles 6, 7, and 9 of the protocol, although not formulated in

trafficking has been to arrest, prosecute and punish traffickers, rather than to protect the human rights of people who have been trafficked.”), *available at* http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf; Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 345–52 (2007); Todres, *supra* note 3, at 457–63; *see also* ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 68 (2010) (explaining how the 1990s marked “an important shift in the international legal framework around trafficking” away from human rights approaches and toward a transnational organized crime model).

19. Shamir, *supra* note 1, at 93–94.

20. *Id.* at 135.

21. There are human rights treaties that address trafficking, but Shamir does not address these. *See, e.g.*, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/263 (May 25, 2000). Moreover, these treaties have not had the influence that the Trafficking Protocol and TVPA have had in shaping the dominant response to human trafficking. *See* Shamir, *supra* note 1, at 93–94.

22. Chacón, *supra* note 18, at 1617–20; Chuang, *supra* note 18, at 1725; Jayne Huckerby, *United States of America*, in *COLLATERAL DAMAGE*, *supra* note 18, at 230, 247 (describing how the U.S. government’s “prosecutorial focus often runs counter to the rights of trafficked persons”); Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking*, 33 MICH. J. INT’L L. 53, 57–67 (2011).

23. Shamir, *supra* note 1, at 98.

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.”²⁴

Her article acknowledges, but glosses over, the fact that these provisions primarily use discretionary language, such as requiring states parties to “*consider* implementing measures to provide for the physical, psychological and social recovery of victims.”²⁵ In contrast, the criminal law provisions of the Trafficking Protocol employ mandatory language.²⁶ For example, Article 5 of the Trafficking Protocol provides that “[e]ach State Party *shall adopt* such legislative and other measures as may be necessary to establish as criminal offences [the conduct that constitutes ‘trafficking in persons’], when committed intentionally.”²⁷ The combination of mandatory criminal law provisions and optional victim assistance provisions does not establish a victim-centered approach but instead constitutes a criminal law framework that addresses aspects of victims’ or survivors’ needs.

Yet her article goes further by stating that this nonbinding language on services for victims actually creates a human rights framework.²⁸ One of the cornerstones of human rights is that individuals have rights simply because they are human; the existence of these rights is not dependent on a government granting them recognition.²⁹ Her article overlooks this core principle of human rights when she claims that a provision that requires governments only to “consider” providing assistance to victims establishes a rights-based framework. It does not. She also writes that the Trafficking Protocol “promoted a human rights framework to anti-trafficking, particularly in its implementation dynamics.”³⁰

24. *Id.*

25. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 6(3), *opened for signature* Dec. 12, 2000, S.TREATY DOC. NO. 108-16, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol] (emphasis added).

26. *See, e.g., id.* art. 5.

27. *Id.* art. 5(1) (emphasis added).

28. Shamir, *supra* note 1, at 98.

29. *See, e.g.,* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”); Henry T. King, Jr., *Robert Jackson’s Transcendent Influence Over Today’s World*, 68 ALB. L. REV. 23, 30 (2004) (“Nuremberg marked the start of the international human rights movement that is flourishing today. Nuremberg held that individuals have international human rights that are not dependent on nation state recognition.”); Ronald C. Slye, *The Dayton Peace Agreement: Constitutionalism and Ethnicity*, 21 YALE J. INT’L L. 459, 460 (1996) (“International human rights law generally embodies the traditionally liberal view of rights as trumps held by individuals to curtail state power.”).

30. Shamir, *supra* note 1, at 90.

Yet her article never explains the basis for concluding this, and there does not appear to be evidence in U.S. law or the law of other countries that the process of implementing the Trafficking Protocol spurred governments to adopt a human rights approach.³¹ In fact, the TVPA does not ensure victims' rights to assistance but rather conditions assistance to certain victims on their willingness to co-operate with law enforcement in the prosecution of their traffickers.³² That is hardly a rights-based approach.

Her argument appears to equate the provision of assistance to select victims as establishing a right to assistance.³³ Though I would be happy if that were true, it is simply not the case. One needs only to look at U.S. jurisprudence on health rights. Through programs such as Medicare and Medicaid, the United States has long provided health-related services to individuals in need, but the existence of these programs has not equated to recognition of a "right to health" under federal law.³⁴ In short, when a government elects to provide social services, such action does not necessarily rise to the level of establishing a fundamental right to those services.

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31. The U.S. State Department publishes an annual Trafficking in Persons Report that in its early years focused almost entirely on law enforcement aspects of governments' responses to trafficking, measuring countries' progress in large part by the number of trafficking-related arrests, prosecutions, and convictions they had made. The 2009 Trafficking in Persons Report acknowledged this law enforcement focus. See Hillary Rodham Clinton, *Secretary's Introductory Letter to U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 1* (2009), available at <http://www.state.gov/documents/organization/123357.pdf> ("A majority of the world's countries now have criminal legislation prohibiting all forms of trafficking in persons . . . Yet much remains to be done, particularly in identifying and addressing the root causes of trafficking . . ."). Even Secretary Clinton's call to address the root causes of human trafficking does not necessarily mean a rights-based approach will be developed.
 32. 22 U.S.C. § 7105(b)(1)(E)(i)(I) (2006) (requiring that prior to receiving assistance, a victim be certified that he or she "is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons or is unable to cooperate with such a request due to physical or psychological trauma"); see also Haynes, *supra* note 18, at 345 ("The United States approaches its efforts to combat trafficking in human beings from a law enforcement perspective, with the justification for victim assistance emerging from the willingness and ability of victims to cooperate with law enforcement.").
 33. See Shamir, *supra* note 1, at 100–02.
 34. Despite Medicare, Medicaid, and other health care programs, federal law does not explicitly recognize a *right* to health care. See Kenneth R. Wing, *The Right to Health Care in the United States*, 2 ANNALS HEALTH L. 161, 162 (1993) ("To begin with the most fundamental, the United States Constitution does not require the federal government, the state governments, or any other level of government to protect the health of its citizens collectively or individually."). The U.S. Supreme Court has not deemed the government to have an affirmative obligation to provide health care to the population, except in limited circumstances. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs of prisoners" contravenes the Eighth Amendment).

Contrary to the claim that the current approach to human trafficking is human rights based, there is ample evidence that the prevailing response to human trafficking is criminal law centered. As noted above, the Trafficking Protocol, which is a protocol to the U.N. Convention Against Transnational Organized Crime and not to a human rights treaty, primarily uses mandatory language for the criminal law provisions and discretionary language for victim assistance. U.S. law, including the TVPA (which was adopted just weeks before the Trafficking Protocol), is similarly law enforcement focused.³⁵ Most federal and state legislation has focused on criminal law components of a response, with limited support for victim or survivor assistance and almost no measures addressing prevention.³⁶ Indeed, there is widespread agreement that the current approach to human trafficking is largely rooted in a criminal law framework.³⁷ Recent initiatives aimed at advancing a victim-centered approach to human trafficking are a direct response to the criminal law emphasis of antitrafficking law and policy.³⁸ Even those measures aimed at forging a victim-centered approach are frequently rooted in the prevailing rescue narrative and not situated in a human rights framework.³⁹ In other words, mere mention of, or even attention to, the rights of trafficking victims does not mean one is taking a human rights approach or adopting a human rights framework. A human rights approach is a much broader concept requiring consideration of human rights at all stages of the

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35. See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 2978–79 (2006) (“Commentators note that the [TVPA]—particularly as it has been implemented—emphasizes the law enforcement components of anti-trafficking initiatives in a way that undercuts the Act’s humanitarian goals of assisting trafficking victims.”).
 36. See ECPAT-USA, *ALTERNATIVE REPORT TO THE INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE RIGHTS OF THE CHILD CONCERNING THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY* 13 (2007) (finding that the U.S. government had undertaken no efforts to identify children vulnerable to trafficking to prevent such harm from occurring).
 37. See Micah N. Bump, *Treat the Children Well: Shortcomings in the United States’ Effort to Protect Child Trafficking Victims*, 23 *NOTRE DAME J.L. ETHICS & PUB. POLY* 73, 73 (2009) (“[T]he U.S. Government is taking a law enforcement approach and not a victim-centered approach to combating trafficking.”); see also sources cited *supra* notes 18, 22.
 38. See, e.g., ECPAT-USA, *supra* note 36, at 1 (supporting a victim-centered approach and criticizing the U.S. government’s “[o]ver emphasis on law-enforcement at the expense of a victim centered approach”); Ivy C. Lee & Mie Lewis, *Human Trafficking From a Legal Advocate’s Perspective: History, Legal Framework and Current Anti-trafficking Efforts*, 10 *U.C. DAVIS J. INT’L L. & POLY* 169, 183, 195 (2003) (critiquing the T- and U-visa schemes as “too heavily centered on the needs of law enforcement” and urging the U.S. government to “address the very real and immediate needs of trafficking survivors in a victim-focused manner”).
 39. See Chuang, *supra* note 18, at 1715–18 (explaining how the rescue paradigm, though well intentioned, fails to respect the rights and desires of victims).

design, development, implementation, and monitoring of law, policy, and programs.⁴⁰ The assertion that the Trafficking Protocol and other antitrafficking law promulgated a human rights framework does not reflect the criminal law emphasis of the Trafficking Protocol, the TVPA, or the dominant approach to human trafficking today.

B. Understanding the Human Rights Approach

A related shortcoming is the article's characterization of the human rights framework. While a human rights approach is not without flaws or weaknesses, what has transpired over the past decade in response to human trafficking has not been, for the most part, a human rights-based approach.

As a threshold issue, it is important to point out that choosing a labor approach over a human rights approach, or vice versa, runs the risk of suggesting a false dichotomy.⁴¹ As Shamir notes, "The labor movement and human rights movement share significant goals and strategies."⁴² Even more so, human rights include core labor rights: The Universal Declaration of Human Rights enshrines the right to freedom of association, as well as the rights to work, to decent wages, to safe working conditions, and to equal pay for equal work, among other rights.⁴³

40. For an example of a human rights approach to human trafficking, see Office of the High Comm'r for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, U.N. Doc. E/2002/68/Add. 1 (2002) [hereinafter *Guidelines*], available at <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>. See also Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL'Y REV. 83, 112 (2010) ("A human rights approach would emphasize prevention and care for those at risk of, or victim to, trafficking; it would not rely primarily on criminal law paradigms of innocent, 'iconic' victims, and individual, culpable trafficker defendants.").

41. See, e.g., Einat Albin, *Introduction: Precarious Work and Human Rights*, 34 COMP. LAB. L. & POL'Y J. 1, 12 (2012) ("[M]ost writers share a view that the promotion of labor rights via human rights is generally welcome What seems to lie at the heart of this claim is a view of human rights and labor law as complementing one another rather than conflicting. This observation was made by Lance Compa, who said that the 'point is not to choose, but to combine.'" (footnotes omitted) (quoting Lance Compa, *Solidarity and Human Rights: A Response to Youngdahl*, 18 NEW LAB. F. 38, 39 (2009))); Kathleen Kim & Kusia Hreshchysyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 12 (2004) ("[H]uman rights and labor rights can be brought together in a way that obviates 'fruitless debates' over consent and prostitution in the context of trafficking. This human rights framework, based on scrutinizing labor practices, privileges the person who has been in the exploitative situation." (footnote omitted) (quoting Jane E. Larson, *Prostitution, Labor, and Human Rights*, 37 U.C. DAVIS L. REV. 673, 689–99 (2004))); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 167 (2007) (noting that the approach of both labor and human rights groups is to protect all migrant workers).

42. Shamir, *supra* note 1, at 94.

43. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 20, 23, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

Her view, however, is that the two “target different spheres of power” with labor targeting the market and human rights targeting the state.⁴⁴ That still does not mean they are mutually exclusive. A labor approach that targets unfair pay for certain individuals is rooted in human rights—including rights to equal pay for equal work and the right to be free from discrimination—even though it might be addressing a market actor and not a state entity. It would be difficult, therefore, to address human trafficking through either approach without incorporating aspects of the other.

Her article argues further that a human rights approach is inappropriate because, among other things, it addresses only extreme cases of exploitation, “its focus [is] on victim rescue,” and it deals only with “postexploitation situation[s].”⁴⁵ Shamir is correct that the current approach helps too few individuals, is rescue focused, and centers primarily on addressing the harm after it occurs.⁴⁶ She provides no evidence, however, as to why that is a product of a human rights approach. I offer a human rights perspective on each of these three assertions.

First, her article suggests that human rights frameworks deal only with the most extreme violations of rights.⁴⁷ Human rights frameworks are set up to protect individuals from rights violations, to assess whether an individual’s rights have been violated, and to provide a remedy for those whose rights are violated. Nothing in human rights law suggests that only severe violations are actionable.⁴⁸ For example, under the International Covenant on Civil and Political Rights, “torture[,] . . . cruel, inhuman [and] degrading treatment or punishment” are all prohibited.⁴⁹ Each is a violation of rights. Nothing in that treaty or any other human rights treaty states that a government needs to refrain from committing,

44. Shamir, *supra* note 1, at 95. It is true that the traditional rights framework centered on the individual-versus-the-state paradigm, but human rights law has evolved and is not so limited today. Suggesting that human rights address only the state and that labor approaches only address the market oversimplifies the issue, as both really need to address the market and the state. Private actors commit human rights violations, so human rights must address more than the state. Likewise, labor cannot ignore the state, as government actions play a significant role in shaping labor markets.

45. *Id.* at 102–03. Her article makes other claims about the failings of a human rights approach. This Essay is not intended to offer a point-by-point reply; instead, I have selected certain prominent arguments that the article advances about a human rights-based approach.

46. See Todres, *supra* note 3, at 492.

47. Shamir, *supra* note 1, at 103.

48. One might argue that often only the most severe violations are pursued by governments, international bodies, and human rights lawyers. Enforcement questions are important but distinct from what appears to be Shamir’s argument—that human rights itself is not designed to address less serious violations. I disagree with that assertion. Moreover, the issue of whether so-called less serious violations are remedied is not exclusive to human rights, and one might pose the same questions about less serious violations of labor law, tort law, or any other area of law for that matter.

49. International Covenant on Civil and Political Rights (ICCPR), art. 7, Dec. 16, 1966, 999 U.N.T.S. 171.

or must prohibit, only certain (read: the worst) offenses.⁵⁰ Should a government deal only with extreme forms of torture, it is departing from a human rights approach.⁵¹

Second, her article argues that a human rights approach focuses only on the rescue of passive victims. This is a key point for Shamir: “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).”⁵² Human rights scholars would disagree with the assertion that a human rights approach sees individuals as passive victims; in fact, the idea that victims are passive individuals without agency has been a target of human rights critiques of the current approach to human trafficking.⁵³ Human rights are really about empowering individuals.⁵⁴ The Convention on the Elimination of All Forms of Discrimination Against Women requires states parties to take steps to ensure the “advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental

50. Article 4 of the ICCPR allows states parties to derogate from certain obligations for limited periods of time only when there is a “public emergency which threatens the life of the nation”—very rare circumstances which are not relevant to human trafficking. *Id.* art. 4.

51. There may be plausible reasons, such as resource constraints, that lead a government to prioritize addressing the most serious human rights abuses. However, the human rights framework does not condition enforcement of civil and political rights on a state’s resources. Resource constraints are understandable and would limit a government’s response, whether it takes a human rights approach, labor approach, or another approach. Nonetheless, selective enforcement that tolerates certain human rights violations still falls short of full implementation of a human rights-based approach.

52. Shamir, *supra* note 1, at 106; *see id.* at 80 (arguing that the human rights approach is one in which victims are passive).

53. *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, 1151 (2003) (“The Trafficking Protocol is not to be mistaken for a human rights treaty . . .”); Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 830 (2009) (“[R]esponses to trafficking and related exploitation have been inadequate, incomplete, and sometimes immensely problematic in human rights terms.”); *see also Guidelines, supra* note 40, at 1 (“Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.”); Mindy Jane Roseman & Alice M. Miller, *Normalizing Sex and Its Discontents: Establishing Sexual Rights in International Law*, 34 HARV. J.L. & GENDER 313, 325 (2011) (“The consent standard in human rights pushes for law to validate and protect the decision of a woman (or any other person), regardless of the identity of her partner and whatever the nature of their sexual conduct . . .”).

54. *See, e.g.,* Alicia Ely-Yamin, *Empowering Visions: Toward a Dialectical Pedagogy of Human Rights*, 15 HUM. RTS. Q. 640, 644 (1993) (“[H]uman rights is aimed at empowering individuals to make choices for themselves in the fulfillment of their human dignity.”); Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709, 713 (2007) (“[H]uman rights are not only universal entitlements, but also empowerment rights—rights that enable individuals to benefit from other equally important rights.”).

freedoms on a basis of equality with men.”⁵⁵ An arguably more striking example is the U.N. Convention on the Rights of the Child, which recognizes children’s right to participate in decisions that affect their lives.⁵⁶ These examples, and others, contemplate individuals as agents, not as passive victims.⁵⁷ In other words, the dominant rescue narrative that fails to recognize the trafficking survivor’s agency, which some may argue is human rights based, is antithetical to the core principles of human rights.

Third, her article argues that a human rights approach deals only with exploitation after the harm occurs.⁵⁸ This is a significant problem with current responses to human trafficking—one that I have examined in my own research on human trafficking.⁵⁹ However, this issue is not inherent to human rights. Human rights law imposes requirements on states not only to respect the rights of individuals (that is, to refrain from interfering with individuals’ rights), but also to protect and fulfill individual rights (that is, to take affirmative steps to prevent human rights violations and enable each individual to realize his or her rights fully).⁶⁰ The realization of rights can help individuals reduce their vulnerability to

55. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 3, U.N. Doc. A/RES/34/180 (Dec. 18, 1979).

56. See Convention on the Rights of the Child, art. 12, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”).

57. Natalie Baird, *To Ratify or Not to Ratify? An Assessment of the Case for Ratification of International Human Rights Treaties in the Pacific*, 12 MELB. J. INT’L L. 249, 257 (2011) (“Greater realisation of human rights has the potential to empower the disadvantaged and marginalised . . .”); Virginia Mantouvalou, *Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor*, 34 COMP. LAB. L. & POL’Y J. 133, 164 (2012) (“Human rights have a unique moral force, and when workers’ rights are violated, human rights law can empower them.”); see also Universal Declaration of Human Rights, *supra* note 43, art. 1. (“All human beings are born free and equal in dignity and rights.”).

58. Shamir, *supra* note 1, at 103.

59. See, e.g., Todres, *supra* note 3.

60. Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 283 (2010) (“Under international human rights law, a state is commonly understood to incur three tiers of legal obligations—the obligations to respect, protect, and ensure rights.”); *What Are Human Rights?*, OFF. HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/en/issues/Pages/WhatAreHumanRights.aspx> (last visited Mar. 22, 2013) (“States assume obligations and duties under international law to respect, to protect and to fulfil [sic] human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil [sic] means that States must take positive action to facilitate the enjoyment of basic human rights.”); see also U.N. Human Rights Comm., *General Comment No. 3: Implementation at the National Level* (July 29, 1981), [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/c95ed1e8ef114cbec12563ed00467eb5?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/c95ed1e8ef114cbec12563ed00467eb5?Opendocument) (“[T]he obligation under the [ICCPR] is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction.”).

exploitation.⁶¹ The right to birth registration, health rights, and education rights all strengthen an individual's resistance to vulnerability. In addition, the principle of nondiscrimination—which is a cornerstone of human rights law that applies to civil and political rights as well as economic, social, and cultural rights—helps prevent marginalization and exploitation of vulnerable populations. The realization of human rights can help position individuals to avoid exploitative settings and strengthen their capacity to articulate demands for improved conditions of employment.⁶²

Overall, Shamir's critique identifies important issues with the prevailing response to human trafficking. However, the fact that she ascribes all these issues to a human rights-based approach undermines her critique and conveys an inaccurate view of human rights. It also forges a false dichotomy between labor and human rights, when in fact the two paradigms are mutually reinforcing. Take for example a young woman who has been denied her right to education. Setting aside that this makes it more likely that she will end up in potentially exploitative work situations,⁶³ if she obtains a job that purports to come with certain bargaining rights, she is less likely to assert those rights if she has never had experience exercising and realizing her rights. Securing her rights throughout her life better positions her to realize her labor rights and to protect against exploitation. Conversely, if she realizes her education rights and other rights, but her employment options are all in places that deny her labor rights, the realization of her education rights may not be enough to protect her from exploitation. Labor rights are essential, but equally important are all other human rights.

III. TOWARD A MULTI-PERSPECTIVE APPROACH TO HUMAN TRAFFICKING

For those troubled by the harms of human trafficking, the desire to find a solution to the problem of human trafficking is understandable. Advocates and

61. See Brian Concannon Jr. & Beatrice Lindstrom, *Cheaper, Better, Longer-Lasting: A Rights-Based Approach to Disaster Response in Haiti*, 25 EMORY INT'L L. REV. 1145, 1171 (2011) ("The rights-based approach reduces the underlying vulnerability by analyzing and addressing root causes of poverty and disasters, rather than simply responding to the immediate results thereof."); Susannah Sirkin, *The Debacle of Hurricane Katrina: A Human Rights Response*, 30 FLETCHER F. WORLD AFF. 223, 225 (2006) ("[R]espect for the rights of all can reduce, minimize, and in many cases eradicate such vulnerabilities"); Todres, *supra* note 22, at 69–70.

62. See sources cited *supra* note 41.

63. MIKE DOTTRIDGE, KIDS AS COMMODITIES?: CHILD TRAFFICKING AND WHAT TO DO ABOUT IT 69 (2004), available at <http://terredeshommes.org/pdf/commodities.pdf> ("Both attendance at school and informal forms of education help ensure that children do not end up in exploitative forms of employment.").

scholars are anxious to find *the* approach that works to address the problem. The reality is that a single strategy is unlikely to resolve complex issues of exploitation, such as human trafficking. Shamir makes a valuable contribution by bringing labor paradigms into the fold, but human rights—which include core labor rights—should not be pushed aside. Ultimately, a successful response to human trafficking will incorporate a range of strategies and methodologies.

A labor approach, as Shamir suggests, could “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.”⁶⁴ Human rights strategies could also help address root causes by strengthening individuals’ economic and social rights and addressing various forms of discrimination that leave individuals vulnerable to various forms of exploitation, including human trafficking. Sustainable socioeconomic development programs aimed at poverty reduction could work well in conjunction with both labor and human rights approaches.⁶⁵ In addition, public health methodologies bring important elements to the table, including an emphasis on developing evidence-based research to guide law and policy responses, a focus on prevention as the primary goal, and significant attention to underlying attitudes and behaviors that heighten the risk of harm and foster a climate in which exploitation can persist.⁶⁶ Even current criminal law strategies have a role to play; human trafficking is a severe form of exploitation, and governments should hold perpetrators accountable.⁶⁷

From the past decade of experience, we have learned that a criminal law-centered approach will not address the root causes of human trafficking. In fact, it is not designed to do so. Thus, although law enforcement remains a key element of any response to human trafficking, a criminal law-centered approach is not well suited to achieving a significant reduction in the prevalence of human trafficking. A different approach needs to be the primary driver. Rather than substitute one approach for another, a more effective tactic will be to develop a comprehensive strategy that combines the strengths of human rights, labor, public health, international development, and other valuable perspectives.

64. Shamir, *supra* note 1, at 81.

65. See Todres, *supra* note 22, at 73–75.

66. See Todres, *supra* note 3, at 470–93.

67. Law also has an expressive function, and criminal law on trafficking expresses society’s view that such exploitation is unacceptable and must not be tolerated. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 822 (1994) (discussing how law serves to “affect social valuations in general”).

CONCLUSION

Human trafficking has been recognized as one of the priority issues of our time.⁶⁸ Shamir's article is correct in arguing that current approaches are not producing the desired results. The five specific legal measures she proposes have value not only for those at risk of trafficking but also for other vulnerable workers. However, she mischaracterizes the current approach as a human rights approach and thus risks pushing aside important human rights law, principles, and strategies that can contribute to antitrafficking efforts. A human rights approach has much to offer; it not only helps to address vulnerability and other root causes, but it can strengthen labor-based initiatives by anchoring them in fundamental rights. More broadly, a multisector approach that employs methodologies from human rights, labor, public health, international development, and other paradigms offers the best hope of developing a comprehensive response that can reduce the prevalence of human trafficking.

68. See, e.g., Ursula Plassnik, Austrian Fed. Minister for European & Int'l Affairs, Opening Statement at the Vienna Forum to Fight Human Trafficking (Feb. 13, 2008), *available at* <http://www.ungift.org/ungift/vf/speeches/plassnik.html> ("Human Trafficking has many cruel faces. It is one of the most serious violations of fundamental human rights and human dignity. In the 21st century, we cannot tolerate human beings to be bought, sold and hired like commodities."); see also Proclamation No. 8471, 75 Fed. Reg. 1267 (Jan. 4, 2010) (declaring January 2010 as National Slavery and Human Trafficking Prevention Month and calling on all Americans to join together in the effort to end human trafficking).