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SYMPOSIUM:
MOVING TO OPPORTUNITY: EXAMINING THE RISKS AND REWARDS OF ECONOMIC MIGRATION

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MOVING TO OPPORTUNITY: EXAMINING THE RISKS

AND REWARDS OF ECONOMIC MIGRATION

REFLECTIONS ON A LEGAL EDUCATION ABROAD: METACOGNITIVE OPPORTUNITIES, KNOWLEDGE AND COGNITIVE COMPLEXITY, AND CULTURAL GLOBALIZATION

COMMENT

Mark L. Shope*

There is no type of legal study that will strengthen the muscles of the mind like the comparative study of two great legal systems.[1]

Our self-awareness, beliefs, values, and behavior reflect a cultural context.[2] We are not born with culture-specific awareness.[3] Because we live in an era of intense economic, technological, cultural, political, and environmental globalization, we must frequently interact with those who have beliefs, values, and behaviors different from our own. These encounters may, and often do, conflict with our own worldview, the normative framework that defines an individual's knowledge and perspective.[4] How do we cope with this potential mismatch? We must first increase our awareness of our inner experiences, which may be challenging if awareness of the inner self has not been an important component of our upbringing.[5] A closed mind, or a mind that has not engaged in self-reflection, may interfere with adopting appropriate methods of moving forward in a multicultural situation.[6] "Individuals learn to value the culture-specific values and beliefs they are born into before they are capable of examining the impact of these culture-specific values and beliefs on the formation of their own understanding of self."[7] In other words, we reflect on how culture-specific values and beliefs impact our understanding of self *only after* we have learned, largely by our upbringing, to value (or be stifled by) those culture-specific values and beliefs.

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[1] Arthur T. Vanderbilt, *Law School Study After the War*, 20 N.Y.U. L. REV. 146, 160 (1944-1945).

[2] HEESOON JUN, SOCIAL JUSTICE, MULTICULTURAL COUNSELING, AND PRACTICE: BEYOND A CONVENTIONAL APPROACH 62 (2010).

[3] *Id.* at 60.

[4] ALLISON ABBE ET AL., CROSS-CULTURAL COMPETENCE IN ARMY LEADERS: A CONCEPTUAL AND EMPIRICAL FOUNDATION 15 (2007).

[5] JUN, *supra* note 2, at 60.

[6] *Id.*

[7] *Id.* (*citing* SUSAN BLACKMORE, CONSCIOUSNESS: AN INTRODUCTION (2004)).

http://dx.doi.org/10.18060/7909.0001

An education that incorporates a foreign cultural perspective allows us to recognize those culture-specific values that form our understanding of the self because we are forced to step outside, albeit temporarily, of our cultural frame of reference.[8] "[T]o change norms, it is necessary to introduce new group members who have different norms in a social environment. To change attitudes, including behavioral intentions, it is necessary to provide new information and social situations in which people behave inconsistently with their attitudes and are reinforced for doing so."[9] Learning in different cultures does just that. It allows us to face these inconsistencies head on. When we adapt to this new educational environment, we are rewarded for behaving inconsistently with our previous behavioral norms because these behavior norms are "normal" in the new educational environment. For example, we may be rewarded by a professor who perceives an answer that uses a more collectivist approach (if such a culture values the collective as opposed to an individualistic approach). We may be rewarded for knowing when to use language that incorporates humility and respect because this shows that we are valuing the histories, traditions, and value systems imbedded in such language. Because of this we grow. Preconceptions, beliefs, concepts, and judgments about ourselves, others, and the universe break down, and our illusion of separateness dissolves.

The staff of the Indiana International & Comparative Law Review asked me to reflect on my legal educational experiences abroad for their 2014 Symposium titled *Moving to Opportunity: Examining the Risks and Rewards of Economic Migration*.[10] As such, my goal in this brief reflection

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[8] An education that incorporates a foreign cultural perspective, for purposes of this reflection, refers to an education abroad. Indeed, there are domestic opportunities that incorporate a foreign cultural perspective, but the current article will not address these opportunities.

[9] HARRY TRIANDIS, THE ANALYSIS OF SUBJECTIVE CULTURE 343 (1972).

[10] In 2006, I was given the opportunity to study in Taiwan through a scholarship from the Ministry of Education of Taiwan. This scholarship included studying Mandarin for one year at the National Taiwan Normal University Mandarin Training Center and two years in a master's degree of my choice. I chose to study in a LL.M. program at the National Taiwan University College of Law ("NTU"). The curriculum included Mandarin studies, private international law, WTO Law (NTU hosted the Asian Center for WTO & International Health Law and Policy; Justice and Professor Chang-fa Lo was a WTO panelist for a trade dispute between EC and Brazil (Brazil – Retreaded Tyres; DS332) (2006)), Taiwan Legal System (I was a teaching assistant for this course and assisted the professor with instructional responsibilities), comparative law, IP law, international arbitration, and Law Review. I was an associate editor for two journals: the Contemporary Asia Arbitration Journal and the Asian Journal of WTO & International Health Law and Policy. I lived in the university dormitories with two or sometimes three other classmates in the College of Law. I participated in study groups, language exchanges, field trips, had an advisor and was for all purposes a normal student at the law school. I was not part of an exchange program. In 2010, I was given the opportunity to study in China at Remin University School of Law through the IU McKinney School of Law China Summer Program. I was given the opportunity to complete an internship at the Centre for Civil and Political Rights in Switzerland. I also spent three weeks at a

is to cogitate about such experiences. I will start with a discussion of the metacognitive aspects of my experiences. I will then discuss cognitive complexity issues, cultural globalization issues, and briefly conclude. Much of what I have to say will be from the perspective of studying at a foreign university, but many of the ideas are relevant to summer, semester, and academic year abroad programs, gap year programs, academic exchanges, and other such programs.

METACOGNITIVE OPPORTUNITIES

Metacognition refers to higher order thinking which involves monitoring one's own cognitive processes.[11] In other words, we are thinking about and being critical of our own thinking. This includes knowledge of cognition in general and the regulation of one's own cognition.[12] One of the key features of a legal, or any, education abroad is the fact that the "inbound" students are outside of their own culture, which allows for unexpected situations and experiences. When thrust into these situations, there is a tendency to search for help to interpret this new state of affairs. The sense of our own cognition is heightened, and we begin to allocate and reorganize cognitive resources in order to deal with these situations and experiences.[13] The ability to allocate cognitive resources such that we can adequately deal with the discord in our present, dominant cognitive mode(s) is central to intelligence.[14]

A person who is particularly self-directed and self-aware has a high knowledge about oneself as a learner and can adjust to the changing situational demands of each learning task. Educational psychologist Gregory Schraw has developed a three-part framework for metacognitive control: planning, monitoring, and evaluating.[15] With regard to the planning feature, students are asked to reflect on the following questions: What is the nature of the task; what is my goal; what kind of information and strategies do I need; how much time and resources will I need? With regard to the monitoring feature, students are asked to reflect on the following questions: Do I have a clear understanding of what I am doing; does the task make sense; am I reaching my goals; do I need to make changes? With regard to the evaluating feature, students are asked to reflect on the following questions: Have I reached my goal; what worked; what didn't work; would

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social sciences translation workshop at Fudan University through a program administered by UCLA. I illustrate these experiences to provide context to my reflection.

[11] JENNIFER A. LIVINGSTON, METACOGNITION: AN OVERVIEW 3 (2003).

[12] Gregory Schraw, *Promoting General Metacognitive Awareness*, 26 INSTRUCTIONAL SCIENCE 113, 113 (1998).

[13] I've also seen cognitive discord in those who resist dealing with these unexpected experiences.

[14] LIVINGSTON, *supra* note 11.

[15] Schraw, *supra* note 12, at 121.

I do things differently next time?[16]

I found that in studying abroad one will begin to ask similar questions of one's own learning, and use Schraw's compendium of questions to monitor one's own cognitive processes. For example, in many learning situations my classmates and I would ask: What skills do we need to utilize; do we simply need knowledge of specifics; do we need to be able to apply the acquired knowledge; based on our interactions with each other, was it apparent that we are reaching our goals; how do we know if we are reaching our goals?[17]

I found that the experience of learning abroad makes us turn inward to take a critical look at how we learn, simply because from a cultural standpoint our existing categories and scripts may not be effective in the new situation. Indeed, "[c]ulture is 'the interactive aggregate of common characteristics that influence a human group's response to its environment.'"[18] Before I went abroad, I was part of a human group with common characteristics that were different than the culture in which I chose to study. The legal ideologies that were a facet of my conscience did not fit nicely with the legal ideologies of the culture in which I was studying. There are those who believe that "every culture has a unique legal order, with distinctive legal institutions, practices, and ideology that evolve in the context of its overall social order."[19] Thus, there are details of a legal system, or distinctive practices and ideology, that evolve in such a way that our existing cognitive structures may have a difficult time processing this new information. I observed that those who were studying abroad at the law school struggled with the new cognitive environment, but usually emerged with a sharper sense of their own cognitive processes because they were forced to reflect upon and reorganize these cognitive processes. Those legal ideologies that were once confusing and a mismatch with our own legal ideologies were now more understandable and could coexist with our existing cognitive frameworks.

Learning abroad exposes us to information and social situations, which are inconsistent with our current cognitive scripts. In order to deal with these differing learning situations, we must turn inward and reflect

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[16] *Id.*

[17] Not surprisingly, these questions are similar to Bloom's taxonomy of learning objectives. *See* BENJAMIN S. BLOOM, TAXONOMY OF EDUCATIONAL OBJECTIVES BOOK 1: COGNITIVE DOMAIN (2d ed. 1984).

[18] Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 739-40 (1999) (*quoting* Michael King, *Comparing Legal Cultures in the Quest for Law's Identity*, *in* COMPARING LEGAL CULTURES 119, 132 (David Nelken ed., 1997)).

[19] Janet E. Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law*, 82 CORNELL L. REV. 19, 28 (1996). On the other hand, there are those who believe that the "legal order occupies the same structural niche in every culture, so that the superstructural details of legal systems may vary dramatically from society to society, but the fundamental structural functions of all legal orders are universally identical." *Id.*

upon our own cognitive capacities. We begin to monitor our learning more. We evaluate our learning more. Because of this we become better overall learners.[20]

KNOWLEDGE AND COGNITIVE COMPLEXITY

When we study outside an educational institution imbedded in our own culture, we are confronted with unexpected situations and experiences.[21] These unexpected situations may not fit into existing knowledge structures that help us make sense of how our everyday life events unfold.[22] Knowledge and assumptions from our own culture may be a mismatch for the new environment, and a closed mind may interfere with adopting more appropriate alternatives.[23] In unexpected situations we are challenged to behave differently, reconsider what is expected of us, as well as what to expect from others. The degree to which we can apply multiple perspectives when perceiving and evaluating stimuli reflects our level of cognitive complexity.[24] Cognitive complexity "[r]epresents the degree to which a potentially multidimensional cognitive space is differentiated and integrated. A cognitively complex person would employ differentiation and integration as part of his or her information processing."[25] A fertile setting to hone these skills of differentiation and integration is the classroom in a law school abroad where cultural paradoxes are seemingly everywhere—the professor and his or her delivery is unfamiliar, the curriculum is unfamiliar, the language may be unfamiliar, teaching and learning methods are unfamiliar, the expectations placed on the student are unfamiliar—but eventually our minds make sense of it. "An increasingly complex understanding of culture allows one to recognize and make sense of cultural paradoxes—apparent contradictions between cultural values or practices that emerge as one becomes more familiar with a foreign culture."[26] In other words, the cognitive process involved in making sense of cultural paradoxes is similar to that involved in making sense of our curricular

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[20] Margaret Y. K. Woo, *Reflections on International Legal Education and Exchanges*, 51 J. LEGAL EDUC. 449, 452 (2001) ("By understanding legal skills, culture, and values, and by knowing the places of overlap as well as the sites of divergence, we can better prepare our students to work more collegially and successfully with our foreign counterparts. To be successful, then, international exchanges require us to delve deeper into understanding our own motivations, needs, and creativity, as well as those of our counterparts from other cultures.").

[21] ABBE ET AL., *supra* note 4, at 15.

[22] MARY KOSUT, ENCYCLOPEDIA OF GENDER IN MEDIA 39 (2012).

[23] ABBE ET AL., *supra* note 4, at 17.

[24] DUANE P. TRUEX & JUNGWOO LEE, COGNITIVE COMPLEXITY AND METHODICAL TRAINING: ENHANCING OR SUPPRESSING CREATIVITY 1 (2000).

[25] TRUEX & LEE, *supra* note 24, at 1-2, *quoting* SIEGRIED STREUFERT & ROBERT W. SWEZEY, COMPLEXITY, MANAGERS, AND ORGANIZATIONS 18 (1986).

[26] ABBE ET AL., *supra* note 4, at 15.

experiences abroad. Because of this we become more cognitively complex individuals.

We must actively develop our awareness of our inner experiences to be effective lawyers.[27] Study abroad is one setting where we can sharpen our awareness of the self and cultivate the cognitive processes characteristic of a person with an open mind. When we are called upon to apply and actively utilize multiple perspectives when perceiving, evaluating, and acting upon stimuli, we are polishing, or heightening, our cognitive complexity. When our cognitive complexity is heightened, we can tackle the unknown with greater dexterity, which makes us more successful as lawyers. We have heightened emotional and cognitive empathy and we have the ability to adjust our cognitive frames of reference in response to different cues in our practice. We can think and feel as others do, and at the same time we develop a heightened sense of identity. When we are tasked to differentiate between ourselves in our culture and ourselves in another culture, we become keenly aware of our identity because of our race, class, religion, gender, ethnicity, ideology, nationality, sexual orientation, culture, history, medical condition, or profession. At the same time, we realize that we are not bound by these identities, or any other reified constructs and objects. We call into question these binary modes of ethnocentric experience, and replace them with less ethnocentric modes of thought.

CULTURAL GLOBALIZATION

There are many aspects to globalization—environmental, political, economic prosperity, health, and culture—just to name a few. Cultural globalization refers to "the process of cultural flows" across the world, and how "contact between people and their cultures—their ideas, their values, their ways of life—have been growing and deepening."[28] Law is a system of "political arrangements, social relations, interpersonal interactional practices, economic processes, cultural categorizations, normative beliefs, psychological habits, philosophical perspectives, and ideological values."[29] Thus, law is a feature of culture.[30] Since law is a feature *of* culture, it is involved in the process of interaction and integration *among* cultures.[31] This

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[27] *Id.*

[28] B. KUMARAVADIVELU, CULTURAL GLOBALIZATION AND LANGUAGE EDUCATION 37, 38 (2007) (*citing* UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1999 18 (1999)).

[29] Ainsworth, *supra* note 19, at 28.

[30] Demleitner, *supra* note 18, at 739; *contra id.* at 741 ("Law is 'a particular type of social norms supported by a set of values/ideas under the legitimate authority/power of a certain social organization.' In that respect, law is different from culture and requires analysis based on these narrower terms.").

[31] Cultural globalization can be divided into three models: cultural homogenization, cultural heterogenization, and cultural glocalization. KUMARAVADIVELU, *supra* note 28, at 38. Cultural

interaction changes the contours of the law and creates new rules, norms, and legal institutions. The law is changing because of this two-way process in which cultures in contact shape and reshape each other.[32] Commonalities and similarities should be recognized; diversity and difference should be embraced and managed, not abolished.[33] A legal education abroad can be one way to give lawyers the tools to recognize commonalities and similarities as well as differences in legal cultures.[34] When studying abroad, we are thrust into a situation where we need to identify similarities with our own legal system to establish a frame of reference with which to proceed. Subtle contours of these similarities become apparent, and we begin to appreciate the connections between legal cultures. The diversity also becomes apparent, but hopefully we are able to make sense of these differences and incorporate them into our being.[35] Legal professionals will more and more be called upon to rectify the influences of the law of different jurisdictions on our own legal system. We will also be called upon to interpret our own law for those in other jurisdictions. A legal education abroad will give us the tools to accomplish this.

CONCLUSION

As our self-awareness, beliefs, values, and behavior develop through this era of economic, technological, cultural, political, and environmental globalization, so must our thoughts about delivery of legal services, which begins with a proper legal education. Inclusion of culture-specific values and legal norms from other legal systems are becoming more mainstream in legal thought.[36] This inclusion of culture-specific values and legal norms from other legal systems has important consequences for legal education

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homogenization holds that cultural globalization is the progressive outward spreading of one dominant culture (currently American culture). *Id.* Cultural heterogenization posits that cultural globalization has actually led to a rise in preservation of local cultures and religion, mainly as a reaction to the threat of the dominant culture. *Id.* Cultural glocalization refers to simultaneous homogeneous and heterogeneous cultural development "where the global is localized and the local is globalized." *Id.*

[32] KUMARAVADIVELU, *supra* note 28, at 44.

[33] Demleitner, *supra* note 18, at 746.

[34] Michael P. Scharf, *Internationalizing the Study of Law*, 20 PENN ST. INT'L L. REV. 29, 30 (2001) ("A second reason for internationalizing the curriculum is to better prepare students to practice law in any field, since inter-national law issues are becoming more and more common throughout the practice of law.").

[35] Demleitner, *supra* note 35, at 739. ("Where do law and legal order begin, and where does culture end? A broad interpretation of culture renders it difficult, if not impossible, to delineate the two clearly. Culture is "the interactive aggregate of common characteristics that influence a human group's response to its environment.").

[36] Indeed, "a significant proportion of the Justices of the Supreme Court have indicated, in opinions and extrajudicial statements, their intention to introduce a wider range of comparative material into Supreme Court practice." H. Patrick Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977, 988 (2001).

and legal practices that are becoming increasingly transnational in nature. This movement "propagates legal ideas outside their place of origin, where they become subject to local, inevitably comparative, evaluation, *whether they are received or not*."[37] Whether we are consciously receiving and integrating comparative legal thought, it is reaching our subconscious and forming those culture-specific values that form our understanding of the self.[38]

Since a legal education "prepares individuals to be law services providers,"[39] the mechanism for gaining a legal education must include international components.[40] When one studies abroad, one must turn inward to take a critical look at how he or she learns, simply because from a cultural standpoint his or her existing categories and scripts may not be effective in the new situation. The student is honing his or her metacognitive skills by monitoring one's own cognitive processes. An Association of American Colleges and Universities report calls for higher education to help "students become intentional learners who can adapt to new environments, integrate knowledge from different sources, and continue learning throughout their lives."[41] The report states further that "[i]ntentional learners are integrative thinkers who can see connections in seemingly disparate information and draw on a wide range of knowledge to make decisions."[42] Learning in different cultures allows us to do just that. When we are learning abroad, we are asked to face inconsistencies head on, make connections with seemingly disparate information, and widen our range of knowledge to make informed decisions. We are becoming informed learners through exposure to "the interrelations within and among global and cross-cultural communities."[43] This prepares us to be effective legal service providers.

The underlying praxis of a cross-cultural legal education undermines attachment to dualistic legal classifications and sabotages the awareness of oneself and one's legal system as standing apart from the world, of self versus other, or "us" versus "them." A cross-cultural legal education provides resources for overcoming such entanglement in ideology, and helps us to see the world more clearly.

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[37] Glenn, *supra* note 36, at 984.
[38] *Id.* at 988.
[39] AMERICAN BAR ASSOCIATION, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 5 (January 2014).
[40] *See generally* Luz Estella Nagle, *Maximizing Legal Education: The International Component*, 29 STETSON L. REV. 1091 (2000).
[41] ASSOCIATION OF AMERICAN COLLEGES AND UNIVERSITIES, GREATER EXPECTATIONS, A NEW VISION FOR LEARNING AS A NATION GOES TO COLLEGE XI (2002).
[42] *Id.* at 21.
[43] *Id.* at 23.

INTERROGATING THE STATE'S ROLE IN HUMAN TRAFFICKING

Karen E. Bravo*

The state maketh and un-maketh;
It giveth and it taketh away
It makes members and non-members,
Exploiter, exploited, and exploitable
In accordance with law.
And is, itself, exploiter, exploited, and exploitable.
In accordance with law.

This Essay identifies some examples of and interrogates the state's role in human trafficking. The state is not a blameless onlooker with respect to trafficking in human beings; nor is it a whole-heartedly committed crusader against this profitable illicit trade. Instead, States create the preconditions for and profit from human trafficking.

Through the state's power to legislate, it defines and re-defines reality – it is the creator and enforcer of paradigms of subordination and exploitation that normalize the exploitation of the individuals and groups it makes vulnerable.

The state's roles in this area arise from (i) *foundational concepts*, such as doctrines supporting and protecting the sovereignty of state actors; (ii) *organizational principles*, such as the implementation and policing of the concepts of belonging and non-belonging; and (iii) *economic and political policies*, such as the tension arising from the state's simultaneously conflicted flirtation with and resistance to globalization.

Anti-human trafficking campaigns, while emotionally gratifying and optically pleasing, do not address the structural foundations of state-created and state-implemented systems of exploitation.

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I. INTRODUCTION

This Essay captures and expands on my comments at the February 2014 Symposium "*Moving to Opportunity: Examining the Risks and Rewards of Economic Migration*" organized by the Indiana International and Comparative Law Review. Human trafficking was prominent among the risks attendant to economic migration that were explored by my fellow speakers. My contribution calls for a structural understanding of human trafficking. Human trafficking is very "*au courant*." School groups learn about and are appalled by its existence.[1] Police officers, hotel workers, social workers, and taxi drivers are trained to recognize it on street corners, in restaurants, nail salons, and hospitals, and to report it to law enforcement officials.[2] Committed and dedicated activists and non-governmental organizations rescue and rehabilitate its victims, and lobby their legislators for the adoption and implementation of anti-human trafficking campaigns.[3]

States[4] and intergovernmental organizations are no slackers in the fight against this modern form of exploitation. Dubbed "modern day slavery," human trafficking is denounced in the halls of the United States Congress,[5] the great rooms of the European Union,[6] and the General Assembly of the United Nations.[7]

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[1] *See, e.g.*, *Comprehensive List of Human Trafficking Curricula*, MBABOLITIONISTS (2014), http://www.mbabolitionists.org/resources/curricula (giving samples of middle and high school curricula on human trafficking).

[2] *See, e.g.*, Abigail Lawlis Kuzma, *Game Plan to Fight Human Trafficking: Lessons from Super Bowl XLVI*, 2 DEPAUL J. WOMEN, GENDER & L. 129, 154-67 (2012) (describing public outreach efforts of Indiana's anti-trafficking task force in anticipation of and during Super Bowl XLVI).

[3] S*ee A Web Resource for Combating Human Trafficking*, Humantrafficking.org (April 10, 2012), http://www.humantrafficking.org (providing facts about and a list of NGOs active in more than 20 countries).

[4] "States," as used in this essay, refers to nation states, the paradigmatic actors in international law. These entities, bearing the attributes of defined borders, fixed populations, a government in control, and the capacity to enter into foreign relations with other states, have the power to enter into treaties, legislate, and use legally sanctioned violence, among other attributes. *See* Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

[5] *See Hearings of the U.S. Senate Committee on Homeland Security and Governmental Affairs, Combatting Human Trafficking: Federal, State, and Local Perspectives* (Sept. 23, 2013), *available at* http://www.hsgac.senate.gov/hearings/combating-human-trafficking-federal-state-and-local-perspectives.

[6] *See* Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, in Council of Europe Treaty Series – No. 197, http://www.coe.int/t/dghl/monitoring/trafficking/Source/PDF_Conv_197_Trafficking_Erev.pdf [hereinafter, Council of Europe Convention].

[7] For example, in a speech to the United Nations General Assembly on September 23, 2003, President George W. Bush declared:

> We must show new energy in fighting back an old evil. Nearly two centuries

Multinational corporations, as well, have participated in the anti-human trafficking crusades. Through funding mechanisms, public relations campaigns, and corporate best practice guidelines and policy papers, these entities have made known their firm stance against this modern form of exploitation.[8]

And yet . . .

While we are encouraged to think that human trafficking is an aberration, it is not. Instead, human trafficking and similar forms of exploitation are embedded in and play an integral role in our contemporary existence. The structural, conceptual, and organizational principles of our lives today facilitate – perhaps even *demand* – that historic slavery and forms of exploitation mutate to forms of human suffering, subordination, and exploitation that we call "human trafficking." Further, on multiple levels, States set the preconditions of and profit from human trafficking. At the same time, States themselves are exploited in order to facilitate human trafficking.

Part II describes some forms of contemporary exploitation labeled as "human trafficking," and acknowledges and summarizes the expected and public anti-human trafficking roles of modern states. Part III of the Essay outlines the nature and scope of state power. Part IV introduces the states' facilitator roles in the mutation and maintenance of human trafficking. Part V identifies the ways in which states, themselves, are exploited and exploitable, and the contribution of those roles to human trafficking and similar forms of exploitation. Part VI calls for a contextual understanding of and approach to human trafficking that expressly includes a reckoning with the structural role of the state.

> after the abolition of the transatlantic slave trade and more than a century after slavery was officially ended in its last strongholds, the trade in human beings for any purpose must not be allowed to thrive in our time.

President George W. Bush, Address to the United Nations General Assembly in New York City (Sept. 23, 2003), *available at* http://www.un.org/webcast/ga/58/statements/usaeng 030923.htm.

[8] *See, e.g.*, The Athens Ethical Principles (2006), *available at* http://www.ungift.org/ docs/ungift/pdf/Athens_principles.pdf; Luxor Implementation Guidelines to the Athens Ethical Principles: Comprehensive Compliance Programme for Businesses (2010), *available at* http://www.unglobalcompact.org/docs/issues_doc/ human_rights/Resources/Luxor_Implementation_Guidelines_Ethical_Principles.pdf (anti-trafficking code of conduct and implementation principles produced by the business community). More than 8,000 businesses in 145 countries have joined the Global Compact. *See Participants and Stakeholders*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/ ParticipantsAndStakeholders/index.html. *See also* American Bar Association, *Majority of Fortune 100 Companies Have Policies on Human Trafficking and Forced Labor*, ABA (June 2, 2014), http://www.americanbar.org/news/abanews/aba-news-archives/2014/05/majority_of_ fortune.html (reporting on a study jointly released by the ABA and a number of higher education institutions*); see Global Business Coalition Against Human Trafficking*, GBCAT, www.gbcat.org (detailing anti-human trafficking efforts of multinationals such as Microsoft, LexisNexis, and Ford).

II. HUMAN TRAFFICKING

> Whether it comes in the form of a young girl trapped in a brothel, a woman enslaved as a domestic worker, a boy forced to sell himself on the street, or a man abused on a fishing boat, the victims of [human trafficking] have been robbed of the right to lead the lives they choose for themselves, and trafficking and its consequences have a spill-over effect that touches every element of a society.[9]

This Part introduces some of the contemporary forms of exploitation that are described in popular media, scholarly literature, and legislative history as "human trafficking," and examines and compares the legal definitions introduced to identify and combat the exploitation. The Part concludes with a summary of state efforts to combat human trafficking.

A. "Human Trafficking"

As illustrated by the quote above from U.S. Secretary of State John Kerry, a sample list of modern forms of human-to-human exploitation which have been described as human trafficking includes: commercial sexual exploitation (of minors and adults of all genders); indentured servitude; agricultural, construction and factory labor coerced through debt bondage or other forms of coercion; exploitative guest worker arrangements; child labor; recruitment and deployment of child soldiers; and other scenarios where individuals are held in positions of total control and exploitation.[10]

Human trafficking involves exploitation and the exercise of control through fraud, misrepresentation, coercion, and violence and/or psychological manipulation.[11] The levers of control may be provided by the legal and/or social system (through employment contracts, for example).[12]

B. Definitions

Following decades of concern about child sex tourism in Southeast Asia and the trade of women for sex work, the sharp increase in the trade of post-Soviet era Eastern European women sparked grave concern in Western

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[9] Letter from U.S. Secretary of State John Kerry to 2014 Trafficking in Persons Report, (June 2014).

[10] *See, e.g.,* U.S. State Department, 2014 Trafficking in Persons Report 1, 29-40 (2014), *available at* http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm (describing some of these forms of exploitation).

[11] *See id.*, at 29-35; *see also* next section for notable, codified definitions.

[12] *See id.*, at 23, 25-39.

capitals and among rights organizations.[13] In 2000, the groundbreaking UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (hereinafter, the UN Trafficking Protocol)[14] opened for signature. That instrument, and the international and domestic anti-human trafficking instruments that followed, have brought the existence of human trafficking to the attention of civil society worldwide and have spurred it to passionate action.

Among the groundbreaking aspects of the UN Trafficking Protocol is its formulation of the first international definition of human trafficking. That definition, and the others excerpted below, include a tripartite definitional structure – act, means, and purpose – in their attempt to identify and name the forms of exploitation that fall within the auspices of the instruments. Both the United Nations Trafficking Protocol and the Council of Europe Convention on Action Against Trafficking in Human Beings[15] follow the tripartite structure.

The U.N. Trafficking Protocol defines human trafficking as:

> ***[Act]*** [T]he recruitment, transportation, transfer, harbouring or receipt of persons, ***[Means]*** by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, ***[Purpose]*** for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[16]

The Council of Europe's definition of trafficking in human beings is virtually identical:

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[13] *See* Karen E. Bravo, *Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 219-23 (2007).

[14] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Vol. I), at 60 (2001) [hereinafter, UN Trafficking Protocol].

[15] *See* Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, (May 16, 2005), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm.

[16] UN Trafficking Protocol Art. 3(a), *supra* note 14, at 42.

> "Trafficking in human beings" shall mean ***[Act]*** the recruitment, transportation, transfer, harbouring or receipt of persons, ***[Means]*** by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, ***[Purpose]*** for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[17]

In contrast, the South Asian Association for Regional Cooperation (SAARC) Convention Preventing and Combatting Trafficking in Women and Children for Prostitution adopts a definition that is much narrower in scope:

> "Trafficking" means the moving, selling or buying of women and children . . . victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means.[18]

While the larger regional grouping, the Association of South East Asian Nations (ASEAN) countries have issued a declaration against human trafficking,[19] the regional bloc has not yet entered into a regional anti-trafficking treaty.[20]

The United States' Trafficking Victims Protection Act,[21] adopted the same year as the UN Trafficking Protocol, also reflects the tripartite structure. However, the U.S. federal instrument distinguishes between severe forms of trafficking and mere sex trafficking. The definition reads as follows:

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[17] Council of Europe Convention, *supra* note 6, at 8.

[18] SAARC Convention Preventing and Combatting Trafficking in Women and Children for Prostitution, Art. 1, §§ 3 and 5, saarc-sec.org/userfiles/conv-trafficking.pdf.

[19] *See ASEAN Declaration Against Trafficking in Persons Particularly Women and Children*, ASEAN (2014), http://www.asean.org/communities/asean-political-security-community/item/asean-declaration-against-trafficking-in-persons-particularly-women-and-children-3.

[20] *See ASEAN Convention on Human Trafficking Sought*, ATUC (July 11, 2011), http://aseantuc.org/2011/07/asean-convention-on-human-trafficking-sought/; *see* Office to Combat and Monitor Trafficking in Persons, *Trafficking in Persons Report 2014*, 420, 428-29, *available at* http://www.state.gov/j/tip/rls/tiprpt/2014/210759.htm (giving a list of international and regional anti-human trafficking instruments).

[21] *See* Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2000) (hereinafter, TVPA).

> 'severe forms of trafficking in persons' means—
>
> ***[Act]*** sex trafficking in which a commercial sex act is induced by ***[means]*** force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or . . . ***[Act]*** the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, ***[means]*** through the use of force, fraud, or coercion **[*purpose*]** for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery...
>
> 'Sex trafficking' means **[*Act*]** the recruitment, harboring, transportation, provision, or obtaining of a person ***[Purpose]*** for the purpose of a commercial sex act.[22]

Subsequent reauthorizations and amendments to the TVPA clarified the types of activities that fall within the definition, and introduced additional mechanisms to combat it.[23]

Although ostensibly a domestically directed statute, it is difficult to overstate the global impact of the U.S. TVPA.[24] The legislation's impact stems from the intent of the drafters that the statute's provisions be extraterritorial. In particular, the statute created a sustained mechanism for exporting the United States anti-trafficking initiatives, backed by the economic and political power of the United States.[25] The mechanisms, in the form of the annual Trafficking in Persons Report, together with the Report's tier system used to rank other countries' anti-trafficking activities pursuant to U.S. standards, and threats of the withholding of U.S. assistance from non-compliant countries, has been effective in persuading many states to sign and ratify the U.N. Trafficking Protocol and to adopt their own domestic legislation that transpose into their domestic regimes the provisions of the Protocol.[26]

Further, all fifty U.S. states have adopted their own human trafficking

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[22] *Id.* at § 7102(9)(A), (B) – (10).

[23] *See* Bridgette Carr et al., Human trafficking Law and Policy xv-xvii (2014) (listing and describing reauthorizations and amendments to the TVPA).

[24] *See* Karen E. Bravo, *Follow the Money?: Does the International Fight Against Money Laundering Provide a Model for International Anti-Human Trafficking Efforts?*, 6 U. St. Thomas L.J. 138, 151-55, 186-88 (2008); *see also*, Trafficking in Persons Report (TIP), *supra* note 10, at 43-44.

[25] Follow the Money?, *supra* note 24, at 152-55. The President has the discretion to withhold or withdraw non-humanitarian, non-trade related foreign assistance as well as funding for government employees' participation in educational and cultural exchange programs. *See id*.

[26] *Id*. at 151-55, 186-88.

legislations.[27] The California definition excerpted below exemplifies the types of definitions deployed and the types of exploitation targeted by the domestic states. California law defines human trafficking as:

> [A]ll acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of persons, within national or across international borders, through force, coercion, fraud or deception, to place persons in situations of slavery or slavery-like conditions, forced labor or services, such as forced prostitution or sexual services, domestic servitude, bonded sweatshop labor, or other debt bondage.[28]

The international and domestic U.S. definitions formulated and deployed in international and domestic instruments demonstrate legislators' struggles to identify and combat these egregious forms of exploitation.

C. State Efforts Against Human Trafficking

Based on public and well publicized evidence, states appear to be actively engaged in combating human trafficking. States have put in place legal prohibitions against both traditional (slavery) as well as new (human trafficking) forms of exploitation.[29] Examples of such instruments include domestic anti-slavery statutes, domestic anti-human trafficking statutes, the United Nations Trafficking Protocol, European Union instruments, and other regional instruments entered into by states in coordination with other states.[30]

Perhaps no state has been as engaged in the fight against human trafficking as the United States. As described by Secretary of State John Kerry in the 2014 Trafficking in Persons Report: "Among [the challenges in which the United States is engaged in] one absolutely inextricably linked to the broader effort to spread the rule of law and face the crisis of failed and failing states, we find perhaps no greater assault on basic freedom than the evil of human trafficking."[31]

In the domestic regime, anti-human trafficking efforts, for example, are also pursued. Within the United States, at the subnational level, individual states have adopted their own anti-trafficking legislation. These may vary in scope and level of implementation and are enacted with the purpose of

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[27] *See* Polaris Project, *2013 Analysis of State Human Trafficking Laws*, *available at* http://www.polarisproject.org/storage/2013_State_Ratings_Analysis_Full_Report.pdf.
[28] Cal. Penal Code § 236.1 (West 2012).
[29] United Nations Office on Drugs and Crime (UNODC), Global Report on Trafficking in Persons 2009, 22-35, *available at* http://www.unodc.org/documents/Global_Report_on_TIP.pdf.
[30]UNODC, Global Report on Trafficking in Persons 2012, 81-88, available at http://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf.
[31] Letter from U.S. Secretary of State John Kerry, *supra* note 9, at 2.

eliminating the forms of exploitation brought to the attention of legislators.[32]

State efforts do not end with the passage of anti-trafficking legislation. National and subnational task forces respond to allegations of trafficking, and educate the public about its evils.[33] Criminal charges are pursued against alleged human traffickers, and victims are rescued from their domination.[34] Efforts to rehabilitate victims include, in some cases, permission to remain and perhaps nationalize in the country of rescue.[35]

These efforts would appear to absolve the state of "blame" or "responsibility." Yet, what is the lived reality of individuals and vulnerable groups subjected to the forms of exploitation characterized as human trafficking; how does that reality illuminate a contradictory role of the state; what is the source of their vulnerability; how is their vulnerability conceptualized, implemented, and policed? Responses to these questions, entertained in the following two sections, indicate that States are *not* blameless onlookers with respect to the traffic in human beings. They are *not* whole-heartedly committed crusaders against the profitable illicit trade in humans and their labor. Instead, there are other, contradictory role(s) of the state: facilitator, implementer, and enforcer of vulnerability to exploitation that give rise to human trafficking.[36]

III. THE SCOPE OF STATE POWER

The state maketh and un-maketh;
It giveth and it taketh away
It makes members and non-members,

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[32] See Polaris Project, A Look Back: Building a Human Trafficking Legal Framework 2014, *available at* http://www.polarisproject.org/storage/2014SRM-capstone-report.pdf (Over a thousand human trafficking bills have been introduced in all fifty states and D.C. since 2015). For a more comprehensive account of state legislation adopted to address human trafficking, *see* 2013 Analysis of State Human Trafficking Laws, *supra* note 27.

[33] These include, on the regional level, the Council of the Baltic States' (CBSS_ Task Force against Trafficking in Human Beings with Focus on Adults (2014 TIP Report, at 428)); the South Asian Association for Regional Cooperation's (SAARC) Regional Task Force (2014 TIP Report, at 429). On the subnational level, such efforts include the U.S. State of Indiana's IPATH. *See Indiana Protection for Abused and Trafficked Humans Task Force*, *http*://www.indianaagainsttrafficking.org/ (website under construction).

[34] UNODC, Global Report on Trafficking in Persons 2014, 51-57, *available at* http://www.unodc.org/documents/human-trafficking/2014/GLOTIP_2014_full_report.pdf.

[35] In the U.S., for instance, each year up to 5,000 victims of human trafficking can receive permanent residence by means of a T visa. 2013 Analysis of State Human Trafficking Laws, *supra* note 27, at 5. A few states such as California, Florida, and Missouri have enacted statutes to accord victims the same benefits and services as refugees. *Id*., at 43.

[36] *See* Bravo, *supra* note 13, at 291 ("Today, despite the mobilization by state actors of anti-trafficking efforts on international and domestic fronts, such actors play a role in modern trafficking.").

Exploiter, exploited, and exploitable
In accordance with law.
And is, itself, exploiter, exploited, and exploitable.
In accordance with law.

The above poem attempts to capture the essence of the contradictions inherent in the role of state entities with respect to human trafficking and similar forms of exploitation. Through the state's powers to legislate and to police it can redefine reality. The state has the power to create and enforce paradigms of subordination and exploitation that serve to normalize the exploitation of individuals and groups who are made vulnerable by its legislative and policing power. For example, the state can redefine an individual human being into an "other" (a non-member, non-citizen, felon, or enemy combatant, for example), a human being illegal in the society (legally excluded, although often physically present), or not endowed with the full panoply of rights recognized in fully human members.[37] The consequences that come with exercise of this power include exploitation.

I acknowledge, and have described in Part II.3 above, the expected and public anti-human trafficking (and anti-exploitation) actions and reactions of states. These are demonstrated by and reflected in anti-trafficking conventions and national legislations as well as anti-human trafficking task forces, domestic laws, and public outreach campaigns. However, as explored more fully in Part IV below, there are other role(s) of the state. These roles include facilitator of exploitation and creator and enforcer of vulnerable status of individual human persons and groups of human persons. These roles stem from the powerful and influential roles of states, generally, in constructing and enforcing legal, economic, and political reality.

A. The State

The "state" referred to in this Essay is the nation or Westphalian state -- an entity exercising sovereignty over territory and people.[38] According to the 1933 Montevideo Convention,[39] which has attained the status of customary law,[40] the prerequisites of statehood are: a defined territory, settled population, a government in control, and the capacity to enter into foreign

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[37] *See, e.g.*, Karen E. Bravo, *On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking*, 31 N. ILL. L. REV. 467, 481-94 (2011).
[38] *See* ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 38 (1990).
[39] *See* Montevideo Convention, *supra* note 4, at Art. I.
[40] The sources of international law include, in addition to treaties, customary norms. *See* 1945 Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, at Art. 38 (listing the sources of international law to be considered by the court in its deliberations).

relations.[41]

B. The Scope of State Power

Entities recognized as states under international law exercise sovereignty over their territory and have the power to enter into treaties with other States.[42] The lawmaking and treaty making powers of the state confer upon the entity the ability to define, re-define, and re-cast reality.[43] That is, to set the lenses through which reality will be interpreted, priorities will be set, and policies implemented.

C. The Exercise of State Power

The state is a legal construct[44], which is endowed with legal existence through the recognition of other states.[45] With legal existence and recognition come the lawmaking, judicial, and police powers of the state.[46]

1. Legislative

Through its legislative branch, however composed pursuant to its domestic legal and other traditions, the state enacts legislation. The legislative power encompasses all facets of human and non-human existence, including family structure,[47] property ownership, transportation, air quality, food production, and health.[48] In the first instance, the state's legislative power is internally focused,[49] but, as with the example of the TVPA, it may

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[41] Montevideo Convention, *supra* note 4, at Art. I.

[42] *See, e.g.*, HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF WORLD POLITICS 8 (2d ed. 1977) ("[S]tates assert, in relation to their territory and population, what may be called internal sovereignty, which means supremacy over all authorities within that territory or population.").

[43] *See id.*

[44] *See* JACKSON, *supra* note 38, at 3 ("The state . . . is constituted and operates by means of law in significant part.").

[45] Analogous to the recognition/creation of corporate actors by the internal laws of state actors.

[46] Lassa Oppenheim, International Law: A Treatise, vol. I, 248-51 (4th ed. 1928).

[47] See, for instance, a failed attempt to regulate what constituted family for housing purposes in a city ordinance by circumscribing it to the nuclear family. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

[48] *See*, for instance, enumerated federal legislative powers in U.S. Const. art. I, § 8. Powers not specifically delegated by the Constitution, police powers (traditionally understood to encompass health, safety, morals, general welfare), are reserved to the states under the Tenth Amendment. *See* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 Notre Dame L. Rev. 429, 485 (2004).

[49] However, through the treaty making power, the state also participated in the making of international law, as well as the constitution and functioning of international organizations. Further, through its actions (state practice), it participates in the formation of norms of customary law.

include provisions designed to have extraterritorial impact.[50] Further, in dualist systems, the national legislature transposes international obligations into domestic law in order to give it domestic effect.[51]

The subject of domestic law-making power is limited only by legislators' creativity and imagination.[52] The content and scope of the legislation are constrained or expanded by cultural norms, domestic constitutional parameters, and international obligations that have been transposed into domestic law.[53] The legislative power always includes the power to define, as definitions (or legal identification) of actors, actions, and goals in furtherance of the legislation are essential parts of the statutes.

1. Judicial

Like the legislature, the judiciary's power to interpret the law is constrained by the parameters of the domestic constitutional regime, culture, and legal tradition.[54] Nevertheless, the scope of that power remains broad. In addition to the power to resolve disputes, and to determine the applicability of laws to an individual's actions (criminal law violations and sanctions for example), the judicial branch interprets the scope and contours of individual legislation, as well as their interaction with each other.[55] The judiciary may be the ultimate authority on the legitimacy (constitutionality) of individual

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[50] The TVPA includes provisions pursuant to which the United States ranks individual countries' anti-trafficking efforts pursuant to unilateral standards created by the United States. *See* discussion *infra* Part II.2 above.

[51] *André* Nollkaemper, *The Duality of Direct Effect of International Law*, 25 Eur. J. Int'l L. 105, 109-11, 113 (2014); *see also* Lassa Oppenheim, International Law: A Treatise, *supra* note 46, 733-34. Oppenheim expressed the traditional notion that a treaty is binding on States, not their subjects: "International Law is a law between States only and exclusively, treaties can have effect upon, and can bind, States only and exclusively." *Id*., at 733. Accordingly, in a dualist system, the treaty must be transposed or incorporated into national law to be given legal effect internally.

[52] *See, e.g.*, Elizabeth Kolbert, *Cuomo Signs Bill Declaring Apple Muffin State's Own*, N.Y. TIMES (August 11, 1987), http://www.nytimes.com/1987/08/11/nyregion/cuomo-signs-bill-declaring-apple-muffin-state-s-own.html (showing states may legislate a specific flower, pie, or muffin.).

[53] *See, e.g.*, Heather Barr, *In Afghanistan, Women Betrayed*, N.Y. TIMES (December 10, 2013), http://www.nytimes.com/2013/12/11/opinion/in-afghanistan-women-betrayed.html?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A10%22%7D.

[54] *See, e.g.*, Gretchen Helmke, Courts Under Constraints: Judges, Generals, and Presidents in Argentina, 1-14 (Cambridge University Press, 2005).

[55] Justice Harlan F. Stone observed, "The statute was looked upon as in the law but not of it, a formal rule to be obeyed, it is true, since it is the command of the sovereign, but to be obeyed grudgingly, by construing it narrowly and treating it as though it did not exist for any purpose other than that embraced within the strict construction of its words." Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 13-14 (1936); *see also* R. Perry Sentell, Statutes in Derogation of Common Law: In the Georgia Supreme Court, 53 Mercer L. Rev. 41, 41-46 (2001).

legislative initiatives. The judiciary may narrow, expand, or nullify the legislation adopted by the legislative branch.[56]

1. Executive

Through the executive power, the state implements and enforces the legal frameworks (and individual laws) created by the legislators and interpreted and upheld by the judiciary.[57] The executive power includes the application of police power within the domestic regime and of military power (which is directed either or both territorially or extraterritorially, depending on the legal tradition and constitutional framework of individual states).[58] As such, the executive ensures the implementation of the frameworks, whether these paradigms provide for the subordination or the equality and recognition of individuals and groups.[59]

The consequences of these attributes of state power include the formulation of criteria and structures that reflect the relationships of subordination, the application of legitimacy or illegitimacy to human activity, the prioritization among competing policy possibilities, and the setting of standards with respect to innumerable aspects of individual human lives. The effect of the exercise of state power is both domestic and international.

Ideally, pursuant to democratic principles, the source of each state's power and the legitimation of its exercise spring from and are constrained by the consent of the inhabitants of the state's territory. That exercise, then, is deemed to reflect the interests, values, and policies of the nationals of that state. Collective moral responsibility for the acts and omissions of the state entity may come with the legitimating force of consent.

IV. STATE FACILITATION

> *States … may be said to be complicit in creating and enforcing the vulnerability of some populations. That accusation is not negated by the mobilization of state*

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[56] *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 917 (2010); *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, 1462 (2014). In *Citizens United*, the U.S. Supreme Court rejected efforts to narrow corporate power by invalidating or limiting the scope of campaign finance laws and affirming the constitutional free speech rights of corporate entities. 130 S. Ct. 876, 917 (2010). In *McCutcheon*, the Court limited the scope of the Voting Rights Act, so as to limit federal power to protect the rights of the individual voter. 134 S. Ct. 1434, 1462 (2014). In other words, the Court acted to re-define corporate entities with more personhood and constitutional protections, while limiting the policing of the voting rights to individual humans from discriminated groups.

[57] Michael Ambrogio, *The Extra-legislative Veto*, 102 Geo. L. J. 351, 353 (2014).

[58] *See, e.g.*, U.S. Const. Art. II, §§ 2, 3.

[59] *See id.*, at Art. II, § 3 ("He shall take care that the Laws be faithfully executed").

resources against human trafficking.[60]

Through the state's power to legislate and police, it re-defines reality; it is the creator and enforcer of paradigms of subordination and exploitation that normalize the exploitation of the groups it makes vulnerable.

Contemporary forms of exploitation, including human trafficking, are based on categories of exclusion both internally and externally directed, created and policed by the state and created in order to preserve accumulated power both within states and among states. Pursuant to the categories, human persons are not merely and simply humans. Instead, each human individual is legally categorized; the legal categorization determines whether the human person belongs or does not belong in a particular sphere, whether that sphere is geographically, politically, culturally or otherwise delineated. Such categorizations include immigrants who are undocumented who do not belong, women and children who are subordinated by the legal or societal imperative of inequality, or exploited foreign workers "welcomed" in host states.[61] Legally created categories serve to facilitate or encourage exploitation and non-belonging and the stripping of rights through the imposition of law. Exclusions based on race, national status, gender, and age are policed through and by the legal system, through imposition of police power, or through judicial or administrative determinations.[62]

If the state is not a blameless onlooker with respect to human trafficking, the sources of the state's roles in relation to human trafficking include: (i) foundational concepts underlying statehood; (ii) the state's organizational principles of belonging and non-belonging; and (iii) economic and political policies backed by the state's legislative and policing powers.

A. Foundational Concepts Underlying Statehood

Among the foundational concepts underpinning "statehood" are state sovereignty and control of territory.[63] The implementation of these conceptual foundations is implicated in the creation of vulnerable and subordinated status both within and outside of states.

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[60] *See* Bravo, *supra* note 13, at 292.

[61] *See, e.g.*, Ariel Kaminer & Sean O'Driscoll, *Workers at N.Y.U.'s Abu Dhabi Site Faced Harsh Conditions*, N.Y. TIMES (May 18, 2014), http://www.nytimes.com/2014/05/19/nyregion/workers-at-nyus-abu-dhabi-site-face-harsh-conditions.html.

[62] Decisions to deport, for example.

[63] *See supra* Part III.1 (discussing the Montevideo Convention and the attributes of statehood).

1. Sovereignty

The term "sovereignty" and its dimensions is contested,[64] and refers to both an internal (domestic) and external (international) component.[65] As traditionally conceptualized, "sovereignty" was understood to mean the absolute power of the "sovereign" or governmental authorities over persons and things within the border of the state.[66] That absolute power was effectuated through the legislative, judicial, and executive powers discussed in Part III.3 *supra*. Contemporary understanding of the concept of sovereignty is now more constrained by, for example, international obligations imposed with the consent of the sovereign. Nevertheless, the understanding that the state exercises power within its territory, to the exclusion of other states or of international organizations, unless consented to by the state, continues to be fundamental in domestic and international law.[67]

The consequences include the power of individual states to create legally enforceable systems of exploitation and subordination within their borders.[68] Although, in some cases, those systems may not be overtly enshrined in the language of legislation (that is, the intent or effect may be hidden or become apparent only following enforcement), the effects of legislative, judicial, and executive practices create vulnerability and facilitate exploitation. For example, legislation in the Gulf States excludes non-nationals from equal treatment, while U.S. militarization of its southern border drives would-be migrants into the arms of human smugglers and traffickers.[69] Pursuant to this framework, rights end at the border: the non-national is *not* protected by a *global* concept of common humanity, but in contrast, is excluded even if left to be vulnerable to exploitation, including human trafficking, lurking outside of an individual state's border. While

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[64] *See* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3-4 (1999) (listing four different ways in which sovereignty has been understood and described).

[65] *See* JACKSON, *supra* note 29, at 28 ("[T]he responsibility of a sovereign [state] is both external to other sovereigns and internal to its citizens.").

[66] *See* BULL, *supra* note 33.

[67] Duncan B. Hollis, *Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 Berkeley J. Int'l L. 137, 173-74 (2005); *see also* Lassa Oppenheim, International Law: A Treatise, *supra* note 46, 17-23, 135.

[68] Examples would include a minimum wage that is below a living wage, or low standards of workplace safety. *See Halfhearted Labor Reform in Bangladesh*, N.Y. TIMES (July 17, 2013), *http*://www.nytimes.com/2013/07/18/opinion/halfhearted-labor-reform-in-bangladesh.html. More egregious examples include legal dispossession of traditional landowners and sale or licensing of their land to foreign or domestic investors. *See, e.g.*, Michael Kugelman, *The Global Farmland Rush*, N.Y. TIMES (Feb. 5, 2013), http://www.nytimes.com/2013/02/06/opinion/the-global-farmland-rush.html; Neil MacFarquar, *African Farmers Displaced as Investors Move In*, N.Y. TIMES (Dec. 21, 2010), http://www.nytimes.com/2010/12/22/world/africa/22mali.html.

[69] Karen E. Bravo, *Free Labor! Toward a Labor Liberalization Solution for Modern Trafficking in Humans*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 545, 586 (2009).

these systems may be subject to international scrutiny and even condemnation, the sovereignty of the state with respect to its domestic regime may foreclose both external and internal attempts to address the exploitative conditions and effects.

1. Borders

Intrinsic to the concept and exercise of internal sovereignty is control over borders – the limits of the geographic territory over which the state exercises most unfettered sovereign jurisdiction. Both in order to protect national security, and to maintain this crucial pre-requisite of statehood (defined borders), states protect and police their borders. That policing entails state maintenance of exclusive border-based power and responsibility. The methodologies utilized – both to ascertain the location of the boundaries and to maintain its function – are devised by each state individually, subject to treaty-based agreements to the contrary. States usually have discretion to determine how and when to deploy resources to preserve and protect their borders. These resources may be deployed in such a way as to use military and/or other coercive force to ensure the exclusion and non-entry of non-nationals of the state.[70]

B. Organizational Principles of Membership and Non-Membership

The vulnerabilities that give rise to human trafficking are facilitated by categories of exclusion, both external and internal, created and policed by states, and deployed in the service of preservation of accumulated power. For example, paradigms of membership and non-membership enshrined by the state's role in the international legal system empower a citizenship-based in-group to the detriment of non-citizens.

1. Nationality & Citizenship

The non-citizen's subordinate status is "legalized" through the constitution, through laws, through customs, and through societal interactions of systems of exploitation and subordination. These systems help to create, reinforce, and police subordination of the non-national. The

[70] Examples include the U.S. Border Patrol deployed on the United States side of its border with Mexico. The analogous power of subnational actors within component states is exemplified by Texas Governor Rick Perry's deployment of state National Guard troops to the Texas/U.S. border with Mexico in order to prevent the entry of desperate non-national migrant children fleeing violence in the Central American states of citizenship. *See* Manny Fernandez & Michael Shear, *Texas Governor Bolsters Border, and His Profile*, N.Y. TIMES (July 21, 2014), http://www.nytimes.com/2014/07/22/us/perry-to-deploy-national-guard-troops-to-mexico-border.html.

paradigm of exclusion constructed through laws is exploited by private parties who are empowered to exploit inequitable relationships because of their own membership in the in-group and/or their mastery of its legal structure.

The paradigms of subordination and exploitation are enhanced where the state strengthens laws with respect to who may enter and who may not, as well as where the state is making it more difficult for a human being to move from a situation of exploitation to a new situation of opportunity. The state also then enforces those paradigms through, for example, anti-immigrant/anti-mobility laws (often to the benefit of the exploiter). Through these laws, their implementation and enforcement, they provide the pre-conditions and enforcement mechanisms for human traffickers.[71]

2. Gender and Age-Based Subordination

Other paradigms of exclusion and/or subordination within individual states also empower would-be exploiters. Most pertinent to the empowerment of human traffickers is the subordination of women and children in individual domestic regimes. What is the status of a child who is arrested because she is prostituted? She may be arrested and charged, while the pimp and/or john is not. This is an example of perpetuation through domestic laws of a system of inequality and subordination. That is, the law reflects the power relationships among these different groups that undermine overt support of rights protection. Only recently have some U.S. jurisdictions changed this specific pattern through adoption of corrective legislative provisions so that underage individuals who become part of the commercial sex industry are not prosecuted for prostitution.

3. Economic and Political Policies: Trade Liberalization, Globalization, and the Curious Case of Labor Immobility

The state also facilitates exploitation through adoption of conflicting economic and political instruments and policies. A paradigmatic example is the tension between the state's simultaneously conflicted flirtation *with* and resistance *to* globalization, the contradiction between pro-globalization trade liberalization and anti-immigration and anti-human mobility laws.[72] This contradiction in laws and policies creates incentives and conditions that demand transnational movement of humans while simultaneously seeks to

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[71] A human trafficker is telling the truth when he or she informs the victim that if s/he goes to the police s/he will be deported, s/he will be arrested, and s/he will be sent home in disgrace. The state therefore lends validity to and reinforces the coercive control mechanisms employed by the human trafficker.

[72] *See* Bravo, *supra* note 49, at 594 (exploring the contradiction and its effects and calling for a multilateral agreement to liberalize the movement of labor).

prevent and punish such movement. This tension between international trade law and domestic immigration law fosters illegal movement across borders and results in the vulnerability of would-be mobile labor providers to human rights abuses such as trafficking and other forms of exploitation.

Looking around the globe, this current era of globalization is based on trade liberalization. However, while the movement of products, money, and services, are liberalized, States demand the immobility of humans who themselves are a unit of economic production. The message is: "You unit of economic production, you thinking person, you may not move. Your movement is forbidden" (even if you may need to move because of the economic effects of trade liberalization). That contradiction is enshrined in domestic immigration laws which seek to reinforce and barricade the border. States barricade the border with respect to people, but with respect to little else, and expect human beings to sit quietly and legally starve, rather than to seek out opportunities that require a legally unsanctioned passage of borders.

The consequences are detrimental to vulnerable and "undesirable" humans who seek to move – either to avoid negative economic consequences of trade liberalization in countries of origin or to seek new opportunities in destination countries. How does a would-be mobile human evade or overcome exclusion? Lacking sufficient resources, she or he may contract or trade his or herself (either body or labor) in order to gain border passage. Attempts to evade the consequences of the trade will be policed by the state. That is, the mobile outsider may be arrested, punished, and deported according to the national security and anti-immigrant laws of the destination state. The contradiction in policy and implementation makes true the claims of the smuggler-trafficker, who predicts arrest and deportation of his victims/merchandise/cargo to those who dare to seek official help or rescue from the exploitation she or he imposes.

States also "profit" from their creation of regulatory regimes that exploit their nationals. In the "race to the bottom," states that decline to transpose minimum international labor standards (including wages) in their domestic regimes attract higher levels of foreign investment.[73] States that allow (or fail to police) predatory and exploitative debt bondage maintain their "attractive" investment status at the bottom of global labor standards ranking systems. These legal and physical obstacles benefit capital: individual states compete to lower their labor, environmental, and other human rights costs so as to attract foreign investment. This race to the bottom (lowest standards = lowest costs) succeeds, so that liberalized global capital flows to the states that offer the best bargains.

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[73] *See* Julfikar Ali Manik and Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, N.Y. TIMES (Apr. 24, 2014), http://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html? (regarding the Rana Plaza collapse, the result of, among other things, poor regulations).

In addition, maintenance of the comparative advantage of cheaper labor and substandard regulatory regimes compared to other states attracts foreign investment and income to the powerful elites within individual states that control state levers of power.

States outsource to the human smuggler-trafficker their own labor recruitment function. That is, while the state enacts and enforces anti-immigrant and anti-mobility laws, human smuggler-traffickers "informally" supply the demands of domestic labor markets for low-cost and compliant labor. Meanwhile, the enforcement functions of the state "benefit" the economy by maintaining a low (*i.e.*, exploitative) wage level.[74] In sum, the existence and labor supply activities of traffickers and smugglers (that is, the exploited labor that they supply to individual domestic economies), allow states to have an official anti-immigrant/anti-human mobility policy, at the same time that their economies' demand for low cost labor is fulfilled.

However, our diagnosis cannot end here. While states play a facilitator and enforcer role in human trafficking, states themselves are exploited and exploitable in furtherance of the exploitation of their nationals. The exploitability of states and states' exploitation by non-state actors contributes to the creation and perpetuation of human trafficking.

V. STATE EXPLOITATION

At the same time, the "state," itself a creation of laws, is exploited and exploitable by other more powerful states and by private actors. These actors exploit the structure of international law and statehood so as to create and profit from the global market in people and their labor and to escape from local and international criminal laws.

A. Quasi-Sovereignty and Other Sources of State Exploitation

The structure of international law and the domestic legal structure of the state make the entity susceptible to exploitation.

1. Quasi-Sovereignty and the Juridical Equality of States

The modern international legal system and international state relations are based upon the concept of juridical equality of states. That is, the state, itself a creature of laws (both domestic and international), is legally equal to all other states. This necessary legal fiction, while facilitating state-to-state

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[74] Some of that recruitment function is performed by state-to-state labor supply agreements, such as the formal and informal arrangements between the Philippines and various Gulf States for the provision of domestic servants and health care workers. *See* Bravo *supra* note 49, at 582-83.

relationships, the entry into treaties and other forms of international obligations, and the "equal" representation of the nationals of all states on the international plane, reflects a decision to juridically ignore sharp differences in economic and political power of states.[75] As a consequence, when a powerful state or group of states exercises economic or political power to coerce another less powerful state into action or inaction, the coerced treaty is not subject to legal challenge.[76]

That inequality is embedded in the very structure of the United Nations, the universal membership international organization formed with the purpose of ensuring world peace. The structure of the Security Council, enshrining greater legal power than other U.N. members in five Permanent Members (the victors of World War II), facilitates exploitation with respect to the Permanent Members' abuse of their own citizens as well as with respect to the Permanent Members' interactions with other states. Thus, the Permanent Members' abuse or exploitation of their own populations can be condemned only with the individual members' consent (or refraining to exercise its veto). The same analysis applies with respect to members' violations of international law, which can be condemned by the Security Council only with these members' consent.[77]

2. The Myth of Sovereignty

I have written elsewhere of the myth of sovereignty and some of its consequences for less powerful states. In brief, the myth of sovereignty is "both a yearned-for psychological and essential truth and a factual lie. It is a 'truth' which [states] crave, as an essential characteristic of the free people and states they now are . . . It is a 'lie' because economic, political and geo-strategic realities place limitations on the [newer states'] ability to act externally . . . ."[78] Here, I will explore the impact of that myth in making

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[75] *See* JACKSON, *supra* note 29, at 21-26, 190-91.

[76] *See* Richard Kearney & Robert Dalton, *The Treaty on Treaties*, 64 AM. J. INTL. L. 495, 533-35 (1970) (describing how the inclusion of disparity in power among states' parties has been rejected as the basis for invalidating the treaty under the coercion provision of the Vienna Convention on the Law of Treaties). Non-treaty examples include the power of the Gulf States to extract exploitative labor supply arrangements with the Philippines and other labor exporting states. The impact on the Philippine migrant workers includes their subjugation to exploitation and abuse, with little legal (or even economic) consequence. *See, e.g.*, Jason DeParle, *Domestic Workers Convention May Be Landmark*, N.Y. TIMES (Oct. 8, 2011), http://www.nytimes.com/2011/10/09/world/domestic-workers-convention-may-be-landmark.html?_r=0 (describing abuse of migrant domestic workers in the Gulf States).

[77] Examples include China's human rights abuses of its Uighur minority population; the United States' segregation of its Black population; and Russia's 2014 invasion and annexation of Ukraine's Crimean region.

[78] Karen E. Bravo, *CARICOM, the Myth of Sovereignty, and Aspirational Economic Integration*, 31 N.C.J. Int'L L. & Com. Reg. 145, 162 (2005).

citizens of individual states vulnerable to exploitation.

The concept of sovereignty conveys the control of the state entity over, among other things, its territory and its people. The extent of that control is disputed, and the gap between legal and real control can be vast. Thus, a state may ostensibly control territory, but be unable to legally, politically, economically provide for or control that territory.[79] As a consequence, however, the citizens of that territory suffer poverty and vulnerability to exploitation, including human trafficking.[80] Nor is that vulnerability only applicable in the economic sense. In the 2014 Child Migrant Crisis in the United States, the inability of Central American governments to exercise law enforcement control within their borders, together with the inability of Mexico and the United States to control their own borders, created economic opportunities for human smugglers and traffickers to exploit these states' vulnerabilities as their citizens fled poverty and violence.

It also, under the rubric of state sovereign responsibility, includes international responsibility for or obligation towards its citizens. That obligation and power, although "legally" constrained by humanitarian and human rights obligations can, in reality, be unchecked.[81] The state and its essential attribute of sovereignty is used as a shield to escape the consequences of such abuses.[82]

3. The State as a Tool of Private Power

The state, its legal fictions and structure, are exploited and exploitable by private actors. The identities and characteristics of these actors may vary, but they are able to, among other things, "buy" state actors. This may be accomplished through, for example, outright monetary purchase, or through the wielding of other types of power (for example, a promise to or a threat not to invest) so that the state adopts legislation, implementation, and policies that benefit the private actors to the detriment of the state's inhabitants and/or citizens. Examples include corporate actors that provide incentives for legislators, law enforcement, or the military to act to the corporation's advantage. The mechanisms may include maintenance or introduction of regulatory regimes that enshrine low environmental or labor standards. Such

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[79] For example, Pakistan's legal control over its tribal territories has not (yet) translated to effective state control.

[80] It is, after all, the poor citizens of poor countries who, in their journeys toward economic or other sanctuary who are most vulnerable to exploitation by smugglers or traffickers. *See, generally*, 2014 TIP Report, *supra* note 33.

[81] *See, e.g.*, JACKSON, *supra* note 29, at 19, 21. Contemporary examples include the crisis in Syria and the human rights abuses committed there, where internal elites take advantage of the legal shield of sovereignty to abuse its people.

[82] *See id.*, at 27 (describing formal, but not real equality among states in the modern international regime: "Negative sovereignty can also be defined as freedom from outside interference: a formal-legal condition.").

standards, however, while theoretically subject to challenge are legally enacted and enshrined within domestic laws.

Other examples of the state's use as a tool by private actors include incentives not to enforce law and/or standards as they are written. There, the division of functions within state branches and the policy positions that may change with transitions in administration give rise to the gaps or contradictory enactments that lead to negative consequences for those affected.

4. The Challenge of Powerful Non-State Actors

Finally, the state is exploitable and exploited as the non-state actor's power increases in relationship to the power held by states. The power of corporate actors, militant groups, and transnational criminal networks to disrupt and/or subvert the activities of the state have been enhanced as the loci of international political and economic power are more widely dispersed in a multi-polar world. The activities of these entities, to the extent that they are able to directly challenge and/or disrupt the state, makes the state unstable, and deprives the citizens of the "protection" of the state.

VI. CONCLUSION

Human trafficking exists today, but this contemporary form of exploitation is not aberrational. Human trafficking and similar forms of exploitation arise from structural foundations. They are present, and so we must recognize that relationship, and must deploy innovative techniques to address them.

Interrogating the state's roles in human trafficking leads to the conclusion that much remains to be learned and understood if a more complete understanding of human trafficking is to emerge. This Essay points to the need for a structural understanding where the roles and interactions of multiple actors, policies, and conceptual frameworks are examined so as to lead to a better understanding of the structures of vulnerability and exploitation that both facilitate and sustain human trafficking.

This requires more than producing a Trafficking in Persons (TIP) Report. Producing a TIP Report informing other states of how badly they are handling their human trafficking problems does little. Its principal result is to encourage targeted states and their often abashed governments to pass laws which they then do not enforce because of lack of interest or resources.

States, the preeminent actors in international law, must identify, understand, and reckon with their own roles in the flourishing and maintenance of human trafficking.

REGAINING THE ECONOMIC EDGE: POLICY PROPOSALS FOR HIGH-SKILL WORKER AND STUDENT AUTHORIZATIONS

Jeff Papa and Jessica Whelan*

The unrivaled dominance of the United States' economic power and institutions of higher education, coupled with its need to compete for hearts and minds in third-world countries during the Cold War, led to the development of a U.S. immigration system which focused more on family unification, refugee protection, protection of U.S. labor markets, and diversity than on the need to compete economically with other nations. This framework can be seen in both the rules surrounding foreign students attending U.S. universities and in rules regarding permanent residence and short term visas for highly skilled foreign workers.

A recent report by the National Foundation for American Policy found that foreign students comprise "70 percent of the full-time graduate students (masters and PhDs) in electrical engineering, 63 percent in computer science, 60 percent in industrial engineering, and more than 50 percent in economics, chemical engineering, materials engineering and mechanical engineering."[1] Given this alarming statistic that the majority of critical science, technology, engineering, and mathematics (STEM) graduate students are foreign visitors, how will the critical occupations requiring these skills in the United States be filled? More specifically, setting aside for purposes of this paper the larger issue of the need to grow U.S. student interest in STEM fields, how can the short-term STEM needs of the United States be met? Beyond this domestic concern, is the current balance of education simply working to train foreign students to compete with the United States after they return home?

In this paper we will examine the current state of noteworthy U.S. practices in higher education, short term professional visas, and permanent residence. After this analysis of current U.S. practices, we will offer several practical suggestions for reforming U.S. laws in these areas.

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[1] Stewart Anderson, *The Importance of International Students to America*, NAT'L FOUND. FOR AM. POL'Y (2013), *available at* http://www.nfap.com/pdf/New%20NFAP%20Policy%20Brief%20The%20Importance%20of%20International%20Students%20to%20America,%20July%202013.pdf.

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I. METHODOLOGY

Our intent with this article is not to offer an academic study or analysis of visa and other issues but rather to take a pragmatic approach and offer practical solutions to the problems faced by immigrants, their families, and those who work with these individuals in the visa process.

We began our research by conducting several interviews with individuals who work with foreign students at Indiana colleges and universities as well as practitioners in the field of immigration law. These interviews helped us identify the everyday issues faced by these individuals. We then set out to determine how these issues could be addressed within the current U.S. immigration framework. While the system is not perfect, and likely never will be, it is our hope that this article will spur meaningful debate in this country on how to improve the efficiency and effectiveness of our immigration system.

II. FOREIGN STUDENTS

In discussing policy changes to the current U.S. immigration system, it is important to first have a general understanding of the various classifications for immigrants. It is also important to understand the terminology used in the field of immigration law. In common parlance, the term "visa" is often used to describe the authorization for a foreign individual to be present or work in the United States.[2] This usage is incorrect. On the contrary, a visa is the entry document needed to enter the United States at a port of entry, while "status" describes the underlying permission to be in or work in the United States.[3] Foreign students wishing to come to the United States to study have several options at their disposal depending on the length of their stay and their course of study.

The F visa is the visa required for students attending university, college, high school, private elementary school, seminary, conservatory, or another academic institution, including a language training program.[4] Students with F-1 status must maintain a full course of study, defined for college and university students as twelve credit hours or more and must possess non-immigrant intent; that is, they must intend to return to their home country upon completion of their course of study.[5] Family members with F-2 status may accompany the F-1 student, but those family members

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[2] Jeff Papa, *Basic Options in the Non-Immigrant Business Context*, 15 IND. INT'L & COMP. L. REV. 279, 280 (2005).
[3] *Id.*
[4] *Student Visa*, U.S. DEPARTMENT OF STATE BUREAU OF CONSUMER AFFAIRS, (last visited July 31, 2013) http://travel.state.gov/content/visas/english/study-exchange/studentt.htm
l [hereinafter *Student Visas*]; 8 C.F.R. § 214.2(f) (2013).
[5] 8 C.F.R. §§ 214.2(f)(1)(i) (f)(6)(B) (2013); *Id.*

may not work or attend school.[6]

The M visa is the visa required for students attending a short-term vocational or recognized nonacademic institution other than a language training program.[7] M-1 status is valid for the length of the student's program, plus up to six months of practical training following the program. This time period, however, may not exceed one year.[8] M-2 family members may accompany the M-1 student, but like F-2 family members, they may not work or attend school.[9]

The J visa is a non-immigrant visa issued to exchange visitors participating in programs that promote cultural exchange. J status related issues, and proposed suggestions are discussed more fully below.

A. Attracting Foreign Students and Improving Their Experience

1. Allow F-2 Status-Holders to Work and/or Study

A common theme that arose during our interviews was the inability of F-2 status-holders, particularly spouses of F-1 status-holders, to work or study while on F-2 status. Although this policy may have made good sense in the past when spouses accompanying F-1 status-holders primarily constituted wives following their student husbands (when, at the time, women traditionally did not work outside the home or attend school), this policy is now outdated and should be reviewed if the United States wishes to attract and retain top talent. While this prohibition on work likely stems from formerly protectionist policies of the United States enacted during the Cold War era, such policies are no longer relevant in modern times where often both spouses work and/or study.

A policy change in this area would increase U.S. competitiveness in attracting top foreign students who may otherwise choose to study elsewhere. Because F-1 status-holders are typically in the United States for four years or longer, the F-2 work and school restrictions place unnecessary burdens on family members who often must make the choice to come to the United States with F-1 status-holders, or remain in their home countries to work or attend school. Allowing F-2 family members to work or attend school in the United States would facilitate cultural assimilation for family members who often feel isolated during their time in the United States. Increased assimilation of family members could have a positive effect on the number of quality F-1 students who decide to stay in the United States and seek permanent employment after completion of their studies.

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[6] 8 C.F.R. § 214.2(f)(15)(i)(ii) (2013).
[7] *Student Visas*, *supra* note 6; 8 CFR 214.2(m) (2013).
[8] 8 C.F.R. § 214.2(m)(5) (2013).
[9] 8 C.F.R. § 214.2(m)(17) (2013).

Since M-1 students are limited to one year of residency, a policy change allowing M-2 family members to work and attend school is not as imperative as allowing F-2 family members to work or attend school. However, it may be worth considering whether allowing M-2 family members limited authorization to work or attend school would also have a positive effect on the caliber of students attracted to the United States for vocational or other nonacademic training.

2. Increase Flexibility in Foreign Students' Study

Many of the individuals we spoke with in international offices at Indiana colleges and universities expressed frustration on behalf of their international students at the rigidity the law imposes on the courses of study for international students.

For example, the law restricts the number of online credit hours that foreign students may take each semester. F-1 and J-1 students are restricted to a maximum of three online credit hours per semester.[10] M-1 students, by contrast, are not permitted to take any online courses during their course of study.[11] These restrictions have become outdated as technology continues to improve and online coursework becomes more prevalent.

In a 2011 Pew Research Center survey, seventy-seven percent of college presidents reported that their institutions offer online courses.[12] Eighty-nine percent of four-year public colleges and universities and sixty percent of four-year private schools offer online classes.[13] Forty-six percent of college graduates surveyed who had graduated in the past ten years reported that they had taken an online course, and the trend is expected to continue.[14] By limiting foreign students' ability to take online courses like the rest of their American classmates, we are restricting foreign students' options and providing a disincentive for the best and brightest to study in the United States, particularly those students interested in pursuing degrees in technology-related fields.

Potential changes in policy could range anywhere from eliminating the restrictions on online courses[15] to an overall increase in the number of

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[10] 8 C.F.R. § 241.2(f)(6)(i)(G) (2013).

[11] 8 C.F.R. § 241.2(m)(9)(v) (2013) ("No on-line or distance education classes may be considered to count toward an M-1 student's full course of study requirement if such classes do not require the student's physical attendance for classes, examination or other purposes integral to completion of the class.").

[12] Kim Parker, Amanda Lenhart & Kathleen Moore, *The Digital Revolution and Higher Education* (Aug. 28, 2011) http://www.pewsocialtrends.org/2011/08/28/the-digital-revolution-and-higher-education/.

[13] *Id*.

[14] *Id*.

[15] This option is unlikely and is not recommended given the potential for abuse. For example, foreign students could use a fully-online program as a back door to obtain

credit hours permitted to be completed online (*e.g.*, fifty percent of credit hours each semester). A more tailored approach depending on the foreign student's course of study is yet another option. In this more tailored approach, students involved in courses of study that lend themselves to online learning (*e.g.*, computer programming, information technology, engineering) would be permitted to complete more credits through online courses than students in other programs. This tailored approach would have the benefit of allowing students for whom it is practical, if not necessary, to increase the number of online credit hours taken, while at the same time maintaining integrity in the system by ensuring that only the students who would benefit from the increase can take advantage of it.

3. Remove Barriers to Practical Training

Students with F-1 status have the option of working in the United States by engaging in practical training during or after their programs of study. Curricular Practical Training (CPT) is work performed during a student's course of study that is "an integral part of an established curriculum."[16] Optional Practical Training (OPT) is work "directly related to the [student's] major area of study," performed during school vacations or breaks, or while school is in session,[17] and upon completion of a student's course of study.[18]

Rigidity in the CPT/OPT requirements is another common complaint among professionals who work with F-1 students. First, the requirement that the work performed by the student be "an integral part of an established curriculum" for CPT, and "directly related to the student's major area of study," is unnecessarily strict and overly vague. Second, students are limited to twelve months of practical training through any combination of CPT and OPT.[19] Thus, if a student participates in two six-month internships under CPT authorization during a four-year course of study, the student is ineligible for any OPT upon completion of his or her course of study. Likewise, if a student works on vacations and breaks under OPT authorization, and such work totals twelve months, the student is ineligible for any post-completion OPT. Rigidity in practical training requirements is confusing and frustrating to students and may serve to discourage the best and brightest students in other countries from attending American programs.

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residency in the United States. Additionally, a fully-online program would not necessitate the foreign student to maintain residency in the United States while participating in the program.

[16] 8 C.F.R. § 214.2(f)(10)(i) (2013).

[17] OPT performed while school is in session may not exceed twenty hours per week. 8 C.F.R. § 214.2(f)(10)(ii)(A)2).

[18] 8 C.F.R. § 214.2(f)(10)(i) (2013).

[19] 8 C.F.R. § 214.2(10) (2013).

Policy changes in the administration of CPT/OPT programs should be considered to encourage and reward students seeking practical training. Employers and an increasing number of colleges and universities place high value on internships, externships, or other types of practical training;[20] so students should be granted flexibility in the relatedness of their training to their program of study. [21]

To facilitate this, the relatedness requirement should be clarified to give greater guidance to university officials approving CPT opportunities. Additionally, CPT performed for credit as part of a student's program of study should not be counted against a student's quota of twelve-months of practical training. CPT experience, particularly if done for academic credit, should be seen as an integral part of the student's program of study, and students should not be prevented from gaining further experience at the end of their program of study. Along those same lines, OPT performed during the school term and/or vacations and breaks should not be counted against a student's twelve-month allotment. In essence, a student should be granted the assurance that he or she will be permitted to remain in the United States for twelve months post-completion, regardless of the CPT/OPT performed during the program of study. This would afford foreign students and their families predictability in planning their stay in the United States.

It would also grant recent graduates additional time within which to plan and apply for more permanent status, as well as allow U.S. employers the ability to "try out" recent graduates in jobs prior to sponsoring them for H-1B authorization. Further, if a recent F-1 student graduate has found full-time employment and an employer willing to sponsor his or her employment, but is not granted H-1B authorization in the year immediately following completion of his or her program of study due to H-1B quota issues, the graduate would have another opportunity in the following year to apply for H-1B authorization before his or her F-1 OPT work authorization expired. [22]

In sum, both the relatedness requirement of practical training and the duration restrictions on practical training should be relaxed. The United States should also consider adopting two separate practical training limits for F-1 students: a defined period of CPT/OPT during a student's program of study (perhaps nine to twelve months), and twelve months of OPT upon completion of the student's program of study. One common method by which graduates with degrees in certain specialty fields may qualify to remain in the United States and work in their field of specialization is

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[20] Allie Grasgreen, *Interns Without (Major) Borders* (Aug. 8, 2012), http://www.insidehighered.com/news/2012/08/08/more-colleges-pushing-internships-liberal-arts.

[21] Brian Burnsed, Degrees Are Great, but Internships Make a Difference, U.S. News and World Report (Apr. 15, 2010), http://www.usnews.com/education/articles/2010/04/15/when-a-degree-isnt-enough.

22 *See infra* Section III.

utilization of the H-1B classification for a limited number of years as a non-immigrant worker.[23] In order to qualify for H-1B status, the proffered job must typically be one which normally requires a specific bachelor's degree or is so complex and specialized that the ability to perform those duties is normally associated with a particular bachelor's degree (or higher).[24]

B. Retaining Foreign Students in the United States

1. Retaining J Status-Holders

J status allows nonimmigrant visitors to remain in the United States, generally for no more than eighteen months[25] in order to undertake a scholarly, trainee, intern, student, specialist, physician, or other similar experience in a field of study for which they are academically and experientially prepared.[26] Upon successfully completing a J status experience, an individual typically has extensive academic preparation, significant practical experience, and time spent working or studying within the United States. Often, then, these individuals are potentially very valuable to a U.S. company, university, or government agency which may find great value in retaining the services of this person for the short or long term (and conversely not be pleased about the prospect of the individual going to their home country to compete).

However, often these individuals are subject to the J status two-year home residency requirement.[27] The U.S. State Department maintains an Exchange Visitors Skills List; foreign nations that appear on the State Department's list may select skills from this list which they believe are critical to the development of their country.[28] If their field of expertise is selected, J status nonimmigrants from these countries are subject to this requirement and must return home for at least two years.[29]

The concept for J status arose during the Cold War as part of the Fulbright-Hays Act of 1961.[30] This act had as its purposes the establishment and expansion of cultural and educational exchanges to

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[23] Immigration and Nationality (McCarran) Act § 101, 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2014).
[24] *Id.*
[25] *See* 22 C.F.R. § 62.22 (b)(2) (2010).
[26] *See* 22 C.F.R. § 62.20 (2006) (professors and research scholars); 22 C.F.R. § 62.22 (2010) (trainees and interns); 22 C.F.R. § 62.23 (2008) (college and university students); 22 C.F.R. § 62.26 (2002) (specialists); 22 C.F.R. § 62.27 (2002) (alien physicians).
[27] *See* 22 C.F.R. § 41.63 (2007).
[28] *Exchange Visitor Skills List – 2009*, U.S. DEPARTMENT OF STATE – BUREAU OF CONSULAR AFFAIRS, http://travel.state.gov/content/visas/english/study-exchange/exchange/exchange-visitor-skills-list.html (last visited Aug. 29, 2014).
[29] *See* 22 C.F.R. § 41.63 (2007).
[30] Fulbright-Hays Act of 1961, Pub. L. No. 87-256, 75 Stat. 527.

strengthen ties between nations and assist in the development of friendly countries.[31] The J status program, and the two-year home residency requirement, made great sense in 1961 as the United States was the unrivaled economic superpower that was locked in a global struggle for hearts and minds in developing nations.[32] However, in today's hyper-competitive global economy, the two-year home residency requirement may be an unnecessary impediment to the United States' ability to compete for talent. A good approach here may be to either eliminate the two-year home residency requirement based on the skills list altogether, or to significantly reduce the types of skills (or nationalities) to which it may apply.

The two-year home residency requirement may also be invoked if the program in which the foreign national is participating was funded by either the home country or U.S. government.[33] If funded by the home government, this requirement is simply fair in order to allow the home government to reap the benefit of funding the student's program. If funded by the U.S. government, this requirement should be eliminated in most cases; it simply prevents the United States from taking advantage of a skill it has paid to develop.

2. Retaining STEM graduates

The *United States Immigrations and Customs Enforcement General Summary Quarterly Review*, issued July 2014, reports that there are currently 1,015,178 F-1 & M-1 students and 188,382 J-1 exchange visitors currently in the United States.[34] This makes the United States the leading host country for international students, enrolling approximately one-fifth of all mobile students worldwide as of 2009.[35] The United States is also the top destination country for foreign students pursuing degrees in the STEM fields.[36] Yet global competition for top talent, particularly in the STEM fields, makes it imperative for the United States to continue to attract the best and brightest foreign talent, to improve their experience during their studies, and to ultimately retain them to staff the future.[37]

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[31] *Id.*

[32] Paul B. Stephan, INTERNATIONAL GOVERNANCE AND AMERICAN DEMOCRACY, 1 Chi. J. Int'l L. 237, 239 (2000).

[33] *See* 22 C.F.R. § 41.63 (2007).

[34] *SEVIS By the Numbers*, U.S. IMMIGRATIONS & CUSTOMS ENFORCEMENT (Apr. 2014), http://www.ice.gov/doclib/sevis/pdf/by-the-numbers.pdf.

[35] Rahul Choudaha & Li Change, *Trends in International Student Mobility*, WORLD EDUCATIONAL SERVICES (Feb. 2012), http://www.wes.org/ras/TrendsInInternationalStudentMobility.pdf.

[36] Ruth Ellen Wasem, *Immigration of Foreign Nationals with Science, Technology, Engineering, and Mathematics (STEM) Degrees*, CONGRESSIONAL RESEARCH SERVICE (Nov. 26, 2012), at 1, http://www.fas.org/sgp/crs/misc/R42530.pdf.

[37] *See Position Statement: U.S. Talent Crisis*, NAT'L ASS'N OF C.S & EMP'RS (Oct. 2007), http://www.naceweb.org/advocacy/position-statements/united-states-talent-crisis.aspx.

One major issue in the current immigration system is the disparity between the number of U.S. students pursuing STEM degrees and the projected need for top talent in STEM careers.[38] Between 2010 and 2020, employment in STEM occupations is expected to expand faster than employment in non-STEM occupations by seventeen versus fourteen percent.[39] Further, both government officials and private industry cite "concerns regarding shortages of skilled workers . . . compounded by the pending retirements of many baby boomers."[40] Correspondingly, the supply of STEM talent is not keeping up with demand.

Although the number of students receiving degrees from four-year institutions has increased in the United States over the past several decades, the share of students graduating with STEM degrees has declined. The percentage of bachelor's degrees awarded in STEM fields declined from twenty-four percent in 1985 to eighteen percent in 2009.[41] During the same time period, the percentage of master's degrees awarded in STEM fields dropped from eighteen percent to fourteen percent.[42] Although the share of doctorate degrees in the STEM fields was relatively stable between 1985 and 2009, the share of those degrees going to domestic students dropped from seventy-four percent to fifty-four percent.[43] Overall, the number of full-time foreign graduate students in science, engineering, and health fields grew from 91,150 in 1990 to 148,923 in 2009.[44] In sum, there is an increase in the demand for STEM professionals, a decrease in the share of students pursuing STEM degrees, and of the students pursuing STEM degrees, a decrease in the share of domestic students pursuing such degrees. Policy changes must be made to address this growing issue.

One reason often cited for the shortage of domestic STEM professionals is the lack of a strong foundation in math and science from elementary and secondary school.[45] The quality of math and science

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[38] *Id*.

[39] STAFF OF J. ECON. COMM. CHAIRMAN, STEM EDUCATION: PREPARING FOR JOBS OF THE FUTURE 2 (Apr. 2012), *available at* http://www.jec.senate.gov/public/index.cfm?a=Files.Serve&File_id=6aaa7e1f-9586-47be-82e7-326f47658320.

[40] *Id.* at 3; *See also The Reauthorization of the America Competes Act Before the H. Comm on Sci. Tech.*, 111th Cong. (2010) (statement of Thomas J. Donohue, CEO, U.S. Chamber of Commerce), *available at* https://www.uschamber.com/sites/default/files/legacy/testimony/100119_americacompetes.pdf; *The STEM Workforce Challenge: The Role of the Public Workforce System in a National Solution for a Competitive Science, Technology, Engineering, and Math Workforce*, U.S. DEP'T OF LABOR, EMP'T & TRAINING ADMIN. (Apr. 2007), *available at* http://doleta.gov/youth_services/pdf/STEM_Report_4%2007.pdf.

[41] STAFF OF J. ECON. COMM. CHAIRMAN, *supra* note 37, at 4.

[42] *Id*.

[43] *Id*.

[44] *See* Wasem, *supra* note 34, at 3.

[45] *See STEM Education: Bolstering Future American Competitiveness*, COUNCIL OF STATE GOV'TS (2008), http://csg.org/knowledgecenter/docs/TIA_STEM%20education.pdf. *See also CSTA National Secondary Computer Science Survey: Comparison of Results from 2005, 2007, 2009,*

teaching is the greatest factor in improving student achievement in STEM fields, yet not enough K-12 math and science teachers have an educational background or in-field experience in STEM.[46]

Creative solutions are necessary to address future shortages in the STEM fields. One potential solution gaining traction in recent years has been the proposal to create a separate "STEM visa," or an expedited path to legal permanent resident status for those in STEM fields. While the STEM visa idea has gained interest in Congress, efforts to pass the initiative have been unsuccessful as of yet.[47]

Another possibility, which may address several of the issues discussed above, is a new visa category for STEM graduates that would provide an expedited path to legal permanent resident status contingent upon a certain number of years of service teaching K-12 math, science, or technology. Such a program, modeled off of the Teach for America program, in which recent college graduates dedicate at least two years to teaching in low-income communities,[48] would have the benefit of retaining foreign STEM graduates in the United States, integrating them into the local community and providing highly trained math, science, and technology teachers in our K-12 institutions. These professionals would not count toward H-1B quotas, which are already stretched thin, but rather would be considered in a class of their own. Upon completion of their teaching commitment, these professionals would be given a grace period within which to locate full-time employ in the STEM fields, or could continue on in the teaching profession.

III. FOREIGN WORKERS

A. H1-B Quotas

One of the primary status classifications available to alien professionals with specialized knowledge is the H-1B classification. While the possible permutations of availability and restriction of H-1B are highly complex, in general, qualification for H-1B requires that the proffered job is one for which a bachelor's degree or equivalent is the minimum requirement for entry and that the proposed individual who will fill this

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2011, and 2013 Surveys, COMPUTER SCI. TCHRS ASSOC., http://csta.acm.org/Research/sub/Projects/ResearchFiles/CSTASurvey2013Comp.pdf (last visited Jan. 23, 2015).

[46] STAFF OF J. ECON. COMM. CHAIRMAN, *supra* note 37, at 4. S*ee also Table 1-8: Preparation of Public School Mathematics and Science Teachers for Teaching in Their Field, by School Level and Teaching Field: Academic Years 2003-04 and 2007-08*, NAT'L SCI. FOUND., www.nsf.gov/statistics/seind12/c1/tt01-08.htm (last visited Jan.23, 2015).

[47] Wasem, *supra* note 34, at 16.

[48] "Our Mission," Teach for America, available at https://www.teachforamerica.org/our-mission (last visited Feb. 21, 2015).

position possesses the minimum educational requirements.[49]

The number of workers who can attain H-1B classification is limited to an annual quota of 65,000 participants.[50] This numerical limit does not apply to participants approved for H-1B status to work for institutions of higher learning or related non-profit entities, to those working for a non-profit or government research organization, or to persons who have earned a master's degree or higher from a U.S. institution of higher learning (although this last exception is capped at 20,000 participants per year).[51] With allowed renewals, the H-1B classification may generally be used for a maximum of six years.[52]

The entire annual quota for H-1B is often subscribed within the first few days of filing. For the FY2014 H-1B availability, the Citizenship and Immigration Service received 124,000 applications within the first week for the 65,000 regular slots and 20,000 advanced degree slots, and had to conduct a lottery among those applicants.[53] For FY2015 availability, the CIS again received more petitions with the first week than allowed by the entire annual quota and was required to conduct a lottery as to which of those applications would be accepted.[54]

While H-4 status (dependents of H1-B status holders) does not count against the annual H1-B quota, H-4 dependents are not authorized to work in the United States.[55] This restriction is often a source of great frustration, as those individuals qualified to hold H-1B status are often married to persons who also possess professional qualifications. The Citizenship and Immigration Service currently is processing a proposed rule which would allow certain H-4 status holders to apply for work authorization.[56] If the rule becomes effective, it would apply to H-4 spouses (not children) in certain cases where an immigrant petition has been approved, or the principal H1-B has been extended beyond six years based on progress toward permanent residence.[57]

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[49] Immigration and Nationality (McCarran) Act § 101, 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2014).
[50] *See Id.* § 1184(g)(1)(A)(vii).
[51] *See Id.* § 1184(g)(5).
[52] *See Id.* § 1184(g)(4).
[53] Press Release, U.S. Citizenship & Immigr. Serv., USCIS Reaches FY 2014 H-1B Cap (Apr. 8, 2013), *available at* http://www.uscis.gov/news/uscis-reaches-fy-2014-h-1b-cap.
[54] Press Release, U.S. Citizenship & Immigr. Serv., USCIS Reaches FY 2015 H-1B Cap (Apr. 7, 2014), *available at* http://www.uscis.gov/news/uscis-reaches-fy-2015-h-1b-cap.
[55] 8 U.S.C. § 1184(g)(2).
[56] H-4 Employment Authorization for Certain H-4 Dependent Spouses, 79 Fed. Reg. 26886 (proposed May 12, 2014) (to be codified at 8 C.F.R. pts. 214 and 274a).
[57] *Id.*

B. H1-B and Entrepreneurs

According to U.S. Census Bureau data, "[a]bout three quarters of all U.S. business firms have no payroll. Most are self-employed persons operating unincorporated businesses . . . ."[58] While in this initial stage, these businesses "account for only about 3.4 percent of business receipts."[59] Additionally, many (if not most) of these businesses fail.[60]

However, further review of census bureau data reveals that the average receipts for these nonemployer entities is around $45,344.[61] By comparison, the median income for a nonfamily male householder in 2012 was $36,989.[62] A recent review by Forbes Magazine found the number of these nonemployer firms generating more than one million dollars in revenue to be greatly increasing.[63] More importantly, these businesses are often innovative operations or new applications of technology and may either grow into large employers, or be strategic purchases for existing companies.

In order to petition for H1-B status, the petitioning company must be a U.S. employer.[64] Where the potential employee is the majority owner and cannot be fired by the petitioning company, the required employer-employee relationship does not exist and H1-B cannot be granted.[65] While self-petitioning could be subject to heightened fraud potential, the inability to do so likely eliminates many entrepreneurial activities in innovative and creative endeavors (which then likely end up being developed overseas). Perhaps self-petition applications for H-1B could be allowed with the development of special additional qualifying criteria, along with additional reporting and audit procedures. In many cases, similar barriers and potential solutions exist regarding permanent residence. For example, the labor certification process requires that qualifying employment must be full-time, permanent, and not self-employment.[66]

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[58] *Employment Size of Firms, Employers and Nonemployers*, U.S. CENSUS BUREAU, http://www.census.gov/econ/smallbus.html (last visited Jan. 23, 2014).
[59] *Id.*
[60] Moya K. Mason, *Research on Small Business*, MOYAK.COM, http://www.moyak.com/papers/small-business-statistics.html (last visited Jan. 23, 2014).
[61] *2012 Nonemployer Statistics*, U.S. CENSUS BUREAU, http://censtats.census.gov/cgi-bin/nonemployer/nonsect.pl (last visited July 12, 2014). Average receipts calculated by dividing receipts for all sectors ($1,030,932,886,000) by the number of employers (22,735,915). *Id.*
[62] *Id.*
[63] Elaine Pofeldt, *The Rise of the Million Dollar, One-Person Business*, FORBES (June 29, 2013, 6:10 PM), http://www.forbes.com/sites/elainepofeldt/2013/06/29/the-rise-of-the-million-dollar-one-person-business/.
[64] 8 C.F.R. § 214.2(h)(2)(i)(A) (2013).
[65] Memorandum from Donald Neufeld, Assoc. Dir., U.S. Citizenship & Immigration Serv.s Ctr. Operations to Serv. Ctr. Dir.s (Jan. 8, 2010) (on file with author).
[66] 20 C.F.R. § 656.3 (2009).

C. Domestic Visa Processing

As pointed out earlier in this article, status and visa are two distinct concepts. Status is the authorization to undertake a certain type of activity in the United States, for a certain duration of time, while a visa is the document which allows entry into the United States to undertake this status. One can be granted a new status or renewal of a prior status and undertake or continue if already present in the United States, but for any new entries to the United States, most nationalities and status types would also require a visa based upon that status.

As noted in detail in an earlier article,[67] this means that an employee with a new or renewed status may be allowed to stay in the United States based on that status, but if he or she anticipates any travel out of the United States, he or she must first travel to a U.S. consulate in their home country, Canada, or Mexico simply for the purpose of obtaining a visa stamp for future travel.[68] Prior to the terrorist attack on September 11, 2001, persons renewing a visa in the same classification could obtain a renewed stamp by mail;[69] however, this option has been eliminated due to concerns that it did not involve in-person verification of identity.[70]

Requiring professional workers (and their families), who are legally authorized to be in the United States, to travel out of the United States and attend a visa appointment at a U.S. consulate abroad is a massive waste of time, energy, money, and lost work time to U.S. business. A domestic visa processing post (or multiple posts) should be created to handle these visa interviews for those who are already in the United States legally and have already been granted a new or extended status by the immigration service.

This processing center could be established in an economically blighted area (or areas). Rather than sending these legal employees and their families abroad to spend money at foreign hotels, restaurants, taxis, and on foreign airlines, those funds could all be spent right here in the United States, as well as supporting employment of U.S. citizens and permanent residents at the processing facility. These would be in-person interviews, addressing the security concerns which caused the elimination of the by-mail renewal system.

This system would reduce lost work-days to U.S. business, and immediately shift a very large amount of money being spent abroad to

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[67] Jeff Papa, *Basic Options in the Non-Immigrant Business Context*, 15 IND. INT'L & COMP. L. REV. 279, 295 (2005).

[68] Papa, *supra* note 4, at 295. For example, to schedule a visa appointment in Canada, one must first visit an official website. OFFICIAL VISA SERVICES OF THE UNITED STATES OF AMERICA – CANADA, https://usvisa-info.com/en-ca/selfservice/ss_country_welcome (last visited Jan. 23, 2015).

[69] U.S. DEPT. OF STATE, 9, FOREIGN AFF. MANUAL 41.102(2014).

[70] Discontinuation of Reissuance of Certain Nonimmigrant Visas in the United States, 69 Fed. Reg. 35,121 (June 23, 2004).

domestic spending and job creation. Those few individuals examined who may be found out of status or ineligible for some reason could be removed directly from this facility to a third country (and the cost of this could be built into the visa processing fees), or for minor paperwork questions, individuals could be rescheduled for a later date (rather than under the current system, being stuck outside the United States and unable to perform their duties). This proposal was discussed in greater detail in a prior article by this author, but remains a great opportunity for simplification and economic growth.[71]

V. CONCLUSIONS

The purpose of this article is to survey professionals in higher education and immigration practitioners to review areas where the current administration of authorized immigration contains inefficiencies, unnecessary, or unintended restrictions, or where Cold War policies remain in place and inhibit U.S. economic competitive abilities unnecessarily. The intent of this paper is not to propose radical change or fundamentally alter the number or types of authorized statuses.

However, when considering the current U.S. crisis in STEM scholarship, the vastly improved economic competitiveness of the rest of the world, and simple bureaucratic prohibitions that exist accidently, or as remnants of old systems, there are several modest changes that can be made to improve U.S. economic competitiveness and efficiency. We have suggested several of these ideas for further discussion. There are many other similar ideas, but these steps could be taken as practical solutions within the currently authorized immigration system without being caught up in the massive undertaking or political aspects of recent debate regarding comprehensive immigration reform and border security.

Regardless of opinions on these broader issues, those activities currently allowed under U.S. law, and discussed in this article, are not perfect and could benefit from modest proposals for change. Hopefully, this article can play a small part in catalyzing discussions which can help move the U.S. economy and education system forward. Our global competition continues to improve in their ability and sophistication; the United States must find new ways to compete in order to retain and regain our economic advantage.

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[71] Papa, *supra* note 4, at 297, 298.

ACCESS TO HIGHER EDUCATION FOR UNDOCUMENTED AND "DACAMENTED" STUDENTS: THE CURRENT STATE OF AFFAIRS

Angela Adams[*]

Kerry S. Boyne[**]

I. INTRODUCTION

An estimated 11.5 million of the more than 40 million foreign-born individuals residing in the United States are considered "undocumented immigrants."[1] Roughly 1.8 million of the nation's undocumented population is eighteen years old or younger,[2] and an estimated 65,000 undocumented students graduate from American high schools each year.[3] In light of the expansive undocumented youth population in the United States, on June 15, 2012, the Obama Administration authored the memorandum

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[**]Kerry S. Boyne received her J.D. from Indiana University Maurer School of Law in 2012. Ms. Boyne works in the immigration field, assisting clients in acquisition of deferred action for childhood arrivals, family based immigrant visas, U visas, adjustment of status, asylum, consular processing, waivers of inadmissibility, and various forms of relief from removal.

[1] Faye Hipsman & Doris Meissner, *Immigration in the United States: New Economic, Social, Political Landscapes with Legislative Reform on the Horizon*, MIGRATION POLICY INST. (Apr. 16, 2013), http://perma.cc/9D66-62W5. This term refers to those foreign born individuals residing in the United States without lawful immigration status.

[2] Vanessa Cárdenas & Sophia Kerby, *The State of Latinos in the United States*, CTR. AM. PROGRESS (Aug. 8, 2012), https://perma.cc/TLB2-QWSP.

[3] CATHERINE EUSEBIA & FERMÍN MENDOZA, EDUCATORS FOR FAIR EDUCATION, THE CASE FOR UNDOCUMENTED STUDENTS IN HIGHER EDUCATION 5 (2013), *available at* http://perma.cc/UJM4-MR8E.

http://dx.doi.org/10.18060/7909.0004

Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.[4] This memorandum called for a new program referred to as Deferred Action for Childhood Arrivals ("DACA") and directed U.S. immigration authorities to withhold immigration enforcement against, and grant temporary relief to, many young undocumented individuals residing in the United States. When implemented, the DACA program represented a monumental change in our nation's immigration policies and stood to benefit an estimated 1.4 million undocumented youths in the United States.[5] Since its inception approximately 642,685 individuals have applied for DACA, with more than 553,000 applications approved and several thousand still pending.[6] On November 20, 2014, the President announced an expanded DACA which could stand to benefit an additional 300,000 people in the United States.[7]

The implementation of the DACA program has prompted new discourse regarding state laws and policies addressing access to postsecondary education for "DACAmented"[8] and undocumented students. A growing number of states have passed legislation and implemented policies allowing both DACA recipients and undocumented students to enroll in colleges and universities, and pay resident tuition rates at public institutions of higher education. With no federal law prohibiting postsecondary enrollment[9] or resident tuition rates for DACA and undocumented students,[10] states have been dealing with these questions in different and often inconsistent ways.

This article examines developments in federal and state laws and policies that have come into play over the last decade, providing an update to the 2005 publication of *Higher Education for Undocumented Students:*

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[4] Memorandum from Sec'y of Homeland Sec. Janet Napolitano to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot.; Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services; and John Morton, Director, U.S. Immigration and Customs Enforcement (June 15, 2012) [hereinafter Napolitano Memorandum], *available at* http://perma.cc/R4C7-76SM.

[5] *Economic Benefits of Granting Deferred Action to Unauthorized Immigrants Brought to U.S. as Youth*, IMMIGRATION POL'Y CTR. (June 22, 2012), http://perma.cc/W6FB-EABT.

[6] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012-2014 (2014), *available at* http://perma.cc/9W9B-TD3U.

[7] *See* http://www.uscis.gov/immigrationaction#daca for additional guidelines on expanded DACA program.

[8] A term often used to refer to DACA recipients, *see* Roberto G. Gonzales & Angie M. Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA*, IMMIGRATION POLICY CTR. (June 2014), http://perma.cc/Q2EF-QAWS.

[9] *See* discussion *infra* Part III.A.

[10] *See* discussion *infra* Part III.B.

The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Immigration Status.[11] Specifically, this article focuses on how these developments relate to access to education for our nation's undocumented and DACAmented population. First, the authors examine federal initiatives offering relief to undocumented youths in the United States and the development of the DACA program. Next, the article considers how access to higher education for both undocumented and DACA students is viewed under federal laws. The study concludes by analyzing the intersection and impact of federal advances with a sampling of state laws and policies related to the enrollment and access to resident tuition rates at public universities for DACA and undocumented students.

II. "DREAMERS" AND THE DISTINCTION BETWEEN DACA RECIPIENTS AND UNDOCUMENTED STUDENTS

A. The Current Status of the DREAM Act

For more than a decade, a number of federal laws have been proposed that would offer assistance to undocumented students living in the United States. The Development, Relief, and Education of Alien Minors ("DREAM") Act was initially introduced in the Senate in 2001.[12] The DREAM Act was designed to confer lawful immigration status to certain individuals who entered this country as children and pursued a higher education degree or served in the U.S. military, often referred to as "DREAMers." The term DREAMers may include both DACA and undocumented students; however, DACA and undocumented students are not the same, as explained further below. Since its inception, the DREAM Act has been proposed in a variety of different forms, but has never been passed into law by Congress. In 2013, former House Majority Leader Eric Cantor[13] proposed the Kids Act, an alternative to the DREAM Act that would provide DREAMers an opportunity to earn a path to citizenship

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[11] Thomas R. Ruge & Angela D. Adams (Iza), *Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Immigration Status*, 15 IND. INT'L & COMP. L. REV. 257 (2005). The authors would like to thank Thomas Ruge for his contributions to this article.

[12] S. 1291, 107th Cong. (2001).

[13] On June 10, 2014, Representative Cantor lost the Republican Primary Election to Dave Brat and soon thereafter announced his intention to resign as House Majority Leader, effective July 31, 2014. *See* Luke Russert & Frank Thorp, *Cantor Announces Resignation As Majority Leader*, NBC NEWS (June 11, 2014, 1:12 PM), http://perma.cc/BK5Z-PRB8.

through either college or military service.[14] Approval of this Act is currently stalled in the House, as representatives continue to debate whether it should permit beneficiaries of the Act to petition for their undocumented parents to gain lawful status through their children.[15]

B. The Distinction between DACA Recipients and Undocumented Students

DACA, initially announced on June 15, 2012, provides certain individuals who do not have lawful immigration status and who entered the United States as minors with a two-year grant of deferred action; meaning, during that time the Department of Homeland Security ("DHS") will exercise its discretion to forego placing DACA recipients in immigration removal proceedings.[16] DACA recipients are eligible for employment authorization[17] and a Social Security number,[18] and in most states they can obtain a driver's license.[19]

DACA does not grant lawful immigration status to recipients, nor does it provide a pathway to citizenship.[20] However, under guidelines issued by U.S. Citizenship and Immigration Services ("USCIS"), receipt of DACA does, in fact, make one "lawfully present"[21] in the United States.[22] There is a clear distinction between "lawful presence" and "lawful status." An individual is deemed to be *unlawfully present* in the United States if he or she entered the country without having been admitted or paroled or

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[14] Cesar Vargas, *Halt Deportation and Pass KIDS Act As Steps to Immigration Reform*, THE HILL (Nov. 16, 2013, 9:00 AM), http://perma.cc/4AW7-P64S.

[15] Fawn Johnson, *Parent Sponsorship Stalls Kids Act*, NAT'L J. (Nov. 3, 2013), http://perma.cc/B493-HAER.

[16] Napolitano Memorandum, *supra* note 8.

[17] *Id.*

[18] SOC. SEC. ADMIN., SOCIAL SECURITY NUMBER—DEFERRED ACTION FOR CHILDHOOD ARRIVALS, *available at* http://perma.cc/EEN6-6Y3F.

[19] *Are Individuals Granted Deferred Action Under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for State Driver's Licenses?* NAT'L IMMIGRATION LAW CTR. (June 19, 2013), http://perma.cc/Y2PE-TC2D.

[20] U.S. DEP'T HOMELAND SEC., U.S. CITIZEN & IMMIGRATION SERVS., FREQUENTLY ASKED QUESTIONS [hereinafter USCIS FAQ] ("Deferred Action for Childhood Arrivals (DACA) is an exercise of prosecutorial discretion and does not provide lawful status or a pathway to citizenship."), http://perma.cc/7DN7-M8ZQ.

[21] The concept of lawful presence plays an integral role in examining a student's eligibility for in-state tuition; s*ee* discussion *infra* Parts III and IV.

[22] *See* USCIS FAQ, *supra* note 23 ("However, although deferred action does not confer a lawful immigration status, your period of stay is authorized by the Department of Homeland Security while your deferred action is in effect and, for admissibility purposes, you are considered to be lawfully present in the United States during that time.").

remains in the country following the expiration of an authorized stay.[23] *Unlawful status*, on the other hand, relates to whether or not the individual has violated the terms of his or her previously lawful status by committing a certain act, like a crime or accepting unauthorized employment.[24] DACA recipients, therefore, find themselves in a unique situation, as they are lawfully present in the United States regardless of their lack of immigration status. However, given the fact DACA is not enacted as law, DHS has the authority to renew or even terminate a DACA grant at any time. Further, because DACA operates by presidential executive authority, the program's continuance depends on the desire of future U.S. Presidents.

In order to qualify for DACA, an undocumented individual must:

1. have entered the United States before his or her sixteenth birthday;

2. have been continuously present in the United States[25] since June 15, 2007[26] and, more specifically, been physically present in the United States on June 15, 2012;

3. be currently enrolled in school, graduated from high school, obtained a General Educational Development ("GED") certificate, or be enrolled in or have successfully completed another qualifying

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[23] Immigration and Nationality Act (INA) § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii) (2013).

[24] 9 Foreign Affairs Manual § 40.92 (2013).

[25] An exception is made for "brief, casual, and innocent" absences from the United States. *See* U.S. Dep't Homeland Sec., U.S. Citizen & Immigration Servs., *Consideration of Deferred Action for Childhood Arrivals (DACA): Guidelines* [hereinafter USCIS, *Guidelines*], http://perma.cc/N5U3-B8B2 (last updated Feb. 18, 2014).

[26] *Id.*; Additionally, the reader should note that on November 20, 2014, the Obama Administration announced, among other immigration initiatives, an "expanded" form of DACA that would permit individuals who have been continuously present in the United States since January 1, 2010, rather than June 15, 2007, to apply for DACA benefits that would span a three-year timeframe. Memorandum from Sec'y of Homeland Sec. Jeh Johnson to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services; Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement; and R. Gil Kerlikowske, Comm'r, U.S. Customs and Border Prot. (November 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf. USCIS was scheduled to begin processing applications for expanded DACA on February 18, 2015; however, in light of a recent preliminary injunction issued by the Southern District of Texas, the Service has placed a hold on processing said applications pending the resolution of the federal lawsuit. *See* http://pdfserver.amlaw.com/nlj/texas_immigration_20150216.pdf. *See also* Julia Preston, *Obama Immigration Policy Halted by Federal Judge in Texas*, NY TIMES (Feb. 17, 2015), http://www.nytimes.com/2015/02/18/us/obama-immigration-policy-halted-by-federal-judge-in-texas.html.

educational program (e.g., GED preparatory course and/or English as a second language course);
4. be at least fifteen years old at the time of the application,[27] but not more than thirty as of June 15, 2012; and
5. have never been convicted of a felony, significant misdemeanor,[28] or more than three non-significant misdemeanors, and not pose a national security or public safety threat.

The implementation of the DACA program grants those to which it applies authorization to work and remain in the United States. Some would therefore say that DACA recipients are no longer "undocumented" because they have been determined by the federal government to be lawfully present in the United States, irrespective of their immigration status.

III. Federal Laws Addressing Higher Education for Undocumented and DACA Students

A. Existing Federal Laws Do Not Prohibit Enrollment of DACA and Undocumented Students

Federal law neither prohibits undocumented or DACA students from enrolling in public postsecondary educational institutions nor entitles them to such a right. In *Plyler v. Doe*, the Supreme Court of the United States examined the constitutionality of a Texas statute that withheld "from local school districts any state funds for the education of children who were not 'legally admitted' into the United States, and which authorize[d] local school districts to deny enrollment to such children."[29] Relying on the Equal Protection Clause of the Fourteenth Amendment, the Court ruled that a state cannot deny a free public education from kindergarten through twelfth grade to undocumented immigrant students who are residing in a school district, as there was no empirical evidence to demonstrate that the policy would further a substantial state interest. The Court ultimately held that states must guarantee to children free public school access to a primary

[27] DHS provides for an exception of this minimum age requirement for individuals who are under the age of fifteen and have previously been in removal proceedings. *See id.*
[28] A significant misdemeanor includes an offense for which an individual was sentenced to, and actually spent, more than ninety (90) days in custody. USCIS, *Guidelines*, http://perma.cc/N5U3-B8B2 (last updated Feb. 11, 2015). Additionally, offenses of domestic violence, sexual abuse, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or, driving under the influence are also considered significant misdemeanors, regardless of the sentence imposed. *Id*.
[29] Plyler v. Doe, 457 U.S. 202, 205 (1982) (5-4 decision) (Burger, C.J., dissenting).

and secondary education, regardless of their immigration status.[30] This holding neither extends nor prohibits the same protections to higher education.

There are very few cases specifically addressing the question of admission of undocumented students into institutions of higher education. For example, in *Equal Access Education v. Merten*, the U.S. District Court for the Eastern District of Virginia addressed whether states could deny admission to undocumented students.[31] The court held that, under the Supremacy Clause of the U.S. Constitution, admissions policies must include federal immigration standards for determining the immigration status of college applicants.[32] In recognizing the absence of federal law addressing the admission of undocumented students to public institutions of higher education, the court upheld Virginia's policy of precluding undocumented students from enrolling.[33]

B. Granting Resident Tuition Rates to DACA and Undocumented Students is Not Contrary to Federal Law and is within States' Discretion

The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), codified at 8 U.S.C. §1623(a), prohibits public postsecondary educational institutions from providing any "alien who is not lawfully present in the United States" with a postsecondary education benefit, "unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident."[34] Because DACA students are lawfully present in the United States,[35] this federal law does not apply to them. While there are no federal regulations interpreting these statutes as applied to undocumented students, a plain reading shows no prohibition of lower tuition rates based on a uniformly applied residency or other requirement. The use of the word "unless" suggests that states have the power to determine residency for undocumented immigrant students. The statute simply conveys that a state or institution cannot give additional consideration to an undocumented student that it would not give to a U.S. citizen.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), codified at 8 U.S.C §1611, provides that foreign nationals who are not "qualified aliens" are ineligible to receive public benefits. Although DACA and undocumented students do not fit the

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[30] *Id* at 230.
[31] Equal Access Education v. Merten, 305 F. Supp. 2d 585 (E.D. Va. 2004).
[32] *Id.* at 608. For extended discussion and analysis of cases addressing enrollment of undocumented students, *see* Ruge & Iza, *supra* note 14, at 264-66.
[33] *Merten*, 305 F. Supp. 2d at 614.
[34] 8 U.S.C. § 1623(a) (2013).
[35] USCIS FAQ, *supra* note 25.

statutory definition of "qualified aliens,"[36] a careful examination of the definition of "public benefit" reveals that federal law does not prohibit offering in-state tuition rates to undocumented and DACA students. The U.S. Code provides a list of what qualifies as a "state or local public benefit," which includes "postsecondary education . . . for which *payments or assistance* are provided to an individual."[37] A number of courts have held that the definition of public benefits under 8 U.S.C. §1621 and §1623 refers to monetary benefits and not the granting of in-state tuition rates.[38] Other courts have asserted that Congress never intended to prohibit states from providing in-state tuition to foreign nationals, because it would have written §1623 differently had it intended to do so.[39] Under 8 U.S.C. §1621(d), states have the authority to enact laws that determine the eligibility of foreign national students for certain state and local benefits.[40] The Supreme Court of the United States has also held that states have the discretionary power to regulate tuition for publicly-funded schools.[41] The Court has remarked that public education is not "merely some governmental 'benefit' indistinguishable from other forms of public welfare."[42] Therefore, federal law does not prohibit DACA and undocumented students from receiving in-state tuition rates, and states have discretion to enact laws in this area.

C. Federal Law Restricts Federal and State Financial Aid to DACA and Undocumented Students but Gives States Authority

The statutes discussed above prohibit DACA and undocumented students from receiving federal and state financial aid as they would not be considered "qualified aliens."[43] In addition, financial aid would likely be considered a "state or local public benefit," which 8 U.S.C. §1621 defines as:

> (a) any grant, contract, loan, professional license or

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[36] Among other categories, qualified aliens are those with lawful permanent resident status, asylees, and refugees. *See* 8 U.S.C. § 1641(b).
[37] *See* 8 U.S.C. § 1623(c)(1)(B) (emphasis added).
[38] *See Merten*, 305 F. Supp. 2d at 607; *see also* County of Alameda v. Agustin, 2007 Cal. App. Unpub. Lexis 7665, at *10 (1st App. Dist. Sept. 24, 2007).
[39] *See* Martinez v. Regents of the Univ. of California, 50 Cal.4th 1277, 241 P.3d 855, 117 Cal.Rptr.3d 359 (Cal., 2010).
[40] 8 U.S.C. §1621(d).
[41] *See* DeCanas v. Bica, 424 U.S. 351, 358 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* Chamber of Commerce of the United States v. Whiting, 131 S.Ct. 1968, 1975 (2011).
[42] *See* Plyler v. Doe, 457 U.S. 202, 221 (1982).
[43] 8 U.S.C. §1641(b).

> commercial license provided by an agency of a State or local government or by appropriate funds of a State or local government; and (b) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistant, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.[44]

However, under 8 U.S.C. §1621(d), states retain the authority to provide state and local public benefits to "an alien who is not lawfully present in the United States."[45] Under this provision, five states have passed legislation allowing undocumented students to qualify for state financial aid.[46] Absent state legislation, these existing federal restrictions laid out in 8 U.S.C. would likely prohibit a state or institution from granting state funded financial aid to DACA and undocumented students.

IV. State Approaches Increasing Access to Postsecondary Education for Daca and Undocumented Students

Below is a sampling of a variety of state laws, referendums, and policies outlining states' stances on providing in-state tuition to undocumented students and, more specifically, DACA recipients. Also included is an overview of a number of state and federal cases interpreting the constitutionality of state-led initiatives granting in-state tuition rates to undocumented students.

A. State Legislation and Polices Regarding Eligibility for Resident Tuition Rates

While only five states currently allow undocumented students to qualify for state financial aid,[47] at least twenty-one states—California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Kansas, Maryland, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, Texas, Utah, Virginia, and Washington—have implemented legislation or other policy initiatives

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[44] 8 U.S.C. §1621(c).
[45] 8 U.S.C. §1621(d).
[46] *Undocumented Student Tuition: State Action*, NAT'L CONF. STATE LEGISLATURES (June 12, 2014), http://perma.cc/M29C-B9H3 (listing California, Minnesota, New Mexico, Texas, and Washington as the only states that currently allow undocumented students to receive state financial aid).
[47] *Id*.

classifying DACA and undocumented students as eligible recipients of in-state tuition rates.[48] These policy measures include a wide range of residency and high school attendance or graduation requirements, and some states require students to sign an affidavit promising to seek legal immigration status.[49] Some states reserve this benefit for DACA recipients only, requiring undocumented students to pay out-of-state tuition. Below is a sampling of recent state policies that qualify undocumented or DACA students for enrollment and resident tuition rates at state public colleges and universities.

Virginia: Virginia previously espoused the view that "section 505 of IIRIRA prohibited states from offering in-state tuition to undocumented immigrants unless the same is provided equally to all citizens."[50] However, the state has seen a number of recent policy developments regarding access to in-state tuition rates for undocumented students. In January 2014, Virginia State Senator Donald McEachin introduced Senate Bill 249, proposing in-state tuition rates for DACA recipients if they, or their parents, could demonstrate having filed state taxes for three or more years.[51] However, this bill failed to pass the Senate Education and Health Committee.[52] Recently, Virginia Attorney General Mark Herring issued a memorandum to the State Council of Higher Education, the presidents of Virginia's colleges and universities, and the chancellors of the Virginia Community College System, asserting that DACA recipients are eligible to pay the resident tuition rate under the existing state law.[53] Virginia Code §23-7.4 lays out the resident tuition rate qualifications, focusing primarily on domiciliary requirements. Like other students looking to pay in-state tuition rates, DACA students must demonstrate that they (1) have a fixed place of residence in Virginia, (2) have maintained a domicile in the state for

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[48] *State Laws and Policies*, NAT'L IMMIGRATION LAW CTR. (June 9, 2014), http://perma.cc/J36A-UN8Y; Letter from Mark R. Herring, Att'y Gen. for the Commonwealth of Va. (Apr. 29, 2014), *available at* http://perma.cc/J47A-STNC; *Basic Facts about In-State Tuition for Undocumented Immigrant Students*, NAT'L IMMIGRATION LAW CTR. (June 2014), http://perma.cc/9MWZ-YAXS.

[49] *Basic Facts*, *supra* note 50.

[50] Ruge & Iza, *supra* note 14, at 272.

[51] *State Bills on Access to Education for Immigrants*, NAT'L IMMIGRATION LAW CTR. (September 29, 2014), http://perma.cc/W45V-N4FS.

[52] S. 249, 2014 Va. Gen. Assemb. Reg. Sess. (Va. 2014), *available at* http://perma.cc/6DDA-X533.

[53] Herring, *supra* note, 50.

at least one year following receipt of DACA, and (3) intend to remain there indefinitely.[54]

Florida: On May 2, 2014, the Florida House of Representatives passed House Bill 851 and Florida Governor Rick Scott signed the bill into law on June 9, 2014.[55] The new measure requires state colleges, universities, and charter technical career centers to offer in-state tuition to "students who are undocumented for federal immigration purposes" and who: (1) attended a Florida secondary school at least three years before graduating from a state high school, (2) apply for admission to a state postsecondary educational institution within twenty-four months of high school graduation, and (3) provide that institution with an official Florida high school transcript.[56]

Indiana: On July 1, 2011, the Indiana General Assembly enacted House Bill 1402, which restricts individuals "*not lawfully present* in the United States"[57] from qualifying for resident tuition rates at public universities. A separate law, Senate Enrolled Act 590 ("SEA 590"), went into effect on July 1, 2011, and requires a state agency to verify the eligibility of an applicant for public benefits.[58] SEA 590 states "the term 'state or local public benefit' has the meaning set forth in 8 U.S.C. 1621" and "includes (1) a postsecondary education award, including a scholarship, a grant, or financial aid; and (2) the resident tuition rate (as determined by the state educational institution)."[59] Indiana Code 24-14-11-1 restricts in-state tuition eligibility to those lawfully present in the United States. However, under Senate Bill 207, which passed into law on May 7, 2013, this restriction does not apply to individuals enrolled in state educational institutions on or before July 1, 2011.[60]

B. Case Law Addressing In-State Tuition Rate Eligibility

Various state and federal courts have found that offering resident

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[54] *Id*.
[55] H.R. 851, 2014 Leg., Reg. Sess. (Fla. 2014) (enacted), *available at* http://perma.cc/8XVR-LFXS.
[56] Fla. Stat. § 1009.26(12)(a) (2014), *available at* http://perma.cc/CCD9-R5BU.
[57] Ind. Code § 21-14-11-1(a) (2011) (emphasis added).
[58] Ind. Code § 12-32-1-3 (2014).
[59] *Id*.
[60] Ind. Code § 12-32-1-5(d)(3).

tuition rates to undocumented students does not violate federal law. In *Day v. Sebelius* and *Martinez v. Regents of the University of California*, plaintiffs challenged laws granting in-state tuition to undocumented students in Kansas and California, respectively.[61] In both cases, the plaintiffs argued that the legislation violated federal immigration laws and the Equal Protection Clause. Both cases were dismissed on the grounds that the plaintiffs failed to prove that the law injured them personally. In *Martinez*, the appellate court overturned the lower court's dismissal, ruling that the California statute granting in-state tuition to undocumented students violated federal law. However, in a unanimous decision, the California Supreme Court reversed the appellate court's ruling, asserting that since individuals do not qualify for in-state tuition at a California public college or university based on residence, but rather, on attendance and graduation from a state high school, the statute did not violate federal law.[62] The U.S. Supreme Court refused to hear an appeal from this decision.[63] As it stands, there is no law that prohibits states from allowing undocumented or DACA students to qualify for resident tuition rates.

V. The Continuing Debate Over Access to Higher Education for "DACAmented" and Undocumented Students

With no federal law in place either providing for or prohibiting undocumented and DACA students from enrolling in or receiving in-state tuition for public postsecondary educational institutions,[64] state policy initiatives are in limbo. Efforts by several states to restrict enrollment and resident tuition rates are being challenged, but the issues remain unresolved. The following examples illustrate the unsettled nature of these issues.

Georgia: In October 2010, the Board of Regents of the University System of Georgia ("USGBOR") adopted Policy 4.1.6, which states that "[a] person who is not lawfully present in the United States shall not be eligible for admission to any University System Institution which, for the two most recent academic years, did not admit all academically qualified applicants (except for cases in which applicants

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[61] Day v. Sebelius, 376 F. Supp. 2d 1022 (D.Kan. 2005); Martinez v. Regents of the Univ. of Cal., 241 P.3d 855, 859 (Cal. 2010).

[62] Josh Keller, *California Supreme Court Upholds Law Giving In-State Tuition to Illegal Immigrants*, CHRON. HIGHER EDUC. (Nov. 15, 2010), http://perma.cc/8P2-PR67.

[63] Bill Mears, *Supreme Court: State Can Offer Illegal Immigrants Reduced Tuition*, CNN (June 6, 2011), http://perma.cc/R54P-XC7F.

[64] *See* discussion of *Plyler*, *supra* Part III.A.

were rejected for non-academic reasons)."[65] According to the USGBOR policies, DACA students are not recognized as being lawfully present in the United States and, consequently, undocumented and DACA students are ineligible to attend the state's top-five state universities.[66] This policy prompted thirty-nine DACA recipients to file suit in Dekalb County Superior Court against the USGBOR.[67] The Court ultimately dismissed the suit, concluding USGBOR qualified for sovereign immunity.[68] The Court therefore could not properly rule on the central issue of whether DACA recipients are "lawfully in [the] state."[69] The Court noted "[t]he fact that judicial review is not available to resolve this issue is lamentable."[70] An appeal of this decision was filed with Georgia's Supreme Court in August 2014 and is currently pending.[71]

Alabama: In 2011, the Alabama legislature passed House Bill 56 into law, which contains a series of prohibitions affecting the daily lives of the state's undocumented population.[72] The measure included a prohibition on the enrollment of an "alien who is not lawfully present in the United States" in any state public postsecondary educational institution.[73] The ACLU filed suit challenging the constitutionality of

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[65] BD. REGENTS OF THE UNIV. SYS. OF GA., POLICY MANUAL § 4.16 (Oct. 29, 2010), *available at* http://perma.cc/H4VP-YP4E; *see also* KARA UMANA, ULTIMATE GUIDE FOR COLLEGE BOUND UNDOCUMENTED GEORGIA STUDENTS 11 (Matt Hicks ed., 2014), *available at* http://perma.cc/MDX5-ZRHY.

[66] *Deferred Action for Childhood Arrivals (DACA)*, GA. STATE UNIV. OFFICE OF UNDERGRAD. ADMISSION (2014), http://perma.cc/CXM7-BZHG.

[67] *DACA Recipients and the Right to In-State Tuition: Litigation Commences in Arizona and Georgia*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (Aug. 2013), http://perma.cc/Y2UU-SX66.

[68] DACA Beneficiary Ga. Coll. Students v. Univ. Sys. of Georgia's Bd. of Regents, 2014 AILA InfoNet Doc. 14061050 (Super. Ct. Fulton County, Ga June 9, 2014).

[69] *Id*.

[70] *Id*.

[71] E-mail from Charles Kuck, Attorney for Plaintiffs, to Author (June 30, 2014) (on file with the author); *See also*, Michael A. Olivas, "State and federal cases involving Higher Education and immigration, 2004- 2014 and all cases citing Sections 1621/1623 (by current citation)," University of Houston Law Center, http://www.law.uh.edu/ihelg/documents/Cases2004-2014cases1621_1623/homepage.asp.

[72] H.R. 56, Ala. H. Rep. (Ala. 2011) (enacted), *available at* http://perma.cc/6F5-HSJ2 (making it illegal for undocumented residents to engage in business transactions; negating contracts entered into by unauthorized immigrants; and making it illegal for unauthorized immigrants to look for work).

[73] *Id*.

the law, which resulted in a settlement agreement effectively removing several provisions. Although the bar on undocumented enrollment remains in effect, Alabama law permits DACA students to enroll and pay resident tuition.[74]

New York: In 2013, legislators in New York proposed Assembly Bill 2463 ("A02463"), which is currently being held for consideration by the New York Senate Standing Committee on Higher Education. If passed into law, A02463 will prohibit the admission of any person who is not a U.S. citizen, a lawful permanent resident, an alien lawfully admitted to the United States for a temporary period of time, or a person authorized to remain in the United States temporarily under federal law to public colleges. Moreover, this bill instructs admissions officers to report any applicants or students "determined to be, or who [are] under reasonable suspicion of being, in the United States in violation of federal immigration laws" to U.S. Immigrations and Customs Enforcement and other officials. Since this proposed bill would permit "a person authorized to remain in the United States temporarily under federal law," it remains unclear whether A02463 would apply to DACA students who are "lawfully present" in the United States according to USCIS.[75]

Arizona: In 2006, Arizona voters approved the legislative ballot referendum Proposition 300, which amended Arizona Revised Statute Section 15-1803.[76] Under Proposition 300:

> a person who is not a citizen of the United States, who is without lawful immigration status and who is enrolled as a student at any university under the

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[74]Ala. Code § 16-64-2 (2014); *Tuition and State Aid Equity for Undocumented Students and DACA Grantees*, UNITEDDREAM.ORG (May 2014), http://perma.cc/J6DD-WHC6.

[75]B. A02463, 2013-14 Reg. Sess. (N.Y. 2013), *available at* http://perma.cc/YQ7G-NKLE.

[76]S. Con. Res. 1031, 47th Leg., 2d Reg. Sess. (Ariz. 2006), Ariz. Rev. Stat. § 15-1803(B), *available at* http://perma.cc/QSP5-A8YH ("In accordance with the illegal immigration reform and immigrant responsibility act of 1996 (P.L. 104-208; 110 Stat. 3009), a person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student pursuant to section 15-1802 or entitled to classification as a county resident pursuant to section 15-1802.01.").

> jurisdiction of the Arizona Board of Regents or at any community college under the jurisdiction of a community college district in [Arizona] is not entitled to tuition waivers, fee waivers, grants, scholarship assistance, financial aid, tuition assistance or any other type of financial assistance that is subsidized or paid in whole or in part with state monies.[77]

Additionally, this proposition requires colleges to report data on the number of students denied in-state tuition rates "because the applicant was not a citizen or legal resident of the United States or was not otherwise lawfully present in the United States."[78]

Following the implementations of DACA in August 2012, Governor Jan Brewer issued Executive Order 2012-06, *Re-Affirming Intent of Arizona Law In Response to the Federal Government's Deferred Action Program*. The Executive Order stipulated that access to state and local public benefits is limited under Arizona Revised Statutes §§ I-501-502 to "persons demonstrating lawful presence in the United States."[79] Governor Brewer expressed her concern that receipt of DACA "could result in some unlawfully present aliens inappropriately gaining access to public benefits contrary to the intent of Arizona voters and lawmakers who enacted laws expressly restricting access to taxpayer funded benefits and state identification."[80] Governor Brewer categorized access to resident tuition rates as a public benefit and asserted that DACA recipients were not lawfully present in the United States.

Despite the executive order, several colleges within the Maricopa County Community College District permitted DACA students who presented evidence of valid employment authorization to pay in-state tuition rates, asserting their work permits "are an acceptable proof of in-state residency."[81] This action led Arizona Attorney General Tom Horne to sue Maricopa County Community College District in June 2013, asserting that university policies allowing DACA students to

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[77] *Id.*

[78] S. Con. Res. 1031, Ariz. Rev. Stat. §15-232(C).

[79] Office of the Ariz. Governor, Exec. Order No. 2012-06, (Aug. 15, 2012), *available at* http://perma.cc/B5QP-457N.

[80] *Id.*

[81] Mary Beth Faller, *In-state Tuition Lawsuit Against Maricopa Colleges to Proceed*, AZ CENTRAL (May 2, 2014), http://perma.cc/AZB4-QPYK.

> pay in-state tuition rates stood in direct violation of Proposition 300, Executive Order 2012-06, and federal law.[82] The suit is now pending resolution and oral arguments will be heard in the Maricopa County Superior Court on March 6, 2015.[83]

The above-referenced policies and statutes demonstrate that, despite the clear difference between undocumented and DACA students, the question of how to interpret a grant of DACA in terms of admissions and in-state tuition eligibility requirements remains unresolved in many states.

VI. CONCLUSION

The implementation of the DACA program offered hope for DREAMers who have seen the failure of numerous federal legislative measures that would grant them lawful immigration status in the United States. Separately, states have implemented a variety of laws and policies in an attempt to clarify eligibility of undocumented and DACA recipients for enrollment in postsecondary education and resident tuition rates. This has led to many unresolved issues confronted by state legislative, judicial, and academic officials. Final resolution of these questions will provide clarity to not only thousands of DACA students, but also the universities that they may attend.

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[82] *DACA Recipients*, *supra* note 69.

[83] *Hearing set for arguments in Arizona Immigrant-tuition case*, TIMES UNION, (Feb. 4, 2014), http://www.timesunion.com/news/article/Hearing-set-for-arguments-in-Arizona-6061119.php.

ENDING *BACHA BAZI*: BOY SEX SLAVERY AND THE RESPONSIBILITY TO PROTECT DOCTRINE

Samuel V. Jones*

> "The practice of *bacha-bazi*, the use of boys as sex slaves by men in positions of power, remained a serious concern."
>
> —*Report of the Secretary-General to the United Nations Security Council*, May 15, 2014[1]

I. INTRODUCTION

A mother and her twelve-year old son, Nuaman, were forced to leave their town after the death of Nuaman's father.[2] During their journey, the mother accepted help from men who offered to retrieve a van for the two and drive them safely to their destination.[3] Instead of transporting the two, Nuaman recalls that the men took him away from his mother and forced him into sexual servitude:

> [T]hey kept me in a room for many days in [a place near Peshawar] where first they had sex with me by themselves for many days, and then they allowed everybody else to come and have sex with me for only 40–50 rupees. It was like I was an animal in the zoo, and people could see me and use me after paying the ticket fee. I was twelve and a half years old at that time. Within one month I think 20–30 men had sex with me and I was about to die of it.[4]

The horror Nuaman describes disrupts the lives of potentially thousands of Afghan boys.

Sex trafficking is universally recognized as a heinous crime involving

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[1] U.N. Secretary-General, *Children and Armed Conflict: Rep. of the Secretary-General*, ¶ 26, U.N. Doc. A/68/878-S/2014/339 (May 15, 2014).

[2] Jan Willem de Lind van Wijngaarden & Bushra Rani, *Male Adolescent Concubinage in Peshawar, Northwestern Pakistan*, 13 CULTURE, HEALTH & SEXUALITY 1061, 1064 (2011). Nuaman is a boy from Northwestern Pakistan, an area dominated by the Pashtun ethnic group, which is also known for practicing *bacha bazi*. *Id*. at 1061. Hence, the problem is not unique to Afghanistan, though this essay focuses primarily on Afghanistan.

[3] *Id*. at 1064.

[4] *Id*.

http://dx.doi.org/10.18060/7909.0005

sexual slavery.[5] Conventional wisdom is that the sexual enslavement of a child is so unanimously condemned under international law that it garners the highest rebuke.[6] A government's complicity in the systemic sexual enslavement of its population of children is an abnegation of its sovereign responsibility.[7] Such action subjects the offending government to sanctions or military intervention under the United Nations' *Responsibility to Protect* doctrine.[8]

This essay challenges the conventional wisdom that prohibitions against government-condoned child-sex slavery have attained non-derogable, peremptory status under international law. Much to the utter shock of field investigators and human rights experts, boy sex slavery has evolved into a constitutive and central feature of the Islamic Republic of Afghanistan (Afghanistan) because of a customary practice commonly referred to as *bacha bazi*.[9]

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[5] 22 U.S.C. § 7101(b)(9) (2012) ("Trafficking includes all the elements of the crime of forcible rape when it involves . . . fraud, force, or coercion."); *Id*. § 7101(b)(6) ("Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion."); U.S. DEP'T STATE, TRAFFICKING IN PERSONS REPORT 5 (2009), *available at* http://www.state.gov/documents/organization/123357.pdf ("Victims may suffer physical and emotional abuse, rape, threats against self and family, and even death."); Samuel V. Jones, *Men and Boys and the Ethical Demand for Social Justice*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 507, 528 (2014) (equating "sex trafficking" to the "systematic rape of boys"); Tanya Mir, *Trick or Treat: Why Minors Engaged in Prostitution Should be Treated as Victims, Not Criminals*, 51 FAM. CT. REV. 163, 164 (2013) ("Sex trafficking is the only violent crime where the abuser's desire to make money depends on the rape and sexual violence perpetuated against others."); White House, News Release, *President Bush Addresses United Nations General Assembly*, (Sept. 23, 2008, 10:12 AM), http://georgewbush-whitehouse.archives.gov/news/releases/2008/09/20080923-5.html (the president stating that nations have a responsibility to protect their populations from "human trafficking and organized crime").

[6] Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83, 90 (2009) ("Sex trafficking involves forced sex, i.e., rape, and thus constitutes one of the most egregious crimes that humans can inflict upon one another.").

[7] Samuel V. Jones, *Human Trafficking Victim Identification: Should Consent Matter?*, 45 IND. L. REV. 483, 491 (2012) (explaining that trafficking victims may be "citizens of the very country in which they are relegated to slavery or indentured servitude").

[8] 1 OPPENHEIM'S INT'L LAW § 131, at 442 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996)

(recognizing that there is a "substantial body of opinion and of practice" supporting the view that when a state inflicts cruelties against its people and denies them fundamental human rights, humanitarian intervention may be legally permissible).

[9] *See* Atia Abawi, *Ignored by Society, Afghan Dancing Boys Suffer Centuries-Old Tradition*, CNN (Oct. 27, 2009, 1:21 PM), http://www.cnn.com/2009/WORLD/asiapcf/10/26/ctw.afghanistan.sex.trade/index.html?iref=allsearch (*bacha bazi* is also referred to as "bacha baazi," "bachabaze," or "boy play," a practice under which Afghan boys are "made to dance and used as sex slaves by powerful men"); Zadzi, *Boys in Afghanistan Sold into Prostitution, Sexual*

Legal scholars have largely ignored Afghanistan's *bacha bazi* tradition, a practice that field observers, U.S. State department officials, and U.S. military officers returning from Afghanistan attribute to creating a culture of male rape.[10] This academic phenomenology is inextricably driven, in part, by false conceptions about sexual victimization.[11] Indeed, conceptions about sex slavery, like other sexual victimization crimes, have been myopically formed, promoted, and viewed through news reports, cinema, public awareness programs, academic literature, and criminal statutes as a heinous crime against women and girls. Widespread sensationalized depictions of sexually enslaved women and girls have rendered boy victims practically invisible.[12] In circumstances where the horror of male sex slavery or rape is undeniable, legal scholars have tended to ignore it,[13] dismiss it as "rare" or unique to prison populations,[14] or deem it biologically and psychologically inconsequential given the supposedly elevated social and economic advantage masculinity enjoys over femininity.[15] But, as this essay will show, such approaches are intellectually corrosive when juxtaposed against the backdrop of Afghanistan's *bacha bazi* tradition.

Slavery, DIGITAL J. (Nov. 20, 2007), http://digitaljournal.com/article/246409; SHIVANANDA KHAN, NAZ FOUND. INT'L, EVERYBODY KNOWS, BUT NOBODY KNOWS, 16, 31 (Sept. 2008), *available at* http://perma.cc/8BQ8-EBFT; Joel Brinkley, *Afghanistan's Dirty Little Secret*, SFGATE (Aug. 29, 2010, 4:00 AM), http://www.sfgate.com/opinion/article/Afghanistan-s-dirty-little-secret-3176762.php; Pul-E Khumri, *Afghan Boy Dancers Sexually Abused by Former Warlords*, REUTERS (Nov. 18, 2007, 11:08 PM), http://www.reuters.com/article/2007/11/19/us-afghan-dancingboys-idUSISL1848920071119 [hereinafter *Former Warlords*]; Chris Mondloch, *Bacha Bazi: An Afghan Tragedy*, FOREIGN POL'Y (Oct. 28, 2013), http://southasia.foreignpolicy.com/posts/2013/10/28/an_afghan_tragedy_why_rampant_pedophilia_is_a_hurdle_to_peace.

[10] *See* Jim Kouri, *Afghan Pedophilia: A Way of Life, Say U.S. Soldiers and Journalists*, EXAMINER (Jan. 19, 2012, 3:34 PM), http://www.examiner.com/article/afghan-pedophilia-a-way-of-life-say-u-s-soldiers-and-journalists (reporting that "Afghanistan is a haven for child rape" according to military officers returning from Afghanistan). A Westlaw search using the term, "bacha bazi," reveals that only five law review publications mention the practice.

[11] Samuel V. Jones, *The Invisible Women: Have Conceptions About Femininity Led to the Global Dominance of the Female Trafficker?*, 7 ALB. GOV'T. L. REV. 143-44, 148-50 (2013) (reasoning that sexual violence and trafficking are almost exclusively examined and interpreted as female victim crimes).

[12] Samuel V. Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2010 UTAH L. REV. 1143, 1163-65 (2011) (providing a number of examples in which male victims are routinely omitted from various criminal justice sex crimes statistics, investigations, and prosecutions).

[13] Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605, 628-29 (2009) (explaining how some commentators pursue a female-specific approach to rape because of the fear that including male victims will detract from female victimization).

[14] Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259, 1263-64 (2011).

[15] Mary Ann Franks, *How to Feel Like a Woman, or Why Punishment is a Drag*, 61 UCLA L. REV. 566, 575-76 (2014) (reasoning that an Afghan *bacha bazi* boy that is raped and forced to prostitute himself and dress like a girl is better off than an Afghan girl that is forced to dress like a boy in order to obtain an education, even though she is not raped or forced into prostitution).

Put succinctly, this essay represents a first step in reducing the knowledge gap relative to boy sex slavery that remains so extant in sex trafficking legal discourse. In so doing, Part II discusses the structural dynamics that enable *bacha bazi*, the perilous existence of boy victims, the Afghan government's unfettered complicity in *bacha bazi*, the relevant findings of the United Nations Security Council (Security Council), and the threat *bacha bazi* poses to the preservation of international peace and security. Part III provides an overview of the development and implementation of the *Responsibility to Protect* doctrine relative to sexual violence. It explains specific features of the United Nations' *Responsibility to Protect* doctrine that were strategically crafted to omit government-condoned boy sexual slavery, such as *bacha bazi*, from triggering humanitarian based intervention.

II. *BACHA BAZI* IN AFGHANISTAN

Bacha bazi, or "boy for play," involves men known as *bacha baz*, or "boy players," collectively exploiting, enslaving, or raping young boys in a systematic and organized fashion.[16] The unabated influence and impunity of wealthy Afghan merchants, illegal armed groups, and government officials drive the demand that propels *bacha bazi*. Meanwhile, robust poverty, communal nihilism, and a large number of young, vulnerable, and displaced Afghan boys enable its supply.[17]

Boys that become *bacha bazi* victims are typically destitute and without relatives.[18] But many extremely poor families, sometimes on the verge of starvation, often sell their sons to *bacha baz*,[19] or permit *bacha baz* to "adopt" their sons in exchange for food, clothing, or money.[20] Other boys are lured with false promises of a better life via vocational education, responsible supervision, or employment.[21] *Bacha baz*, like many traffickers,

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[16] *See id*.

[17] *Afghanistan: An In Depth Look at the Practice of Bacha Bazi (Dancing Boys)*, CHILD RIGHTS INT'L NETWORK (Sept. 18, 2013), http://www.crin.org/en/library/news-archive/afghanistan-depth-look-practice-bacha-bazi-dancing-boys [hereinafter *Bacha Bazi (Dancing with Boys)*]; Agenzia Fides, *ASIA/AFGHANISTAN - Minors Abducted and Exploited for the Practice of "Bacha Bazi"* (Sept. 23, 2013), http://www.fides.org/en/news/34352-ASIA_AFGHANISTAN_Minors_abducted_and_exploited_for_the_practice_of_Bacha_Bazi#.UxOr3PRdUpq.

[18] JOHN L. COOK, AFGHANISTAN: THE PERFECT FAILURE 95 (2012).

[19] Abawi, *supra* note 9.

[20] Wijngaarden & Rani, *supra* note 2, at 1061; Cook, *supra* note 18, at 96.

[21] Marcia G. Yerman, *"The Dancing Boys of Afghanistan" – Examining Sexual Abuse*, DAILY KOS (Feb. 14, 2012, 9:00 PM), http://www.dailykos.com/story/2012/02/15/1064923/--The-Dancing-Boys-Of-Afghanistan-Examining-Sexual-Abuse; Frontline, *The Dancing Boys of Afghanistan*, PBS.ORG (Apr. 20, 2010), http://www.pbs.org/wgbh/pages/frontline/dancingboys/etc/synopsis.html.

find boys on the streets, in the marketplace,[22] or in other public places, such as rest stops where young, hungry boys are known to prostitute themselves.[23] Many boys are simply abducted.[24]

Bacha bazi boys are typically forced to dress up in female attire, wear bells on their feet, dance for the entertainment of their *bacha baz*,[25] or they are rented out for male-only parties where they perform dance routines and are sexually exploited.[26] If the boys do not dance or perform in a way that pleases observers, the *bacha baz* beat them.[27] Once the dancing ends, the boys are generally sold to the highest bidder or shared sexually amongst wealthy or influential Afghan men.[28] Some men fight over the boys, which sometimes ends in the death of a *bacha bazi* boy.[29] For those Afghan men who cannot afford a *bacha bazi* boy, videos of the boys are typically sold on the streets in major Afghan cities.[30]

The *bacha bazi* boys' existential identities are inextricably defined by a wide variety of emotional and psychological scars inflicted by their captors, whom they typically despise.[31] The boys, who know no other life except as chattel, routinely refer to their *bacha baz* as "my Lord."[32] Many fear for their lives, hopelessly questioning how they will escape bondage or survive.[33] They do not report their capture out of fear of stigma, honor killing, or reprisal.[34] They're told if they escape, their families will be murdered.[35] A particular brand of sorrow evolves, fueled by a sense of

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[22] Yerman, *supra* note 21.

[23] INT'L ORG. FOR MIGRATION, TRAFFICKING IN PERSONS: AN ANALYSIS OF AFGHANISTAN 43-44 (Jan. 2004), *available at* http://publications.iom.int/bookstore/free/Trafficking_Afghanistan.pdf.

[24] *Id.* at 37.

[25] Sara L. Carlson, *To Forgive and Forget: How Reconciliation and Amnesty Legislation in Afghanistan Forgives War Criminals While Forgetting Their Victims*, 1 PENN. ST. J.L. & INT'L AFF. 390, 392 (2012); Cook, *supra* note 18, at 96; Ghaith Abdul-Ahad, *The Dancing Boys of Afghanistan*, GUARDIAN (Sept. 11, 2009), http://www.theguardian.com/world/2009/sep/12/dancing-boys-afghanistan [hereinafter GUARDIAN, *Dancing Boys*]; *Former Warlords*, *supra* note 11.

[26] Ernesto Londoño, *Afghanistan Sees Rise in 'Dancing Boys' Exploitation*, WASH. POST (Apr. 4, 2012), http://www.washingtonpost.com/world/asia_pacific/afganistans-dancing-boys-are-invisible-victims/2012/04/04/gIQAyreSwS_story.html; Frontline, *supra* note 23.

[27] Zadzi, *supra* note 9.

[28] Kayla Coleman, *Bacha Bazi Documentary Uncovers Horrific Sexual Abuse of Afghan Boys*, CARE2 (June 19, 2010, 1:30 AM), http://www.care2.com/causes/help-the-dancing-boys-of-afghanistan-escape-the-world-of-bacha-bazi.html.

[29] Frontline, *supra* note 21.

[30] GUARDIAN, *Dancing Boys*, *supra* note 25.

[31] Ghaith Abdul Ahad, *Dancing Boys of Afghanistan*, PUB. RADIO INT'L (Sept. 18, 2009, 12:00 AM), http://www.pri.org/stories/2009-09-18/dancing-boys-afghanistan [hereinafter PRI, *Dancing Boys*].

[32] Kelly B. Vlahos, *The Rape of Afghan Boys*, ANTIWAR.COM (Apr. 13, 2010), http://original.antiwar.com/vlahos/2010/04/12/a-deal-with-the-devil/ [hereinafter Vlahos].

[33] *See* Abawi, *supra* note 9.

[34] *See Bacha Bazi (Dancing with Boys)*, *supra* note 17.

[35] *See id.*

worthlessness and powerlessness, resembling a unique form of depression often seen only in enslaved people.[36]

The boys that survive until the age of nineteen, or until they grow a beard, are typically released from servitude because they no longer possess the prepubertal features *bacha baz* find appealing.[37] Ripe with psychological and emotional shame,[38] and having been denied the opportunity to learn marketable labor skills necessary to support themselves, many *bacha bazi* boys become *bacha baz* themselves, often turning to drugs and alcohol as a coping mechanism.[39] Other boys remain with their captors after becoming men, fully aware of the circumstances under which they first encountered their captors. One Afghan man admitted, "I was only fourteen years-old when a former Uzbek commander forced me to have sex with him. . . . Later, I quit my family and became his secretary. I have been with him for ten [10] years. I am now grown up, but he still loves me and I sleep with him."[40] Put succinctly, once a boy becomes a victim of *bacha bazi*, he is typically deranged and emotionally traumatized for life.

A. The Subordinated Status of Afghan Women Contributes to Bacha Bazi

Most Afghan men that keep *bacha bazi* boys have wives.[41] Reportedly, a popular Afghan adage is that "women are for children, boys are for pleasure."[42] Such sentiments help explain why in some parts of Afghanistan, such as Kandahar, a city heralded for its "beardless boys"[43] and high instances of *bachi bazi*, women are largely subordinated and banned from participating in many aspects of public life.[44] A woman that has sex outside of marriage can be put to death, along with her partner.

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[36] *See* Abawi, *supra* note 9; *see also* Jones, *supra* note 12, at 1151 ("As with most victims of sex trafficking, such acts wreak havoc on the child's physical, psychological, and social well-being, resulting in headaches, stomach aches, eating disorders, fear, anxiety, depression, declining grades, aggression, and increased likelihood of adolescent prostitution, substance abuse, and suicide attempts.").

[37] GUARDIAN, *Dancing Boys*, *supra* note 25; Cook, *supra* note 18, at 97; *see* Claude d'Estrée, *Voices from Victims and Survivors of Human Trafficking*, *in* HUMAN TRAFFICKING: EXPLORING THE INTERNATIONAL NATURE, CONCERNS, AND COMPLEXITIES 79, 94 (John Winterdyk, Benjamin Perrin & Philip Reichel, eds., 2012) (suggesting that some of the victimized boys are so young, they are almost "genderless" to their captors).

[38] Abawi, *supra* note 9.

[39] Londoño, *supra* note 25; Abawi, *supra* note 9.

[40] *Former Warlords*, *supra* note 9.

[41] *Bacha Bazi (Dancing with Boys)*, *supra* note 17.

[42] U.S. ARMY, HUMAN TERRAIN TEAM (HTT) AF-6, RESEARCH UPDATE AND FINDINGS: PASHTUN SEXUALITY 9 (2010) [hereinafter PASHTUN SEXUALITY], *available at* http://www.scribd.com/doc/39111225/Pashtun-Sexuality; Cook, *supra* note 19, at 96.

[43] PASHTUN SEXUALITY, *supra* note 4, at 10.

[44] *See id.* at 2; *see also Former Warlords*, *supra* note 9.

While, conversely, men routinely have sex with *bacha bazi* boys and force the boys to accompany them on public errands, at parties, and even to their homes, effectually undermining and subordinating the Afghan wife or mother.[45] When an Afghan man, who kept a young boy, was asked what the boy's family thought, he merely shrugged and countered that it was not an issue "because the boy's father had died," showing no concern for the feelings or rights of the child's mother.[46] Another Afghan man reported:

> I was married to a woman 20 years ago, she left me because of my boy. . . . I was playing with my boy every night and was away from home, eventually my wife decided to leave me. I am happy with my decision because I am used to sleeping and entertaining with my young boy.[47]

Put succinctly, *bacha bazi* not only enslaves Afghan children, it relegates Afghan women, namely mothers and wives, to a grim and subordinated state of existence.

In most parts of the world, the sexual exploitation or enslavement of a child would be considered repugnant, morally objectionable, and criminal. But in Afghanistan, enslaving and sexually exploiting a boy is no more disparaging and injurious to an Afghan man's reputation than was having a slave in the Antebellum South. Like the Antebellum South slave master, enslaving an Afghan boy appears to enhance an Afghan man's financial status and reputation. The more physically appealing and talented the *bacha bazi* boy is perceived to be, the more he enriches his captor's social and financial standing.[48] As one Afghan woman explained, "[h]aving a boy has become a custom for us. Whoever wants to show off, should have a boy."[49] For that reason, Afghan men openly flaunt their *bacha bazi* boys.

Contention exists regarding the legitimacy of *bacha bazi* under Islamic law. Many Afghans strongly object to *bacha bazi* on grounds that it is homosexual in nature, and banned by Islamic tradition.[50] Some Afghan

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[45] *See Afghan Men Struggle with Sexual Identity, Study Finds*, FOXNEWS.COM (Jan. 28, 2010), http://www.foxnews.com/politics/2010/01/28/afghan-men-struggle-sexual-identity-study-finds/; *see also* Wijngaarden & Rani, *supra* note 2.

[46] Ernest Londoño, *Afghanistan's 'Dancing Boys': Behind the Story*, WASH. POST (Apr. 5, 2012, 9:47 AM), http://www.washingtonpost.com/blogs/blogpost/post/afghanistans-dancing-boys-behind-the-story/2012/04/05/gIQAFXzJxS_blog.html [hereinafter Londoño, *Behind the Story*].

[47] Vlahos, *supra* note 32.

[48] PASHTUN SEXUALITY, *supra* note 42, at 10.

[49] *Former Warlords*, *supra* note 9.

[50] *See* Zadzi, *supra* note 9; *see also* Press Release, U.N. Dep't of Pub. Info., Urgent Action Needed by World Community to Stamp Out Violence Against Children, Newly Appointed Special Representative Tells Third Committee, GA/SHC/3951 (Oct. 14, 2009), http://www.un.org/

men assert that Islam only prohibits a man from loving another man, but does not prohibit a man from using a boy for sex.[51] In addition, some Afghan men engage in *bacha bazi*, despite being convinced that Islamic law prohibits their behavior. Chaman Gul, an Afghan man, conceded: "We know it is immoral and unIslamic, but how can we quit? We do not like women, we just want boys."[52]

B. The Afghan Government Condones Bacha Bazi

Regardless of whether Islamic law prohibits *bacha bazi*, United Nations officials and human rights organizations widely view it as an unacceptable form of child sexual servitude. [53] But unlike many forms of organized child sexual slavery, *bacha bazi* flourishes, unabated, with seemingly tacit approval of the Afghan government despite its contrary treaty obligations.[54]

The Security Council has flatly condemned the deplorable circumstances affecting Afghan children and urged the Afghan government "to take immediate and specific measures to put an end to and prevent the perpetration of . . . *bacha bazi*."[55] The United Nations published a detailed manual tailored to help the Afghanistan government implement a legal framework for banning child sex trafficking.[56] The Afghan government also

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News/Press/docs/2009/gashc3951.doc.htm; *see also* U.N. News Centre, Afghanistan: UN Official Urges Steps to Prevent Child Deaths in Conflict (Feb. 24, 2010), http://www.un.org/apps/news/printnewsAr.asp?nid=33879&Cr=afghan&Cr1#.UI1PldWGd.

[51] *Id*.

[52] *Former Warlords*, *supra* note 9.

[53] Aazem Arash, *AIHRC Turns Toward Stemming Bacha Bazi*, TOLONEWS (Oct. 30, 2013, 6:27 PM), http://www.tolonews.com/en/afghanistan/12435-aihrc-turns-toward-stemming-bacha-bazi.

[54] *See* Londoño, *supra* note 26 (referring to the practice as being an "open secret in Afghanistan, [that] is seldom discussed in public or with outsiders"); *see also* PRI, *Dancing Boys*, *supra* note 31 (claiming that the roots of *bacha bazi* date back thousands of years).

[55] Press Release, U.N. Dep't of Pub. Info., Statement by Chairman of Security Council Working Group on Children and Armed Conflict, SC/10259-/AF/G369-HR/5054 (May 18, 2011), http://www.un.org/News/Press/docs/2011/sc10259.doc.htm ("Also urging them to take immediate and specific measures to put an end to and prevent the perpetration of sexual violence by members of their respective groups, in particular the practice of bacha b[]azi, to take measures so that perpetrators are brought to justice and to publicly declare an end to such practice.").

[56] U.N. Office on Drugs and Crime, *Appropriate Legal Responses to Combating Trafficking in Persons in Afghanistan: Manual for Parliamentarians of Afghanistan* (July 2008), *available at* http://www.unodc.org/documents/human-trafficking/Legal_Responses_to_Trafficking_in_Persons_Manual_for_Parliamentarians_of_Afghanistan.pdf. The U.N. effort to assist Afghanistan with the legal response manual is consistent with its concern that "a global deficiency in knowledge about human trafficking" existed and that many countries needed to engage in "more extensive research, intelligence gathering, and information sharing." *See* Jones, *supra* note 11, at 145.

signed the *Convention on the Rights of the Child*[57] and acceded to the *Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.[58] Still, the Afghan government has failed to implement an effective system of justice designed to enforce these treaty obligations and prohibit the rape of male children.[59] Upon receiving news that *bacha bazi* represented a grave breach of its human rights obligations, Afghan President Hamid Karzai dismissed the idea of instituting immediate measures to protect Afghan's boys from sexual servitude, and replied, "[l]et us win the war first. Then we will deal with such matters."[60]

Not only is the Afghan government known to prosecute boy victims of *bacha bazi*, rather than the adult male victimizers,[61] but state officials sexually exploit young boys with alarming impunity.[62] Some Afghan provincial governors are known to openly keep *bacha bazi* harems.[63] Afghanistan's military and police officials are some of the most vigorous sexual predators[64] and make no effort to conceal their sexual exploitation of

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[57] *See* Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), *available at* http://www.ohchr.org/ en/professionalinterest/ pages/crc.aspx.

[58] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *opened for signature* May 25, 2000, 2171 U.N.T.S. 227 (entered into force Jan. 18, 2002), *available at* https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-c&chapter=4&lang=en.

[59] *Afghanistan: Don't Prosecute Sexually Assaulted Children*, HUMAN RIGHTS WATCH (Feb. 10, 2013), http://www.hrw.org/news/2013/02/09/afghanistan-don-t-prosecute-sexually-assaulted-children (reporting that the Afghan Penal Code "refers only to the rape of women or girls" and that "[t]here is no comparable specific prohibition on rape of men and boys"); *see* Kouri, *supra* note 9; *see also* Amitai Etzioni, *Stop Enabling Pedophilia*, WORLD POST (Jan. 4, 2012, 10:50 AM), http://www.huffingtonpost.com/amitai-etzioni/stop-enabling-pedophilia_b_1183408.html; *see also Afghanistan: UN Urges More Action on Child Rights*, IRIN NEWS (Feb. 9, 2011), http://www.irinnews.org/report/91869/afghanistan-un-urges-more-action-on-child-rights (explaining that the prevention of *bacha bazi* in Afghanistan is difficult because of "problems with the judiciary and the justice system").

[60] Yerman, *Dancing Boys*, *supra* 21.

[61] Fides, *supra* note 17; Abawi, *supra* note 9.

[62] Fides, *supra* note 17; Zadzi, *supra* note 9.

[63] Rod Nordland, *Deadly Betrayals, and Unsettling Patterns; in Latest Attacks, Officers Are Being Killed by Fellow Afghans While They Sleep*, INT'L HERALD TRIBUNE (Dec. 29, 2012) at 3.

[64] Cook, *supra* note 18, at 96; HUMAN RIGHTS WATCH, AFGHANISTAN: "JUST DON'T CALL IT A MILITIA": IMPUNITY, MILITIAS, AND THE "AFGHAN LOCAL POLICE" 48-49 (Sept. 2011), *available at* http://www.hrw.org/sites/default/files/reports/afghanistan0911webwcover.pdf; Press Release, U.N. Dep't of Pub. Info.; Press Conference to Launch Report 'Setting the Right Priorities: Protecting Children Affected by Armed Conflict in Afghanistan,' (June 14, 2010), http://www.un.org/News/briefings/docs/2010/100614_Children.doc.htm.

Afghan's boy population.[65] Numerous Afghan boys are detained and sexually assaulted in government facilities without charges or an opportunity to have the legality of their imprisonment reviewed by a court.[66]

Frontline's documentary, *The Dancing Boys of Afghanistan*, presented video footage of Afghan police officers openly fondling young Afghan boys.[67] An Afghan Thursday night tradition involves uniformed Afghan police officers lining up several pre-teen boys and taking a select few into the police station for hours at a time.[68] The discoveries reported in the documentary not only comport with findings made by the Security Council, but also validate reports by the U.S. State Department, which found that the Afghan government has failed to make "discernible progress in protecting victims of trafficking" and its officials systematically engage in the "sexual abuse of boys."[69] In May 2014, the U.N. Secretary-General officially designated the Afghan National Police and Local Police as "parties" that engage "in the recruitment and use of children, sexual violence against children, the killing and maiming of children, recurrent attacks on schools and/or hospitals and recurrent attacks or threats of attacks against protected personnel in contravention of international law."[70]

Because of *bacha bazi's* resurgence after being banned by the Taliban, and the Afghan government's complicity in the practice, obtaining an accurate count of child victims of *bacha bazi* is virtually impossible.[71] But at least one observer has noted that approximately "half the Pashtun tribal members in Kandahar and other southern towns are *bacha baz*."[72] Observers claim that at least one out of every five Afghan weddings include *bacha bazi*.[73]

Bacha bazi so freely permeates Afghanistan that it now threatens the legitimacy and authority of the Afghan government. The woeful reality of the Afghan government's complicity in *bacha bazi* and absence of an effective legal infrastructure to halt its growth has left scores of Afghans with a seething outrage and deep-rooted doubt regarding the international

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[65] Don Martin, *Afghan Justice Clashes with Our Version of the Law*, CALGARY HERALD (June 17, 2008), http://www.canada.com/calgaryherald/columnists/story.html?id=76262860-cde1-40b3-b6dd-a17cbe6dee8f.

[66] *Children in Armed Conflict Report*, *supra* note 1, at ¶ 24.

[67] *Frontline*, *supra* note 21; Coleman, *supra* note 28.

[68] *Frontline*, *supra* note 21.

[69] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 62-63 (2012), *available at* http://www.state.gov/j/tip/rls/tiprpt/2012/.

[70] *Children in Armed Conflict Report*, *supra* note 1, ¶ 3.

[71] *Country Profile: Afghanistan*, CARTER CTR., http://www.cartercenter.org/peace/human_rights/defenders/countries/afghanistan.html (last updated Nov. 2009); Londoño, *supra* note 27; Cook, *supra* note 20, at 97.

[72] Brinkley, *supra* note 9.

[73] Londoño, *supra* note 26.

community's resolve to do justice. The festering sore of oppression and government corruption is so heightened that many Afghan citizens now prefer Taliban rule.[74] Many insurgents continue to fight in Afghanistan because they view the Taliban as the only viable alternative to the existing government, which they deem too corrupt to provide "basic needs such as long term employment, schools, hospitals and a justice system."[75]

The Afghan government's failure to safeguard its populace from sexual violence has significantly undermined U.S. counterinsurgency objectives, raising serious questions about prospects for peace and security in the region.[76] There is no question that the success of U.S. counterinsurgency policy relies principally on the protection of the Afghan populace. In 2009, the U.S. announced that the safeguarding of Afghan citizens would even take precedence over attempts to kill the Taliban.[77] The perilous reality of systemic child sex trafficking in Afghanistan has reduced prospects for peace and security, prompting serious questions as to whether the international community has an obligation to intervene on behalf of the victims under the *Responsibility to Protect* doctrine.

III. THE *RESPONSIBILITY TO PROTECT* DOCTRINE DOES NOT PROTECT ENDANGERED POPULATIONS FROM CHILD SEX TRAFFICKING

As a member state of the United Nations, the Afghan government is obligated to respect international human rights.[78] The U.N. Charter bars

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[74] Patrick Cockburn, *Stealing Money, Selling Heroin and Raping Boys -- The Very Dark Side of the Afghan Occupation*, ALTERNET (Nov. 13, 2009), http://www.alternet.org/story/143956/stealing_money%2C_selling_heroin_and_raping_boys_--_the_very_dark_side_of_the_afghan_occupation.

[75] Mark E. Johnson, *Reintegration and Reconciliation in Afghanistan: Time to End the Conflict*, MIL. REV. Nov. – Dec. 2010, at 97, 97, *available at* http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20101231_art016.pdf.

[76] Samuel V. Jones, *The Ethics of Letting Civilians Die in Afghanistan: The False Dichotomy Between Hobbesian and Kantian Rescue Paradigms*, 59 DEPAUL L. REV. 899, 901-02 (2010) [hereinafter Jones, *Afghanistan*] (explaining that the success of U.S. counterinsurgency operations in Afghanistan is contingent upon protecting the civilian populace in order to deprive the Taliban of its power and appeal); Kevin T. Carroll, *Afghan Corruption - the Greatest Obstacle to Victory in Operation Enduring Freedom*, 43 GEO J. OF INT'L LAW 873 (2012) ("If we don't get a level of legitimacy and governance, then all the troops in the world aren't going to make any difference. . . . Karzai has got to take concrete steps to eliminate corruption. That means that you have to rid yourself of those who are corrupt, you have to actually arrest and prosecute them."); Azam Ahmed, *Taliban Making Military Gains in Afghanistan*, N.Y. TIMES, July 26, 2014, http://www.nytimes.com/2014/07/27/world/asia/taliban-making-military-gains-in-afghanistan.html?hp&action=click&pgtype=Homepage&version=HpSum&module=first-column-region&region=top-news&WT.nav=top-news.

[77] Jones, *Afghanistan*, *supra* note 76, at 902.

[78] *See* United Nations, Member States of the United Nations, http://www.un.org/en/members/; M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*,

member states from intervening in the internal affairs of another member state, unless in self-defense.[79] Despite the purportedly non-derogable, *jus cogens* status of international prohibitions against slavery and rape,[80] and the well-documented episodes of sexual violence that occurred in Rwanda and Kosovo, the United Nations has not adopted a legal framework by which member states can appropriately intervene in distressed nations, such as Afghanistan, to prevent systemic child sex trafficking.

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22 GA. ST. U. L. REV. 541, 542 (2006) ("In the last 50 years, national legal systems have qualitatively advanced far more than during the preceding 7,000 years. This advance is largely due to the impact of international human rights norms on national legislation. . . . [T]o some extent, this permeation of international human rights norms and standards has also occurred in the international legal system."); Article 1(3) of the U.N. Charter states that among the UN's purposes is to "achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedom for all." U.N. Charter art. 1, para. 3. Additionally, Articles 55 and 56 of the U.N. Charter provide that all member states "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of . . . universal respect for, and observance of, human rights." U.N. Charter art. 55(c), 56.

[79] U.N. Charter art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . ; but this principle shall not prejudice the application of enforcement measures under Chapter VII."); U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); G.A. Res. 2625 (XXV), U.N. Doc. A/1889 (Oct. 24, 1970); U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.").

[80] Jack Alan Levy, *As Between Princz and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to Jus Cogens Violators*, 86 GEO. L.J. 2703, 2706–07 (1998) (recognizing that the corpus of *jus cogens humanum* evolves over time because of the discovery and recognition of additional norms); United States v. Matta-Ballesteros, 71 F.3d 754, 764 (9th Cir. 1995); Felice D. Gaer, *Rape As a Form of Torture: The Experience of the Committee Against Torture*, 15 CUNY L. REV. 293, 307 (2012) ("[R]ape . . . will remain as one of the gravest human rights violations having peremptory or jus cogens status."); David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 234 (2005) ("The jus cogens nature of a norm barring rape under international humanitarian law is evident in a number of sources."); Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens As a Limitation on Enforcement*, 22 WIS. INT'L L.J. 245, 259 (2004) (citing various cases for the proposition that slavery, rape and torture are *jus cogens* violations of international law); A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J.L. & PUB. POL'Y 725, 733-734 (2004) (reasoning that a recent trend in international practice has been to deviate from the long-accepted practice of noninterference when serious human rights violations have occurred); ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF DETERMINATION, 225 (2004).

When the International Commission on Intervention and State Sovereignty (ICISS) [81] considered whether member states should have a right to intervene, it proposed that the well-established principle of non-intervention should yield to the international responsibility to protect endangered populations in "situations of compelling human need," via "sanctions," "prosecution," and "in extreme cases, military intervention."[82] ICISS developed the *Responsibility to Protect* doctrine based on its recognition that member states have an obligation to protect their citizens from "mass murder," "rape," and "starvation." When member states are "unwilling or unable" to meet these commitments, "that responsibility must be borne by the broader community of states."[83] In an apparent effort to exclude child sex slavery practices, like *bacha bazi*, ICISS proposed that intervention would only be justified in circumstances where the rape committed involved "systematic rape for political purposes of women of a particular group either as another form of terrorism, or as a means of changing the ethnic composition of that group."[84] ICISS emphasized that its goal was "to focus on protecting communities from mass killing," and "women" rather than boys "from systematic rape," and "children from starvation."[85] ICISS made no attempt to acknowledge sexual violence against children, choosing instead to suggest that rape affects only women.

When the United Nations hosted the 2005 World Summit, global leaders articulated their conclusions regarding the *Responsibility to Protect* doctrine in the *2005 World Summit Outcome Document* (Summit Outcome).[86] Consistent with ICISS, the Summit Outcome recognized the

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[81] Int'l Comm'n on Intervention and State Sovereignty [ICISS], *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, at 1 (Dec. 2001), *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf at 2 [hereinafter ICISS REPORT]; Paul R. Williams, J. Trevor Ulbrick & Jonathan Worboys, *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE W. RES. J. INT'L L. 473, 477 (2012); *see generally* Scott Woodward, *The Responsibility to Protect: The Time is Now*, 23 MEDITERRANEAN Q. 82 (Summer 2012).

[82] ICISS REPORT, *supra* note 81, at XII. (where military intervention is contemplated, ICISS proposed that the legitimacy of the intervention be conditioned upon: (1) there being a just cause, such as a "large scale loss of life" or "large scale 'ethnic cleansing'"; (2) the assistance is a true last resort as other peaceful options have been explored and exhausted; (3) "rightful intention" on the part of the intervening state; (4) the action is proportional to the humanitarian crisis; (5) that action has a reasonable chance of success; and (6) the action is authorized by a legitimate authority, like the Security Council). *See id*. at XII.

[83] *Id*. at VIII.

[84] *Id*. at 33.

[85] *Id*. at 17.

[86] 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1, at 30 (Oct. 24, 2005), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement; *The World Summit: 'A Moving Force'*, UN CHRON., 42, no. 4:6 (Dec. 2005); *see also* S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2009) (confirming the responsibility to

applicability of the *Responsibility to Protect* doctrine when a nation fails to protect its citizens from human rights atrocities after peaceful means have proven unsuccessful.[87] However, by expressing a desire that governments protect their child citizens from "sexual abuse and exploitation and trafficking," the Summit Outcome departed drastically from the limitations ICISS proposed regarding sexual violence.[88] The recommendation appeared to be a clear attempt to protect children from sex trafficking practices, like *bacha bazi*.

Following the 2005 World Summit, the U.N. Security Council issued Resolution 1820, setting forth its position regarding sexual violence.[89] The Security Council appeared to distort the concerns expressed in the Summit Outcome by qualifying the document's "resolve" as one principally dedicated to protecting "women and girls" rather than "children."[90] Among other things, the Security Council: (1) reiterated its desire to protect "civilians, in particular women and girls;" (2) noted that "women and girls are particularly targeted by the use of sexual violence;" (3) reminded member states of their obligation "to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice;" and (4) demanded that member states exercise appropriate measures against "parties to situations of armed conflict who commit rape and other forms of sexual violence against women and girls."[91] The U.N. Security Council made no reference to men and boys. Instead, through the use of strategic legalism and gender-specific language, it endorsed the false supposition that sexual violence is only a male culprit-female victim occurrence. Perhaps more surprisingly, the U.N. Security Council completely omitted any reference to the Summit Outcome's recommendation that governments take appropriate actions to protect children from "sexual abuse and exploitation and trafficking."[92] In effect, U.N. Security Council Resolution 1820 repudiated any claim that child

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protect civilian populations from human rights atrocities, as provided in paragraphs 138 and 139 of the 2005 World Summit Outcome Document).

[87] 2005 World Summit Outcome, *supra* note 86, at ¶ 139 ("The international community, through the United Nations, also has the responsibility . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. . . . [W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council . . . on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations.").

[88] *Id.* at ¶ 141.

[89] S.C. Res. 1325, U.N. Doc. S/RES/1820 (June 19, 2008).

[90] *Id.* ("Reaffirming also the resolve expressed in the 2005 World Summit Outcome Document to eliminate all forms of violence against women and girls, including by ending impunity and by ensuring the protection of civilians, in particular women and girls, during and after armed conflicts, in accordance with the obligations States have undertaken under international humanitarian law and international human rights law.").

[91] *See Id.*

[92] 2005 World Summit Outcome, *supra* note 86, at ¶ 141.

sexual exploitation and trafficking triggered a right of intervention. Instead, the U.N. Security Council declared that sexual violence, "when used as a tactic of war against civilians, can significantly exacerbate situations of armed conflict and impede the restoration of international peace and security."[93] By adopting the formulaic standards ICISS proposed, and excluding exploitation and trafficking, the U.N. Security Council declared its position that sexual exploitation and trafficking did not represent a sufficient or credible threat to the restoration of international peace and security.

In 2009, the U.N. codified the *Responsibility to Protect* doctrine.[94] It formally declared that when a state refuses to accept assistance, fails to protect its population, and ignores less coercive measures, then intervention could be authorized by the Security Council,[95] the General Assembly under the "Uniting for Peace" procedure,[96] or via regional or sub-regional agreements with the prior authorization of the Security Council.[97] In cases where mass sexual violence endangers a population and its government is either unwilling or unable to stop it, the U.N. suggested that intervention under the *Responsibility to Protect* doctrine would be appropriate only under the criteria specifically enunciated in Security Council Resolution 1820.[98] The resolution excluded child sexual exploitation and trafficking, such as *bacha bazi*, from triggering international intervention.

IV. CONCLUSION

Over a decade ago, then U.N. Secretary-General Kofi Annan warned that in countries throughout the world, including Afghanistan, "there are a great number of people who need more than just words of sympathy from the international community. They need a real and sustained commitment to help end their cycles of violence."[99] Since his remarks, the level of sexual

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[93] UNSC/S/RES/1820, (June 19, 2008).

[94] Implementing the Responsibility to Protect, G.A. Res. 63/677, ¶ 67, U.N. Doc. A/RES/63/677 (Jan. 12, 2009), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/63/677 [hereinafter Implementing R2P].

[95] *Id.* at ¶ 25, para 56 (relying on "Articles 41 or 42 of the Charter").

[96] *Id.*; *see also*, Samuel V. Jones, *Darfur, The Authority of Law, and International Humanitarian Intervention*, 39 U. TOL. L. REV. 97, 115 (2007) (asserting that the General Assembly may authorize humanitarian intervention pursuant to the "United for Peace Resolution" because it was "specifically designed to create a decision-making role for the General Assembly in situations when, as with the crisis in Sudan, the UNSC becomes paralyzed by veto or bias and fails to discharge its responsibilities").

[97] Implementing R2P, *supra* note 94, at ¶ 25, para 56.

[98] *Id.* at ¶ 25, para 57 (stating that "in the case of sexual violence [sanctions would be triggered] in accordance with the terms contained in Council resolution 1820 (2008)").

[99] Kofi Annan, Secretary-General Address to the United Nations General Assembly (Sept. 20, 1999), UNIS.SG.2381, *available at* http://www.unis.unvienna.org/unis/en/pressrels/1999/sg2381.html.

violence perpetrated against Afghan's boy population has persisted with alarming regularity.

The undeniable consequence of the lack of international protection of *bacha bazi* victims is that Afghan officials feel no genuine obligation to comply with treaty obligations that require them to respect the human rights of its boy population. The lack of humanitarian intervention suggests that there is no genuine demand that the Afghan government install an effective judiciary, justice system, and police force, to protect its population of boys from sexual exploitation and trafficking, prosecute offenders and prevent *bacha bazi*. Without a credible legal demand or threat of coercive action, there is virtually no incentive for the Afghan government to limit its actions or curtail the range of atrocities currently being inflicted upon the powerless and hopeless boys of Afghanistan. The United Nations' unwillingness to adopt a framework that triggers a right to intervene in response to the Afghan government's obvious complicity in *bacha bazi*, makes the United Nations an ideological accomplice to its practice, which, unequivocally, now represents a clear threat to international peace and security in the region.

ECONOMIC MIGRATION GONE WRONG: TRAFFICKING IN PERSONS THROUGH THE LENS OF GENDER, LABOR, AND GLOBALIZATION

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More often than not, "trafficking is labor migration gone horribly wrong in our globalized economy."[1]

INTRODUCTION

The last decade brought much needed attention to the global plight of human trafficking, as numerous members of vulnerable populations are trafficked all over the world to be enslaved in a broad range of industries including, but far from limited to, commercial sex. Yet, the global community's efforts to successfully mitigate trafficking and protect those most likely to fall victim to it continue to fall short. This Article argues that the lack of success in fighting human trafficking is to a large extent the result of framing the existing discourse of human trafficking as primarily a matter of criminal law and human rights of women and children rather than addressing the economic and global market conditions within which human trafficking thrives. It is, as Jonathan Todres puts it, a design failure rather than an implementation failure.[2]

This Article further suggests that the almost exclusive focus on criminal and human rights discourse developed in response to the paradigmatic story of human trafficking—young women or children being duped and kidnapped for exploitation—in the illegal commercial sex industry. However, that focus continues to marginalize the impact on the role of women, children, and migrant workers from developing nations in the global economy. We will not be able to mitigate human trafficking or to achieve economic and social equality around the world without acknowledging the gendered and class underpinnings of human trafficking discourse.

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[1] Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137, 138 (2006) [hereinafter *Preventing Human Trafficking*].

[2] Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fights Against Human Trafficking*, 33 MICH. J. INT'L L. 53, 55 (2011) [hereinafter *Incorporating Perspectives*] (exploring alternative perspectives to the criminal law model of human trafficking, including a human rights perspective, a public health perspective, and a development perspective). *See also* Jonathan Todres, *Moving Upstream: The Merits of Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447 (2011) (discussing the limitations of the current legislative framework).

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Recent efforts link human trafficking to economic pull and push factors exacerbated by globalization and trade liberalization, but very little discourse frames the discussion in those terms. The current discourse on trafficking fails to admit that human trafficking is the "underside of globalization." There is no willingness to admit that human trafficking greases the wheels of the global economy. Instead, this Article argues for an economic analysis of human trafficking which primarily looks at globalization, trade liberalization, and labor migration as the core areas that need to be explored to advance the prevention of human trafficking.

Part I briefly examines the prevailing criminal law enforcement framework regarding human trafficking—both at the international level and in the United States—which stems out of viewing human trafficking as primarily a threat to global security and an underground industry of transnational criminal enterprises. It argues that while criminalization no doubt helped bring much needed attention (and resources) to human trafficking, the narrow criminal law focus fails to address the root causes of human trafficking and will not be able to prevent human trafficking.

Part II looks at the complementary human rights framework to combat human trafficking. It briefly explores the early human rights discourse regarding trafficking and its limitations, the concerns over the criminal law emphasis of the trafficking protocol and Trafficking Victims Protection Act (TVPA), and the efforts in the past decade to re-infuse the human rights approach and to strengthen the protection and services provided to trafficking victims. It argues that the human rights framework is likely to remain very limited in its ability to push governments and private sector stakeholders to action because it continues to evoke the early discourse focusing on the protection of women and children and fails to recognize the global economic impetus of human trafficking.

Part III examines closely the gendered nature of the current human trafficking discourse. It argues that the criminal enforcement efforts and the human rights approaches are unsuccessful in combating human trafficking in large part because these efforts remain focused on sex trafficking of women and children as the paradigm. That dominant narrative, however, serves as a double-edged sword. While the narrative emphasizes the plight of many women and children and the need to "rescue" them from the traffickers, it is less likely to garner the firm international and domestic commitment and resources needed for true preventative measures as long as it is viewed as a women's issue. The focus on the enslavement of women and children in the illegal sex industry by criminal organizations allows us to view human trafficking as an aberration rather than acknowledge the central role it plays in supporting and maintaining the global economy; and, it continues to marginalize both the impact on and the role of women, children, and migrant workers from developing nations in the global economy.

Part IV offers a close examination of the realities of labor and

migration in the era of globalization. It specifically highlights the vulnerabilities to trafficking and exploitation brought upon by globalization, the feminization of labor migration, and the links between irregular migration and human trafficking. Consequently, in Part V, the article suggests the need to develop an economic analysis of human trafficking, one which primarily looks at globalization, trade liberalization, and labor migration as the core areas that need to be explored to prevent human trafficking.

I. HUMAN TRAFFICKING AND CRIMINAL LAW DISCOURSE: THE ORIGINS OF THE CURRENT LEGAL FRAMEWORKS TO COMBAT TRAFFICKING

"Human trafficking" was not defined in international, regional, and national laws[3] until the late 2000s when the United Nations (U.N.) finally adopted the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children,[4] and the United States enacted the TVPA,[5] in recognition of the modern-day alarming rise in the trade-in and enslavement of millions of people around the world. While various legal instruments already existed to address certain aspects of the problem, it was clear that various slavery-like practices including, but not limited to,

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[3] Several international legal instruments have already incorporated and addressed the need to eliminate trafficking (at least sex trafficking of women and children), but did so without clearly defining what trafficking is. *See* e.g. International Agreement for the Suppression of the White Slave Traffic, *opened for signature* May 4, 1904, 1 L.N.T.S. 83, amended by a Protocol approved by the U.N. General Assembly on Dec. 3, 1948, 30 U.N.T.S. 23 (entered into force Jul. 18, 1905); International Convention for the Suppression of the White Slave Traffic, *opened for signature* May 4, 1910, 3 L.N.T.S. 278, amended by a Protocol approved by the U.N. General Assembly on Dec. 3, 1948, 30 U.N.T.S. 23 (entered into force Aug. 8, 1912); International Convention for the Suppression of Traffic in Women and Children, *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 415 (entered into force Jun. 15, 1922); International Convention for the Suppression of Traffic in Women of Full Age, *opened for signature* Oct. 11, 1933, 150 L.N.T.S. 431 (entered into force Aug. 24, 1934); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force Jul. 25, 1951).

[4] *See, e.g.*, 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* Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Trafficking Protocol].

[5] *See* Trafficking Victims Protection Act of 2000, Division A of Pub. L. No. 106-386, 114 Stat. 464 (2000), reauthorized by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, reauthorized by the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006), *the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5054, and in Title XII of the Violence Against Women Reauthorization Act of 2013*, Pub. L. No. 113-4, 127 Stat. 54 (2013); *See also* 22 U.S.C. §§ 7101-7112 (codifying most of the human trafficking laws in the United States).

forced labor, child labor, debt bondage, and commercial sexual exploitation of children and adults were thriving with impunity in many parts of the world.[6] The international framework and the U.S. framework called for the criminalization of all acts of human trafficking and envisioned that governmental response should incorporate the 3Ps: prevention, criminal prosecution, and victim protection.[7]

While all three components have been recognized as essential, they have not been equal, neither in design nor in implementation.[8] From the start, as will be demonstrated below, much of the contemporary discourse and resources focused on criminal enforcement and security issues posed by illegal human trafficking. Accordingly, the foremost obligation on nations and states (under the Trafficking Protocol, European Union (EU) and other regional instruments, TVPA, or State law) is to take legislative and other measures to criminalize conduct amounting to trafficking in persons, and prosecute traffickers.

Historically, the limited attention to human trafficking was driven by moral-based and human rights concerns regarding mostly white women and children.[9] In contrast, the prompt for the series of meetings convened by the U.N. in Vienna in the late 1990s, which eventually led to the adoption of the Trafficking Protocol, was the identified link between trafficking, migrant smuggling, transnational organized crime, and the threat to global security.[10] Having viewed human trafficking as a growing enterprise of transnational organized crime, the Trafficking Protocol itself was developed as a supplement to the U.N. Convention Against Transnational Organized Crimes,[11] helping to facilitate cooperation among states in the investigations and prosecutions of transnational crime including trafficking in persons.[12] The most concrete obligation on signatory states, stated in Article 5, is to take legislative and other measures to criminalize conduct

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[6] ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 1-2 (2010) [hereinafter GALLAGHER].

[7] Trafficking Protocol, *supra* note 4, art. 5. "Trafficking in Persons" under the Protocol is defined in art. 3. *Id.* art 3; *See also* 22 U.S.C. §§ 7102-7106.

[8] *Incorporating Perspectives*, *supra* note 2, at 56-57.

[9] *See infra* Part II.A.

[10] GALLAGHER, *supra* note 6, at 68. The international community quickly determined it needed to reach an agreement to facilitate the collaborative fight against transnational organized crime. *Id.* at 1, 68. Dr. Anne Gallagher, who at the time served as a U.N. Official representing the U.N. High Commissioner for Human Rights in those meetings, recalls a conversation with a very senior delegate who viewed this not as a human rights issue but as the need of governments to cooperate in order to catch the traffickers, whom he viewed as criminals. *Id.* at 2.

[11] United Nations Convention Against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, 2225 U.N.T.S. 209, (entered into force Dec. 25, 2003) [hereinafter Organized Crime Convention].

[12] *Id.* art. 1.

amounting to trafficking in persons.[13] Other articles in the Protocol, such as Article 10 (dealing with information sharing and training for law enforcement and immigration authorities), Article 11 (dealing with measures to increase border security), and Articles 12 and 13 (dealing with security of travel documents) again underscore the core focus of the Organized Crime Convention and Trafficking Protocol on global security and transnational criminal law enforcement.[14]

The regional and national legal frameworks that developed in the decade that followed placed much of the same emphasis on the criminalization of human trafficking and the prosecution and punishment of traffickers. The EU 2002 Framework Decision on Combatting Trafficking in Human Beings[15] retained and expanded the Trafficking Protocol's criminal justice focus.[16] The Preamble to the later Directive 2011/36/EU of the European Parliament and of the Council of Europe on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA also begins by stating that "[t]rafficking in human beings is a serious crime, often committed within the framework of organized crime . . ."[17] before delineating the law enforcement priorities for the EU.

The TVPA reflects the central focus of the criminal law enforcement approach to combating trafficking in the United States.[18] While the United States had various laws on the books addressing forced labor, involuntary servitude, sex trafficking of children, etc., it was clear that existing legislation, law enforcement, and sentencing guidelines in the United States were "inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved."[19] As noted in the Congressional findings, "[n]o comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme."[20] The TVPA included significant amendments to Chapter 77 of Title 18 to the United States Code, which defines various crimes of peonage, slavery,

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[13] Trafficking Protocol, *supra* note 4, art. 5.

[14] 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* Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Trafficking Protocol]

[15] *See* Council Decision of 19 Jul. 2002 on Combatting Trafficking in Human Beings (2002/629/JHA), 2002 O.J. (L 203/1).

[16] *See* GALLAGHER, *supra* note 6, at 96-99 (providing a detailed discussion of the EU Framework Decision on Trafficking in Human Beings).

[17] European Parliament and Council Directive of 5 Apr. 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, Replacing EU Council Framework Decision 2002/629/JHA (2011/36/EU), 2011 O.J. (L 101/1).

[18] *See infra* notes 20-27 and accompanying text.

[19] 22 U.S.C. § 7101(b)(14-15) (2012).

[20] 22 U.S.C. § 7101(b)(14-15) (2012).

and trafficking in persons,[21] as well as to the sentencing guidelines.[22] Since the passage of TVPA, all fifty states have followed with similar legislation criminalizing the various forms of human trafficking.[23] Federal and state law enforcement agencies now place the investigation, prosecution, and sanctioning of traffickers high on their agenda, devoting significant resources and training opportunities to that task.[24]

Particularly telling are the ways in which the law enforcement approach frames the United States' globally-applicable "minimum standards for the elimination of trafficking" and its engagement with other governments on this issue.[25] The "minimum standards for the elimination of trafficking" set out in TVPA require foreign governments to prohibit trafficking and punish acts of trafficking, and to make serious and sustained efforts to eliminate trafficking.[26] The Act also sets out criteria that "should be considered" as indicia of "serious and sustained efforts to eliminate trafficking"; the first of which is whether the government vigorously investigates and prosecutes acts of trafficking within its territory.[27] Countries are then placed into one of the report's three tiers based upon these countries' governmental efforts to combat trafficking.[28]

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[21] *See* Trafficking Victims Protection Act of 2000, Division A, Sec. 112(a) of Pub. L. No. 106-386, 114 Stat. 464 (2000) (focusing on strengthening the prosecution and punishment of traffickers). For example, Sec. 112(a) increased the maximum sentence for crimes of peonage, 18 U.S.C. § 1581a (2000), and enticement to slavery, 18 U.S.C. § 1583 (2000), sale into involuntary servitude, 18 U.S.C. § 1584 (2000) from 10 to 20 years, and possibly life. More importantly, it specifically added the crimes of forced labor, 18 U.S.C. § 1589 (2000), Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor, 18 U.S.C. § 1590 (2000), Sex trafficking of children or by force, fraud or coercion, 18 U.S.C. § 1591 (2000), and Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor, 18 U.S.C. § 1592 (2000).

[22] Trafficking Victims Protection Act of 2000, Division A, Sec. 112(b) of Pub. L. No. 106-386, 114 Stat. 464 (2000), codified as 22 U.S.C. § 7109 (2000).

[23] Policy Advocacy, THE POLARIS PROJECT, http://www.polarisproject.org/what-we-do/policy-advocacy (listing a comprehensive survey of each state's existing and pending legislation).

[24] U.S. DEPT. STATE, TRAFFICKING IN PERSONS REPORT 381-383 (2013), http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm.

[25] Realizing that the U.S. efforts to eliminate trafficking depend on the level of engagement of other governments with this issue, Congress established in TVPA a framework for the U.S. government to provide assistance to, measure progress of, and potentially impose unilateral sanctions on, the governments of a country of origin, transit, or destination for victims of severe forms of trafficking. *See* 22 U.S.C. § 7106. Congress required the establishment of the Department of State Office to Monitor and Combat Trafficking, 22 U.S.C. § 7103(e) (2012), to assist the Secretary of State in issuing an annual assessment of other governments' efforts to combat trafficking, known as the annual Trafficking in Persons Report. 22 U.S.C. § 7103(e), 7107(b) (2012).

[26] 22 U.S.C. § 7106(a) (2012).

[27] 22 U.S.C. § 7106(b) (2012).

[28] 22 U.S.C. § 7107 (2012). Countries whose governments fully comply with the Act's minimum standards for the elimination of trafficking, i.e. those which criminalize and have

There has been much critique of the United States' unilateral approach in setting its own global standards, apart from the Trafficking Protocol, and taking the role of a global sheriff in imposing those standards on other countries.[29] There is little doubt, however, that most governments around the world have ceded to the U.S. regime on anti-human trafficking measures, either due to the direct support of U.S. funding and institutional resources to aid foreign governments, combat trafficking, or the somewhat effective "naming and shaming" tool that the annual Trafficking In Persons (TIP) report has become.[30] Consequently, the world allocates an overwhelming majority of its legal efforts and resources to the criminalization of human trafficking, to the training of law enforcement authorities, and to the prosecution of traffickers.

Criminalization helped bring much needed attention (and funding) to this modern slavery. However, the number of prosecutions is dismally low in comparison to the scope of the problem, and the estimated numbers of people being trafficked is on the rise.[31] The allocation of most resources and attention to criminal enforcement relegated the grave human rights dimensions of this growing crisis to a secondary place at best.[32] Once

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successfully prosecuted trafficking, and have provided a wide range of protective services to victims as well as sponsor prevention campaigns, are placed in tier 1; countries whose governments do not fully comply with those standards are placed in tier 2, if they are making "significant efforts to bring themselves into compliance" with the standards, such as countries which are strong in the prosecution of traffickers, but provide little or no assistance to victims. *Id.* at (b)(1) The TIP Report also places some tier 2 counties on a watch list if: a) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; b) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or c) the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year. *Id.* at (b)(3)(A)(iii). Lastly, countries which are not making significant efforts to bring themselves into compliance are placed in tier 3, *Id.* at (b)(1)(c), and may be subject to certain sanctions by the United States. 22 U.S.C. § 7107(d) (2012).

[29] *See, e.g.*, Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2005-2006) [hereinafter *Global Sheriff*]; GALLAGHER, *supra* note 6, at 485.

[30] *See Global Sheriff*, *supra* note 29, at 439. Chuang focuses her critique on the unilateral sanctions regime set up by the United States and suggests that that sanctions regime has prompted many governments to develop laws and policies to combat trafficking. *Id.* Contra Karen Bravo, *Follow the Money? Does the International Fight Against Money Laundering Provide a Model for International Anti-Human Trafficking Efforts?* 6 U. ST. THOMAS L. J. 138 (2008) (arguing that the TIP Report naming and shaming lists have had minimal impact compared to the FATF's dirty lists regarding corruption).

[31] *Incorporating Perspective*, *supra* note 2, at 65-66 (comparing the low number of trafficking prosecutions worldwide, as of 2009, with the estimated growing numbers of trafficking victims).

[32] Jonathan Todres, *Human Rights, Labor, and the Prevention of Human Trafficking: A Response to a Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. Discourse 142, 151 (2013).*See also* Part II.B. and II.C *infra*.

framed as a criminal law and security issue, it is more likely that further efforts will be anchored in a criminal law approach.[33]

Moreover, as will be discussed infra,[34] the narrow criminal law focus fails to address the root causes of human trafficking, and hence, will not be able to prevent human trafficking. Trafficking is anything but limited to the illegal activity of criminals. To the contrary, it is the demand for products and services in legitimate industries within the dynamics of global markets which fuels the black market of trading in humans. Having realized the huge profitability of the human trafficking market, criminal enterprises and traffickers all over the world serve as the conduit connecting the never ending supply of desperate workers with the growing demand of businesses and consumers across all economic sectors for cheap products and services produced by cheap labor. The dominant narrative of trafficking as an aberrant criminal activity of "bad apples," however, serves to mask the direct complicity and significant economic benefits gained by governments, businesses, and members of society through the facilitation and furthering of exploitation through human trafficking, primarily at the expense of poor men, women, and children.

THE HUMAN RIGHTS DISCOURSE: EVERYTHING OLD IS NEW AGAIN

Historically, the issue of human trafficking was addressed at the margins of international human rights discourse. Throughout the twentieth century, the international community condemned human trafficking as a grave human rights violation through various legal instruments.[35] However, notwithstanding such efforts to frame human trafficking as a human rights problem, the concern over transnational criminal organizations and border security motivated governments to develop a new international legal

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[33] *Incorporating Perspective*, *supra* note 2, at 63-64 (discussing the "anchoring effect" of the criminal law approach to combat human trafficking).

[34] *See* Part III and IV *infra*.

[35] *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Apr. 30, 1956, 266 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Elimination for Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13; Convention on the Rights of Child and Its Optional Protocols (on the Sale of Children, Child Prostitution and Child Pornography and on the Involvement of Children in Armed Conflict), G.A. Res. 44/25, 44 U.N. GAOR Supp. (No. 49), U.N. Doc. A/44/49 (Nov. 20, 1989) and G.A. Res. 54/263, Annexes I, II (May 25, 2000), S. TREATY DOC. NO. 106-37 (2000); ILO Convention Concerning Forced and Compulsory Labor, *opened for signature* Jun. 28, 1930, 39 U.N.T.S. 55, ILO No. 29; ILO Convention Concerning the Abolition of Forced Labor, *opened for signature* Jun. 25, 1957, 320 U.N.T.S. 291, ILO No. 105; ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, *opened for signature* Jun. 17, 1999, 2133 U.N.T.S. 161, ILO No. 182.

framework.[36] As Anne Gallagher notes, it is very possible that without the need for global collaboration on criminal enforcement, border integrity and security threats, the human rights dimension alone would not have sufficed to garner the renewed interest and agreement among the states on defining, criminalizing, and prioritizing human trafficking.[37]

Concerns over the criminal law emphasis of the Trafficking Protocol and TVPA led to efforts in the past decade to revive the human rights approach to trafficking and to strengthen the protection and services provided to trafficking victims.[38] There has been increasing recognition amongst policy makers and human trafficking advocates that providing protective measures for trafficking victims is as important as capturing and prosecuting their traffickers;[39] and there is a growing consensus within the international community about the need to address the human rights violations that trafficking brings about.[40]

The sections below explore the early human rights discourse regarding trafficking and its limitations, the concerns over the criminal law emphasis of the trafficking protocol and TVPA, the efforts over the past decade to re-infuse the human rights approach, and the efforts to strengthen the protection and services provided to trafficking victims. Nonetheless, this Article argues, The human rights framework is likely to remain very limited in its ability to push governments and the growing number of private sector stakeholders to action because it continues to evoke the early discourse focusing on the protection of women and children and fails to recognize the global economic impetus of human trafficking.

A. Trafficking and Human Rights Discourse in the Early Twentieth Century – Focusing on White Women and Children Exploited in the Commercial Sex Industry

While recent efforts to combat human trafficking go back only to the late 1990s, human trafficking is not a new phenomenon. The late-nineteenth and early-twentieth centuries saw the use of the term "human trafficking" in

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[36] *See* Part I *supra*.

[37] GALLAGHER, *supra* note 6, at 4-5.

[38] *See* Part II.B and Part II.C *infra*.

[39] *See* Youla Haddadin & Ilona Klímová-Alexander, *Human Rights-Based Approach to Trafficking: The Work of the United Nations Office of the High Commissioner for Human Rights*, 52 NO. 1 JUDGES' J. 22, 22 (2013). *See also forward by* former Secretary of State Hillary Clinton to the 2012 TIP Report, U.S. DEPT. STATE, TRAFFICKING IN PERSONS REPORT 2 (2012), http://www.state.gov/j/tip/rls/tiprpt/2012/index.htm ("We should aim not only to put an end to this crime, but also to ensure that survivors can move beyond their exploitation and live the lives they choose for themselves.").

[40] *See*, e,g., Youla Haddadin & Ilona Klímová-Alexander, *Human Rights-Based Approach to Trafficking: The Work of the United Nations Office of the High Commissioner for Human Rights*, 52 NO. 1 JUDGES' J. 22, 22 (2013).

connection with the forcible or fraudulent recruitment of white women or girls into commercial sex work.[41] Both the 1904 White Slavery Convention[42] and the 1910 White Slavery Convention,[43] for example, were intended to combat the coerced criminal procurement of women and girls for "immoral purposes."[44] The term "white slavery" referred only to sex trafficking, and was specifically defined to distinguish it from the earlier widespread practice of (African) slave trade.[45]

Although references to "white slavery" diminished,[46] the focus on the coerced sexual exploitation of innocent young women and children across borders remained core to subsequent conventions, and continues to remain the core of the discourse to date.[47] The 1921 International Convention for the Suppression of Traffic in Women and Children[48] avoided references to "white slavery" and applied to boys and girls under the age of twenty-one, and to older women if they were coerced into "immoral" sex work. The 1933 International Convention for the Suppression of Traffic in Women of Full Age[49] eliminated the notion of consent and applied to the trafficking of women of any age across international borders for immoral purposes. The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,[50] which consolidated the various earlier instruments, applies to men and women (in title as well), but remains limited to trafficking for prostitution.

The Preamble to the 1949 Convention established a direct link to the

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[41] GALLAGHER, *supra* note 6, at 13.

[42] International Agreement for the Suppression of the White Slave Traffic, *opened for signature* May 4, 1904, 1 L.N.T.S. 83, amended by a Protocol approved by the U.N. General Assembly on Dec. 3, 1948, 30 U.N.T.S. 23 (entered into force Jul. 18, 1905).

[43] International Convention for the Suppression of the White Slave Traffic, *opened for signature* May 4, 1910, 3 L.N.T.S. 278, amended by a Protocol approved by the U.N. General Assembly on Dec. 3, 1948, 30 U.N.T.S. 23 (entered into force Aug. 8, 1912).

[44] *See* Art. I and Art. II of the International Agreement for the Suppression of the White Slave Traffic, *opened for signature* May 4, 1904, 1 L.N.T.S. 83, amended by a Protocol approved by the U.N. General Assembly on Dec. 3, 1948, 30 U.N.T.S. 23 (entered into force Jul. 18, 1905); Art I. and Art. II of the International Convention for the Suppression of the White Slave Traffic, *opened for signature* May 4, 1910, 3 L.N.T.S. 278, amended by a Protocol approved by the U.N. General Assembly on Dec. 3, 1948, 30 U.N.T.S. 23 (entered into force Aug. 8, 1912).

[45] GALLAGHER, *supra* note 6, at 55.

[46] *See infra* notes 48-57 and accompanying text.

[47] *See infra* Part III.

[48] International Convention for the Suppression of Traffic in Women and Children, *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 415 (entered into force Jun. 15, 1922).

[49] International Convention for the Suppression of Traffic in Women of Full Age, *opened for signature* Oct. 11, 1933, 150 L.N.T.S. 431 (entered into force Aug. 24, 1934).

[50] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force Jul. 25, 1951).

"dignity and worth of the human being," which neither trafficking nor prostitution is compatible.[51] In addition to prosecution and punishment measures, protection and rehabilitation of victims are key concepts, including fair treatment of foreign victims in the proceedings against their traffickers,[52] the provision of certain social services,[53] and care for destitute victims prior to repatriation.[54] The 1949 Convention receives much criticism for denying women their agency, and for not truly taking a human rights approach.[55]

For thirty years, the 1949 Convention served as the only international agreement on trafficking. It was finally supplemented in 1979 with the passage of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[56] and the passage of the Convention on the Rights of the Child (CRC) in 1989.[57] Both addressed a broad scope of coerced and exploitative practices involving women and children and calling for the elimination of all forms of trafficking against women and children. Other international human rights instruments addressing abusive and exploitive work conditions for migrant workers[58]

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[51] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, at Preamble, *opened for signature* Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force Jul. 25, 1951).

[52] *Id.* at art. 14.

[53] *Id.* at art. 16.

[54] *Id.* at art. 19(1).

[55] A discussion of the debate surrounding women's agency and choice, prostitution, and the abolitionist approach taken by most of the international and domestic legal instruments is beyond the scope of this Article. For more detailed discussion and further sources, *See* GALLAGHER, *supra* note 6, at 55, 61-62.

[56] Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 13, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981), art. 6 at 17.

[57] Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), art. 35, 36.

[58] *See* ILO Convention No. 143, Concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, *opened for signature* Jun. 24, 1975, 1120 U.N.T.S. 324 (entered into force Dec. 9, 1978). The other eight core ILO conventions, as well as another ILO Convention specifically protecting migrant workers, are also relevant in the context of trafficking. *See* Convention Concerning Forced and Compulsory Labour, *opened for signature* Jun. 28, 1930, 39 U.N.T.S. 55, ILO No. 29 (entered into force May 1, 1932); Convention Concerning Freedom of Association and Protection of the Rights to Organize, *opened for signature* Jul. 9, 1948, 68 U.N.T.S. 17, ILO No. 87 (entered into force Jul. 4, 1950); Convention Concerning Right to Organize and Collective Bargaining, *opened for signature* Jul. 1, 1949, 96 U.N.T.S. 257, ILO No. 98 (entered into force Jul. 18, 1951); Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, *opened for signature* Jun. 19, 1951, 165 U.N.T.S. 303, ILO No. 100 (entered into force May 23, 1953); Convention Concerning the Abolition of Labour, *opened for signature* Jun. 25, 1957, 320 U.N.T.S. 291, ILO No. 105 (entered into force Jan. 17, 1959); Convention Concerning Discrimination in Respect of Employment and Occupation, *opened for signature* June 25, 1958, 362 U.N.T.S. 31, ILO No. 11 (entered into force Jun. 15, 1960); Convention Concerning Minimum Age for

would also have potential applicability to trafficking victims, but the connection between trafficking and migrant labor was not directly drawn until recently.[59]

The inherent political, legal, and structural weaknesses of the international human rights system resulted in few effective solutions to human trafficking during most of the twentieth century.[60] During the second half of the twentieth century, the States' reporting obligations and overall enforcement mechanism under the 1949 Convention proved to be extremely weak,[61] and the concern over innocent women and girls being taken abroad and forced against their will into situations of (typically sexual) exploitation was "almost exclusively confined to the margins of the relatively low-profile human rights system."[62] Despite fairly straightforward prohibitions in two major treaties and an array of related standards in other human rights conventions, it was, and still is, extremely difficult to link trafficking to the violation of a specific provision of a specific convention.[63]

The scope of trafficking did not disappear however; to the contrary, it kept growing at an alarming rate. Eventually, the chronic inability of human rights law and tools to deal with modern forms of exploitation and trafficking prompted States to look for more effective responses outside the human rights framework.[64]

B. Human Rights Discourse and the Trafficking Protocol

Many in the human rights community were concerned that the drafting of the first modern international legal instrument on trafficking was vested in the U.N. Crime Commission rather than the U.N. Commission on Human Rights.[65] In trying to ensure that a human rights perspective was injected into the criminal law enforcement framework, efforts were taken to convince States that incorporating human rights protections to the victims was crucial to achieving the crime and border control objectives.[66]

Admission to Employment, *opened for signature* Jun. 26, 1973, 1015 U.N.T.S. 298, ILO No. 138 (entered into force Jun. 19, 1976); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *opened for signature* Jun. 17, 1999, 2133 U.N.T.S. 161, ILO No. 182 (entered into force Nov. 19, 2000); Convention Concerning Migration for Employment (Revised), *opened for signature* Jul. 1, 1949, 20 U.N.T.S. 79, ILO No. 97 (entered into force Jan. 22, 1952).

[59] GALLAGHER, *supra* note 6, at 161-62.

[60] *Id.* at 4.

[61] *Id.* at 62.

[62] *Id.* at 16.

[63] *Id.* at 4.

[64] *Id.* at 477.

[65] *Id.* at 4. *See also Global Sheriff*, *supra* note 29, at 446-47.

[66] GALLAGHER, *supra* note 6, at 71-72. For example, it was recognized that successful investigation and prosecution of traffickers depended on the cooperation of the victims,

Consequently, while clearly driven by concerns about global security and transnational criminal enterprises, the Trafficking Protocol also reflects an agreement amongst the international community about the severe human rights issues that human trafficking entails.[67] Both the Preamble to the Protocol[68] and its Statement of Purpose[69] emphasize the need to respect and protect the victims' human rights. Similarly, Article 6 (dealing with assistance and protection to trafficking victims), Article 7 (dealing with the status of trafficking victims in receiving states), and Article 8 (dealing with repatriation of trafficking victims) specify specific areas of focus for the states to address, from immediate medical, counseling,[70] and housing needs,[71] to long-term education,[72] employment,[73] and residency status assistance.[74]

As many critics have noted, most of the requirements do not place "hard" detailed obligations on States.[75] States do not breach their international obligations, if they provide no assistance whatsoever to trafficking victims.[76] The question is whether this flaw in the Trafficking Protocol can be remedied by the already existing, though underutilized, protections in general international human rights law, and by subsequent legal developments.[77]

C. Human Rights Discourse and the Call for Better Protection of Trafficking Victims

There is no doubt that human trafficking presents grave human rights issues.[78] Since the enactment of the Trafficking Protocol, there has been increasing recognition that protective measures for trafficking victims are as important, if not more so, than capturing and prosecuting their traffickers.[79]

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which in turn requires measures to protect their rights and provide much needed services. *Id.* at 83; *See also*, the U.S. Department of Homeland Security victim-centered approach under its Blue Campaign, *available at* http://www.dhs.gov/blue-campaign/about-blue-campaign.

[67] *See infra* notes 68-74 and accompanying text.

[68] Trafficking Protocol, *supra* note 4, pmbl.

[69] *Id.* art. 2.

[70] *Id.* art. 6.3(c)

[71] *Id.* art. 6.3(a)

[72] *Id.* art. 6.3(d)

[73] *Id.* art. 6.3(d)

[74] *Id.* art. 7.

[75] *See* GALLAGHER, *supra* note 6, at 81-82.

[76] *Id.* at 83.

[77] *Id.* at 2.

[78] *See, e.g.*, 22 U.S.C. § 7101(b)(23); GALLAGHER, *supra* note 6, at 5 ("Trafficking goes to the very heart of what human rights law is trying to prevent.").

[79] *See* Youla Haddadin & Ilona Klímová-Alexander, *Human Rights-Based Approach to Trafficking: The Work of the United Nations Office of the High Commissioner for Human Rights*, 52 NO. 1 JUDGES' J. 22, 22 (2013). *See also infra* notes 80-94 and accompanying text.

Both the European approach to human trafficking[80] and the slowly-changing focus in the implementation of the U.S. TVPA demonstrate the growing consensus of the need to address the human rights violations that trafficking brings about.[81]

The current European approach to human trafficking focuses more directly on the human rights issues than does the Trafficking Protocol. The 2005 Council of Europe Convention on Action against Trafficking in Human Beings[82] (Convention) set out to be, in contrast to the Trafficking Protocol, a human rights instrument with a core focus on victim protection.[83] It is a comprehensive treaty focusing mainly on the protection of victims of trafficking and the safeguarding of their rights.[84] In designing, implementing, and assessing policies and programs to prevent trafficking, the Convention required member countries to promote a human rights-based approach and to use a gender mainstreaming and child-sensitive approach.[85] Accordingly, Chapter III of the European Trafficking Convention sets up specific measures to protect and promote the rights of victims and to guarantee gender equality.[86]

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[80] *See infra* notes 82-86 and accompanying text.

[81] As former Secretary of State Hillary Clinton pointed out in the 2012 TIP Report:

> Trafficking in persons deprives victims of their most basic freedom: to determine their own future. Our work in fulfilling the promise of freedom should be not only the pursuit of justice, but also a restoring of what was taken away. We should aim not only to put an end to this crime, but also to ensure that survivors can move beyond their exploitation and live the lives they choose for themselves.

U.S. DEPT. STATE, TRAFFICKING IN PERSONS REPORT 2 (2012), http://www.state.gov/j/tip/rls/tiprpt/2012/index.htm.

[82] Council of Europe Convention on Action Against Trafficking in Human Beings and its Explanatory Report, CETS 197, 16.V.2005, *opened for signature* May 16, 2005, entered into force Feb. 1, 2008 [hereinafter European Trafficking Convention]. *See also* GALLAGHER, *supra* note 6, at 110-27 (offering a detailed discussion of the drafting process and scope of the Council of Europe Convention Against Trafficking).

[83] GALLAGHER, *supra* note 6, at 114.

[84] As stated in the Preamble, the European Trafficking Convention is based on recognition of the principle that trafficking in human beings is first and foremost a violation of human rights and an offence to the dignity and integrity of the human being. European Trafficking Convention, *supra* note 82, at pmbl. It therefore aims to protect the human rights of trafficking victims, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, and to ensure effective investigation and prosecution. European Trafficking Convention, *supra* note 82, at art. 1(1)((b).

[85] European Trafficking Convention, *supra* note 82, at art. 5(3).

[86] Such measures include, for example, correct identification of victims and postponement of any removal proceedings; identity and privacy protection; assistance to victims in their physical, psychological and social recovery including housing, medical services, translation services, counsel and assistance in the criminal proceedings against the traffickers, education for child victims, and so forth; residence permit if necessary based on the victims' personal situation or to ensure cooperation with law enforcement authorities; access to legal aid and

The U.S. TVPA also creates hard obligations[87] with regard to victims' protections and assistance, both for victims outside the United States and for victims within the United States.[88] Alien trafficking victims within the United States, for example, may be eligible for federal public benefits and assistance,[89] protection of their safety, and access to medical care.[90] The Trafficking Victims Protection Reauthorization Act of 2003 also created a private cause of action for trafficking victims.[91] Trafficking victims may even be eligible for temporary or permanent residency status in the United States.[92]

Within the TVPA statutory framework, prevention comes first, then protection, and finally prosecution. As noted earlier, at the implementation stage, much of the focus and resources early on has been on the criminal enforcement aspect.[93] Most TIP reports clearly put more emphasis in their assessment of efforts in other countries on legislative action to criminalize trafficking and on efforts by law enforcement agencies and the criminal

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compensation; and repatriation with due regard for the victim's rights, safety and dignity. European Trafficking Convention, *supra* note 82, at art. 10-16.

The anchoring of the European approach in human rights law received a further boost in a 2010 landmark decision of the European Court of Human Rights. In the case of Rantsev v. Cyprus and Russia, the Court found that Cyprus and Russia were legally responsible and liable in damages for the death, in Cyprus, of a Russian woman who was most likely a trafficking victim. Eur. Ct. H. R. App. No. 25965/04 (2010), (ECHR Jan. 7, 2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96549#{"itemid":["001-96549"]}. The Court specifically ruled that trafficking in human beings fell within the scope of Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.* at ¶ 293, 309. The Court emphasized that, accordingly, States had a positive human rights obligation to put in place an appropriate legal and administrative framework against trafficking, to take measures to protect victims and to investigate acts of trafficking, including through effective co-operation with other States concerned on criminal matters. *Id.* at 290-309.

[87] Applicable only to victims of "a severe form of trafficking in persons." The term "severe forms of trafficking in persons" is defined in 22 U.S.C. § 7102(8) (2012) as:

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
>
> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

[88] *See* 22 U.S.C. § 7105(a) (2012) and 22 U.S.C. § 7105(b) (2012).

[89] 22 U.S.C. § 7105(b)(1) (2012).

[90] 22 U.S.C. § 7105(c)(1)(B) (2012).

[91] TVPRA of 2003, Pub. L. No. 108-193, 117 Stat. 2875, §4(a)(4)(A) (providing a private cause of action for victims to sue their individual traffickers); *See also* 18 U.S.C. § 1595(a) (2012) (offering an additional cause of action for trafficking victims to sue their traffickers in order to recover damages and attorneys fees).

[92] *See* 22 U.S.C. § 7105(c)(3)(i) (2012). Immigration status, however, is contingent upon cooperation with law enforcement in prosecution efforts. *See* 22 U.S.C. § 7105(c)(3)(iii) (2012).

[93] *See* Part I *supra*.

justice system as a whole to capture and punish traffickers.[94] It was not until the 2012 TIP Report that protection of trafficking survivors took a more central role in shaping U.S. policy on trafficking.[95] The 2014 TIP report underscores the U.S. commitment to support trafficking victims in their journey to becoming trafficking survivors.[96]

The emphasis on trafficking as a human rights issue helped shift the

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[94] *See, e.g.*, U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 14 (2003), *available at* http://www.state.gov/documents/organization/21555.pdf (discussing in the following order: prevention, prosecution, and protection). In 2004, the order became prosecution, protection, prevention, and the analysis continued in that order in 2005, 2006, 2007, 2008, 2009, 2010, and 2011. *See* Trafficking in Persons Report, U.S. DEPT. OF STATE, http://www.state.gov/j /tip/rls/tiprpt/index.htm (last visited Jun. 20, 2014).

As recently as the 2009 and 2010 TIP reports, prosecution and punishment were at the top of the U.S. policy priorities. *See* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 25-32 (2009), *available at* http://www.state.gov/documents/organization/123357.pdf; *See also* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 12 (2010), *available at* http://www.state.gov/documents/organization/142979.pdf. The 2009 TIP Report included an explanatory section on the "3Ps," Punishment, Protection and Prevention, *See* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 25-32 (2009), *available at* http://www.state.gov/ documents/organization/123357.pdf (discussing the "3P"), and the 2010 TIP Report section on Policy Priorities stated: "Since the issuance of President Bill Clinton's Executive Memorandum on the Trafficking of Women and Children in March 1998, the U.S. government has advocated a policy structured by the "3P" paradigm: prosecution, protection, and prevention." *See also* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 12 (2010), *available at* http://www.state.gov/documents/organization/ 142979.pdf.

Current policy communications from the Office to Monitor and Combat Trafficking in Persons and from the President's Interagency Task Force To Monitor and Combat Trafficking in Persons suggest that a shift in focus back to prevention, protection, prosecution, and the newly added 4P ("partnership") is slowly taking place. *See, e.g.*, *Office to Monitor and Combat Trafficking in Persons*, U.S. DEPT. OF STATE, http://www.state.gov /j/tip/index.htm. The fourth 'P'–Partnerships–has been included in recent TIP reports, starting with the 2010 TIP Report. The most recent reauthorization of the TVPA specifically added a section promoting collaboration and cooperation between the U.S. government, foreign governments, civil society actors, and private sector entities. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1202, 127 Stat. 54 (2013) (codified as amended at 22 U.S.C. § 7103a(a) (2013)).

[95] *See* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT (2012), *available at* http://www.state.gov/j/tip/rls/tiprpt/2012/index.htm (focusing on how to make victim protection more effective for helping survivors restore their lives and for providing them with meaningful choices to move forward). The 2013 TIP report continues on this path, by not only focusing on effective victim identification, but most importantly by focusing on listening to survivors' experiences and incorporating their perspectives and giving survivors a true voice in the process. *See* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT (2013), *available at* http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm.

[96] *See* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS Report (2014) *available at* http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm. The 2014 TIP report makes it clear that "a major element of the recovery process is helping victims regain their agency, their dignity, and the confidence to make choices about how to move forward with their lives." *Id.* at 8.

perception of trafficking victims from being considered criminals themselves, subject to deportation and prosecution to being viewed as victims.[97] The human rights discourse also put pressure on governments' to incorporate the Protection aspect of the "3P" paradigm;[98] it now drives many public awareness campaigns and educational programs under the Prevention component of the "3P" paradigm.[99] Moreover, a human rights approach continues to remind us "trafficking is woven deeply and inextricably into the fabric of an inequitable, unjust, and hypocritical world."[100]

At the same time, the human rights discourse remains mostly aspirational and limited in its ability to obligate nations and businesses to take affirmative steps to address the social and economic conditions that perpetuate trafficking. There is no shortage of international human rights standards that address trafficking, but very little takes the form of concrete obligations and true engagement with the underlying issues.

The inherent limitations of the human rights and the criminal law enforcement framework to prevent human trafficking show that a new approach is needed. A few scholars have begun focusing on other possible approaches to human trafficking.[101] Those emerging voices primarily take a

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[97] *See e.g.* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT (2010), *available at* http://www.state.gov/documents/organization/142980.pdf at p.13-16 (setting a victim-centered approach as a policy priority for the U.S. anti-trafficking efforts and identifying the detentions and criminalization of victims as harmful to victims and as counterproductive.). *See also* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT (2013), *available at* http://www.state.gov/documents/organization/210737.pdf at p.36 (discussing non-criminalization of victims).

[98] *See* e.g. *See* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT (2011), *available at* http://www.state.gov/documents/organization/164452.pdf at p.40-42 (delineating governments' responsibility to offer comprehensive protection measures to trafficking victims). *See also* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT (2012), *available at* http://www.state.gov/documents/organization/192587.pdf at 9-14.

[99] *See* e.g. the mission statement of the U.N. Global Initiative to Fight Human Trafficking (UN.GIFT), *available at* http://www.ungift.org/knowledgehub/en/about/index.html ("UN.GIFT aims to mobilize state and non-state actors to eradicate human trafficking by reducing both the vulnerability of potential victims and the demand for exploitation in all its forms; ensuring adequate protection…while respecting the fundamental human rights of all persons…UN.GIFT will increase the knowledge and awareness on human trafficking; promote effective rights-based responses…). High profile media campaigns, for example, include the CNN Freedom Project, http://thecnnfreedomproject.blogs.cnn.com/.

[100] GALLAGHER, *supra* note 6, at 4.

[101] *See e.g.*, Sarah Richelson, *Trafficking and Trade: How Regional Trade Agreements Can Combat the Trafficking of Persons in Brazil*, 25 ARIZ. J. INT'L & COMP. L. 857 (2008)(suggesting the integration of labor and other human rights into free trade agreements as a new approach to combat human trafficking); Karen E. Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 545, 562 (2009) (arguing that human capital and labor should be able to move freely in the global economy, similar to other goods and services, thus undermining the incentives for underground mu=migration and human trafficking) [hereinafter Free Labor]; James Gray

labor approach or, to a lesser extent, a development approach and a public health approach.[102] Common to all these approaches, as well as to this Article, is the recognition that human trafficking thrives on the vulnerability of certain individuals and populations to exploitation and the call to investigate the relations between labor migration and human trafficking.[103]

It is now time to recognize the limitations of the current approaches and address the problem as a matter of economic development and sustainability. To do so, however, we need to specifically examine the gendered nature of the current discourse. As this article argues in Part III infra, the current discourse on human trafficking is gendered in several ways. On the one hand, criminal enforcement efforts and the human rights approaches remain focused on sex trafficking of women and children as the paradigm. On the other hand, the focus on the enslavement of women and children in the illegal sex industry by criminal organizations allows us to view human trafficking as an aberration rather than acknowledge the central role it plays in supporting and maintaining the global economy. Consequently, the current discourse continues to marginalize both the impact on and the role of women, children, and migrant workers from developing nations in the global economy.

III. A PROBLEMATIC GENDERED DISCOURSE: THE FOCUS ON WOMEN AND CHILDREN

Part I and II *supra* argued that the discourse on human trafficking has been too narrow, and consequently ineffective, due to its focus on criminal law enforcement and on human rights. This part asserts that the current discourse has also been narrow in its primary focus on women and children, and, up until recently, on sex trafficking. It is largely due to that focus that we have not been able to truly address and hopefully prevent human

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Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849 (2010) (focusing on the empowerment of workers to claim their rights); Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fights Against Human Trafficking*, 33 MICH. J. INT'L L. 53, 55 (2011) (exploring alternative perspectives to the criminal law model of human trafficking including a human rights perspective, a public health perspective, and a development perspective); Jonathan Todres, *Moving Upstream: The Merits of Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447 (2011)(further exploring a public health approach to human trafficking); Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76 (2012) (examining human trafficking through a labor lens and suggesting workplace measures to empower employees)[hereinafter A Labor Paradigm]; Jonathan Todres, *Human Rights, Labor, and the Prevention of Human Trafficking: A Response to a Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. Discourse 142 (2013)(supporting a combined human rights and labor approach to combat human trafficking).

[102] *See infra* Part V.

[103] *Id.*

trafficking.

The historical legacy of initially excluding people of color from the early trafficking protections and of conceptualizing trafficking as only relating to sex trafficking of women and children is reflected in the current legal framework and discourse regarding trafficking.[104] Whether directly reflected in their names, or indirectly underlying the legal framework, much of the current approaches to human trafficking developed in response to the paradigmatic horror story of human trafficking—the young (white) woman or child being duped and kidnapped for exploitation in the illegal commercial sex industry.[105] The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (emphasis added) was initially intended to deal only with trafficking in women and children. However, a proposal to expand the scope to all persons was made early on, and almost all the States agreed, with the understanding that particular attention should be given to the protection of women and children.[106] The question of whether to move beyond the traditional focus on sex trafficking to include forced labor, debt bondage, and forced marriage garnered much more opposition.[107] Much of the discourse in Europe and in Asia in the 1990s and to some extent today, shows a clear preference to define trafficking as restricted to the sexual exploitation of women and children.[108] The TVPA, which in 2000 was part of a legislative package addressing violence against women, similarly elevates trafficking in the form of sexual exploitation of women and children.[109] Today as well, portrayals of human trafficking in the media (including in documentary and fiction movies), advocacy campaigns by NGOs, and on social networks, demonstrate that the history of the human trafficking discourse—especially the narrative envisioning the rescue of innocent women and girls from life of enslavement in immoral sexual activities—continue to shape the current human trafficking discourse.[110]

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[104] *See supra* Part II.A.

[105] *See infra* notes 106-110 and accompanying text.

[106] GALLAGHER, *supra* note 6, at 26.

[107] GALLAGHER, *supra* note 6, at 26-29.

[108] *Id.* at 19-22.

[109] TVPA separately identifies "sex trafficking" as a severe form of trafficking if procured by fraud or coercion, or if involving minors. 22 U.S.C. § 7102 (2012). Of the twenty-four Congressional findings that frame TVPA, five findings reference sex trafficking and the commercial sex industry and five findings refer specifically to women and children as victims of trafficking, primarily in sexual exploitation. 22 U.S.C. § 7101 (2012). The 2013 reauthorization of TVPA was again as part of the reauthorization of VAWA. *See* Title XII of the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

[110] UN.GIFT maintains a list of many documentary and fiction films on human trafficking (http://www.ungift.org/knowledgehub/media/films.html, archived at PERMA). Of the better known ones are the three Taken Hollywood movies (2008, 2012, 2014), Sex Traffic (2004),

That dominant narrative, however, serves as a double-edged sword. While the narrative emphasizes the plight of many women and children and the need to 'rescue' them from the traffickers, as long as it is viewed as a women's issue it is less likely, as we have unfortunately seen in many other areas, to garner the firm international and domestic commitment and resources needed for true preventative measures. Since many trafficked women and men are often also poor migrant individuals of color from the Global South, their marginalization and invisibility goes beyond gender issues and is compounded by the intersection of multiple characteristics that are devalued, historically, and within the current global power structures.

Jonathan Todres' analysis of "otherness" and "othering" in the context of trafficking is particularly insightful. In his article Law, Otherness and Human Trafficking,[111] Todres suggests that "otherness," which inherently devalues and dehumanizes the "Other," facilitates the abuse and exploitation of certain individuals and explains, at a regulatory level, both the current selective responses to exploitation and trafficking and complete inaction in various regards.[112] The intersections of race, gender, ethnicity, class, culture, and geography leads members of dominant backgrounds (either as individuals or as groups or even countries) to devalue and "other" certain individuals, communities and entire nations.[113] Poor women of color in developing countries are persistently subject to "othering" on multiple dimensions, and tend to be the most marginalized and devalued within the global community.[114] The more marginalized they are, the more they are at risk of exploitation.[115] The more limited their choices are because of their race, gender, ethnicity, class, culture, or geography, the more they may opt to engage in risky work or risk dangerous paths.[116]

"Othering" also allows the global community, especially the Global

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Trafficked (2005), Human Trafficking (2005), Daryl Hannah's human trafficking documentary (2006), Not for Sale (2007), Redlight (2009), and Not My Life (2010). With the exception of Not My Life, these movies focus on sex trafficking of women and children and the efforts to rescue them.

NGO examples include: THORN, formerly the DNA Foundation founded by Demi and Ashton Kutcher, which focuses on combating the digital/online sexual exploitation of women and children (http://www.demiandashton.com/aboutus/, archived at PERMA); the Coalition Against Trafficking in Women, http://www.catwinternational.org/, which is a multi-regional international network fighting sexual exploitation and prostitution (http://www.catwinternational.org/, archived at PERMA); End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT), which is another NGO and a global network of civil society organizations exclusively dedicated to ending the commercial sexual exploitation of children, (http://www.ecpat.net/, archived at PERMA).

[111] Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605 (2009).

[112] *Id.* at 607.

[113] *Id.* at 609.

[114] *Id.* at 619-20.

[115] *Id.* at 621-22.

[116] *Id.* at 622.

North, to, on the one hand, view itself as the altruistic savior of the "Other," and, on the other hand, to rationalize and turn a blind eye to its own exploitation and benefit at the expense of the "Other."[117] The focus on the enslavement of women and children in the illegal sex industry by criminal organizations allows us to view human trafficking as an aberration rather than acknowledge the central role it plays in supporting and maintaining the global economy.[118] It continues to marginalize both the impact on and the role of women, children, and migrant workers, primarily from developing nations, in the global economy. As may often be the case, "trafficked women may be . . . migrant women attempting to meet their own needs or responding to labor demand in the West."[119] But, the dominant trafficking narrative ignores the complex structural, social, and economic aspects of women's labor migration.[120]

As long as the focus remains on "saving" women and children from the hands of criminals, instead of acknowledging the global economic realities that feed and perpetuate the business of human trafficking, our efforts will continue to be a drop in the sea. I join Jonathan Todres in suggesting that it is precisely because those most vulnerable to—and directly harmed by—human trafficking are impoverished migrant women, children and men of color—i.e. "The Other"—that the discourse has been allowed to remain in the marginalized and weaker international law domain of human rights and labor rights rather than at the core of economic growth and trade policies.

IV. THE REALITIES OF ECONOMIC MIGRATION AND HUMAN TRAFFICKING IN THE ERA OF GLOBALIZATION

In an increasingly interdependent world, human migration is just another element of the global market-place.[121]

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[117] *Id.* at 623-35. *See also* Shamir, A Labor Paradigm, *supra* note 101, at 80-81 ("[T]he 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 against severe forms of exploitation, when in reality, little is being done to address the underlying causes.").

[118] As Todres demonstrates, "othering" also allows the dominant group, the "Self," to exempt its own behavior and exploitation of those it views as "Other." Todres, *supra* note 111, at 616-17, 623-35.

[119] Janie Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1702 (2010) [hereinafter: *Rescuing Trafficking*].

[120] *Id. See infra* Part V.

[121] Jennifer Chaćon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2977 (2006) [hereinafter *Misery and Myopia]*.

As migrant workers, particularly migrant women, are playing an increasingly critical role in the global economy, trafficking victims are often poor unskilled migrant workers. The dominant trafficking narrative continues to marginalize the impact on, and the role of, women, children, and migrant workers, primarily from and within developing nations, in the global economy.

Many trafficked workers are enslaved in their own countries and are not necessarily cross-border migrant workers. Many may be "domestic" migrant workers from rural, less-developed areas to urban or industrial areas. Others are simply relegated to exploitive and dangerous jobs in the name of global economic development, open markets, and competitive production and supply chains. All, especially trafficked cross-border migrant workers, increasingly serve a critical role in sustaining the global economy all over the world.

A. Vulnerability and Globalization

Human trafficking feeds into a global market dependent on cheap and exploitable labor and the goods and services that such labor can produce. It is exacerbated by gender violence, poverty, and disparities in economic opportunities *vis-a-vis* unmet labor demands and strict migration laws in wealthier countries. As Janie Chuang aptly put it:

> The problem of trafficking begins not with the traffickers themselves, but with the conditions that caused their victims to migrate under circumstances rendering them vulnerable to exploitation. Human trafficking is but "an opportunistic response" to the tension between the economic necessity to migrate, on the one hand, and the politically motivated restrictions on migration, on the other.[122]

Trafficking exploits the vulnerability of certain individuals and populations, especially those seeking better economic opportunities at home or abroad.[123] Amongst the factors that help shape individual's or certain group's, communities', and societies vulnerability to trafficking are poverty and lack of employment opportunities, which are often aggravated by inequality, discrimination and gender-based violence, and the lure of better economic opportunities elsewhere.[124] These "push" factors are intensified

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[122] *Preventing Human Trafficking*, *supra* note 1, at 140.
[123] *Incorporating Perspectives*, *supra* note 2, at 58-59.
[124] GALLAGHER, *supra* note 6, at 415.

by "pull" factors including ongoing and increasing demand, mostly in wealthier developed regions, for cheap goods and services.[125] Desperate for any job, poor unskilled workers are willing to fill unmet labor demands in informal sectors or in jobs that are rejected by domestic workers in wealthier countries for being too dirty, dangerous, or difficult.[126] At the same time, employers who seek to increase profits at the expense of vulnerable workers, "create" demand for forced labor.[127] Lastly, rather than acknowledge their dependency on migrant labor in many economic sectors, destination countries, fearing the "other," respond with strict migration laws and border control, thus incentivizing trafficking.[128]

These push and pull factors are not new. However, they have taken center stage in the era of contemporary globalization.[129] Globalization and trade liberalization led not only to greater international exchange of capital and goods, but also to increasing labor migration.[130] Alongside general economic benefits,[131] globalization increases the wealth gap between countries and between rich and poor within countries.[132] Such wealth disparities feed increased survival labor migration as economic opportunities disappear in less wealthy countries and communities.[133] Those desperate to migrate, however, encounter tightening border controls and limited options for legal migration at the destination countries (although those countries generate a growing demand for such migrant

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[125] *Incorporating Perspectives*, *supra* note 2, at 60 ("Ultimately, as with the drug trade, traffickers are feeding a demand driven by consumers. In the human trafficking context, the demand is driven by both the desire for commercial sex and the desire for cheap goods and services.").

[126] *Preventing Human Trafficking*, *supra* note 1, at 145.

[127] *Id. See also A Labor Paradigm*, *supra* note 101, at 83 ("[T]here are rent-*See*king 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.").

[128] *A Labor Paradigm*, *supra* note 101, at 146.

[129] Globalization is a loosely defined set of complex economic and financial processes that have made our world economies increasingly interdependent on each other, including trade liberalization and rise "in international trade, global movement of capital, transnational commerce and investment and labor flows. . . ." IRFAN UL HAQUE, GLOBALIZATION, NEOLIBERALISM AND LABOUR 1 (Jul. 2004), *available at* http://unctad.org/en/Docs/osgdp 20047_en.pdf.

[130] *Preventing Human Trafficking*, *supra*, note 1, at 140. Traditional sex roles and division of labor typically means that women participate in the labor market, primarily for survival, in unpaid or underpaid traditional female jobs. *Id.* Discriminatory gender practices often deprives women from access to both basic or higher education, which further limits their prospects for better paying jobs covered by labor protections. *Id.*

[131] *See generally* IRFAN UL HAQUE, *supra* note 129, 3-5.

[132] *Preventing Human Trafficking*, *supra*, note 1, at 140.

[133] *Id.* at 141.

workers), which in turn exacerbates their vulnerability to trafficking.[134]

Furthermore, other aspects of globalization have also contributed to the expansion of traffickers' reach. No longer limited to individuals who fall prey to trafficking because of adverse personal circumstances, violent environment, lack of education, and no prospects for employment, "[i]ndividuals with higher education, including university qualifications and with second and third languages, that are in employment and stable relationships are now considered to be almost as vulnerable but for different reasons."[135] Greater freedom of movement and ease of travel, lower-cost regional and international transport, and global communication and financial networks, combined with previously unavailable opportunities to work overseas and individuals' self-confidence enable traffickers to recruit persons who would not normally be thought of as vulnerable.[136]

B. The Feminization of Labor and Migration

Women comprise most of those emigrating for survival (due to both economic hardship and gender-based repression), and relatedly, the overwhelming majority among those who are exploited in the process and subject to labor trafficking.[137] Women, as well as many men and children, faced with lack of jobs in their domestic markets, may opt to migrate in order to access developed markets within their region or abroad. Importantly, aside from fulfilling their own survival needs, migrant women, as well as men and children, are playing an increasingly critical role in sustaining the global economy as they fill the demand for workers particularly in informal low-wage earning economic sectors in destination countries.[138]

Human trafficking is very much a manifestation of the feminization of both poverty and migration.[139] Poverty and unemployment increase

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[134] *Id.* at 138.

[135] GALLAGHER, *supra* note 6, at 415 note 2

[136] *Id.*

[137] Preventing Human Trafficking, *supra*, note 1, at 141.

[138] *Id.* at 143. Saskia Sassen argues that "exploited and undervalued women are active factors in the making of alternative political economies for survival, not only for their households but also for a range of economic sectors and for governments," even if they themselves do not necessarily gain anything or become empowered. Saskia Sassen, *Strategic Gendering As Capability: One Lens into the Complexity of Powerlessness*, 19 COLUM. J. GENDER & L. 179, 180 (2010) [hereinafter Complexity of Powerlessness].

[139] *See generally Alyson Dimmitt Gnam, Mexico's Missed Opportunities to Protect Irregular Women Transmigrants: Applying a Gender Lens to Migration Law Reform*, 22 PAC. RIM L. & POL'Y. J. 713 (2013) (focusing on the Mexico-U.S. migration corridor to demonstrate the global phenomenon of increasing numbers of job-*See*king migrant women).

opportunities for trafficking in women.[140] Women are especially vulnerable due to entrenched discriminatory and gender-based violence practices that relegate them to unregulated low-wage employment in informal sectors and limited opportunities for legal migration.[141] Women particularly are being pushed out of developing countries due to economic, familial, and societal pressures and comprise at least fifty-six percent of the world's trafficking victims.[142] In enacting TVPA in 2000, Congress was in fact cognizant of many of these aspects.[143] Amongst its key findings, Congress recognized that traffickers primarily target women and girls who are disproportionately affected by poverty, lack of access to education, chronic unemployment, low status and discrimination, and the lack of economic opportunities in countries of origin.[144] Consequently, traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay and buy children from poor families and sell them into various types of forced or bonded labor.[145]

Globalization has had a particularly harsh impact on women in the "Global South," and it is critical that we recognize the "systemic link between the growing presence of women from developing economies in a variety of global migration and trafficking circuits on one hand and the rise in unemployment and debt in those same economies on the other."[146] Women in developing countries who may have been able to participate in the formal economy through small locally owned businesses and farms may no longer have those opportunities and lose out to cheaper imported goods.[147] They are consequently pushed into the informal sector, or into low-skilled manufacturing and service jobs generated by the entrance of transnational corporations into developing economies.[148] Quite often those corporations are allowed to get away with adverse working conditions and low wages in their "global assembly line."[149] Such employers may even prefer female workers from disadvantaged backgrounds as they take advantage of deeply imbedded gender subordination in traditional societies,

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[140] U.N. Secretary-General, Traffic in Women and Girls: Rep. of the Secretary-General, ¶ 22, UN Doc. A/50/369 (Aug. 24, 1995) (citing the Committee on the Elimination of Discrimination Against Women 1992 General Recommendation 19, para. 14).

[141] *Preventing Human Trafficking*, *supra* note 1, at 141-44.

[142] *See* 2009 ILO Global Report of Forced Labour, The Cost of Coercion, at p.1, *available at* http://www.ilo.org/global/topics/forced-labour/publications/WCMS_106268/lang--en/index.htm. *See also* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 34 (2010), *available at* http://www.state.gov/documents/organization/142979.pdf

[143] *See* 22 U.S.C. § 7101 (2012).

[144] *Id.*

[145] 22 U.S.C. § 7101(b)(4) (2012).

[146] *Complexity of Powerlessness*, *supra* note 138, at 193; *See also* Gnam, *supra* note 139.

[147] *Preventing Human Trafficking*, *supra* note 1, at 142-43.

[148] *Id.*, at 142-43.

[149] *Id.* at 143.

and assume that these workers are likely to be more submissive and less likely to resist exploitive work conditions.[150]

The international community has recognized the factors that feed into and facilitate human trafficking, including: (1) the increasing gaps between rich and poor both within countries and between regions, which means that many (women) have become more subject to trafficking in view of their economic circumstances and their hopes for increased income for themselves and their families;[151] and (2) the increasing ease of international travel and the growing phenomenon of temporary migration for work, which means that opportunities for trafficking have increased.[152] However, rather than acknowledge their dependency on migrant labor in many economic sectors, destination countries respond with strict migration laws and border control, especially with regards to working-class and so-called unskilled migrant labor, thus incentivizing trafficking.[153]

C. (Irregular) Labor Migration and Human Trafficking

It is increasingly acknowledged that the risk of trafficking increases when the demand for labor is undermined by migration policies that limit working-class migration.[154]

The dynamics of cross-border migration within the era of globalization compound and present additional catalysts for human trafficking. In the era of globalization, the logic of trade and finance may be

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[150] *Id.* These dynamics are also very much at play when employers in destination countries take tacit advantage of subordination factors of migrant workers, due to gender, racial and language vulnerabilities, socioeconomic background and immigration status. *Id.* at 145-46. Saskia Sassen similarly offers an analytical framework of the strategic gendering in the global division of labor, discussing both the feminization of offshore workers, as a way to weaken unions and ensure a submissive and disempowered workforce, and the parallel use of migrant women for domestic work to facilitated professional 'no-wife' households in the global cities. *Complexity of Powerlessness*, *supra* note 138, at 179, 188-91.

[151] *See* generally Alyson Dimmitt Gnam, *Mexico's Missed Opportunities to Protect Irregular Women Transmigrants: Applying a Gender Lens to Migration Law Reform*, 22 PAC. RIM L. & POL. J. 713 (2013).

[152] U.N. Secretary General, *Traffic in Women and Girls: Rep. of the Secretary General*, ¶ 6, U.N. Doc. A/51/306 (August 27, 1996).

[153] *See also Misery and Myopia*, *supra* note 121, at 2977 (arguing that the U.S. is not a passive recipient of trafficked human beings and must acknowledge its role in generating a market for trafficking); *Free Labor*, *supra* note 101, at 568 ("In denying legal transborder mobility to the majority of human labor providers, nation states *See*k to have it both ways. They employ both the rhetoric of globalization and integration, as well as the contradictory rhetoric of exclusion. At the same time, their migration policies are policies of exclusion characterized by incomplete trade liberalization and draconian immigration laws.").

[154] JULIE HAM, MOVING BEYOND 'SUPPLY AND DEMAND' CATCHPHRASES: ASSESSING THE USES AND LIMITATIONS OF DEMAND-BASED APPROACHES IN ANTI-TRAFFICKING, 56 (2011).

one of openness but "the logic of migration is one of closure."[155] With trade and investment, the wealthier Global North advocates openness whereas countries in the Global South have been more critical, at least initially. With migration, the dynamics are opposite: wealthier states try to keep migrant labor out whereas underdeveloped and developing states want to export workers and capitalize on their remittances.[156]

Traffickers can become one of the only avenues left to meet the demands of both employers and workers within such restrictive migration systems.[157] In the face of tightening border controls and limited options for legal migration at the destination countries, those desperate to migrate for survival opt for risky underground migration channels, which puts them at much higher risks of becoming victims of human trafficking.[158] Nonetheless, the international community has been reluctant to fully investigate and act upon the linkage between trafficking and migrant labor.[159] In fact, within the current legal framework dealing with trafficking, there is a clear effort to distinguish "trafficking" from "illegal migration" and "migrant smuggling."[160] The former crime involves helpless virtuous victims, whereas the latter two involve those who are complicit in their own misfortune, ignoring the realities of migration flows and human trafficking.[161]

As discussed earlier, the renewed interest in human trafficking in the late 1990s arose partially as this phenomenon became associated with other global criminal trends, including criminal organizations engaging in the illegal movement of migrants across borders for profit.[162] The discourse began to expand and to address these issues from the perspective of migration control, border security, and organized crime.[163] Although the analytical and empirical links between trafficking and migration flows started to surface, the legal discourse remained insistent on treating them as separate issues.[164] The prevailing view continues to distinguish between

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[155] James F. Hollifield, *Migration, Trade, and the Nation-State: The Myth of Globalization*, 3 UCLA J. INT'L. L. & FOREIGN AFF. 595, 597 (1998-99).
[156] *Id.*
[157] HAM, *supra* note 154, at 56.
[158] *Id. See also* Jennifer Chaćon, *Misery and Myopia*, *supra* note 121, at 2977 (2006).
[159] *See infra* Notes 163-170 and accompanying text.
[160] *See infra* Notes 163-170 and accompanying text.
[161] *See infra* Notes 163-170 and accompanying text.
[162] GALLAGHER, *supra* note 6, at 17.
[163] *See supra* notes 10-12 and accompanying text.
[164] For example, a report by the U.N. Secretary General elaborated on the connection between trafficking and illegal migration, but was careful to differentiate the two:
Trafficking across international borders is by definition illegal . . . The question must be asked however, whether trafficking is the same as illegal migration. It would seem that the two are related but different. Migration across frontiers without documentation does not have to be coercive or exploitive. At the same time persons can be trafficked with their consent. A

trafficking, as the coerced and fraudulent movement for the end purpose of for-profit exploitation, and smuggling, as the facilitation of illegal movement across borders.[165] The notion that smuggling is consensual and

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distinction could be made I terms of the purpose for which the borders are crossed and whether movement occurs through the instrumentality of another person. Under this distinction, trafficking of women and girls would be defined in terms of the 'end goal of forcing . . . into economically and exploitive situations . . . for profit . . . .
U.N. Secretary-General, *Traffic in Women and Girls: Rep. of the Secretary-General*, ¶17, U.N. Doc. A/50/369 (Aug. 25, 1995).

[165] One clear manifestation of that view is the way in which trafficking and migrant smuggling are treated separately under the Organized Crime Convention. In addition to the adoption of the Trafficking Protocol, the Organized Crime Convention was supplemented by two additional protocols on migrant smuggling and on trade in small arms. *See* Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, 2241 U.N.T.S. 507 (entered into force Jan. 28, 2004), as amended Oct. 24, 2009 [hereinafter Migrant Smuggling Protocol]; *See also* Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* May 31, 2001, 2326 U.N.T.S. 208 (entered into force Jul. 3, 2005). With many European States as well as Australia and the United States experiencing a significant increase in the number of illegal migrants starting in the 1990s, the Migrant Smuggling Protocol intended to prevent and combat migrant smuggling by defining migrant smuggling as an international crime, by promoting international cooperation, and by protecting the rights of smuggled migrants. Migrant Smuggling Protocol, *Id.*

The Migrant Smuggling Protocol criminalizes the conduct of those who procure or otherwise facilitate the smuggling of migrants by defining smuggling as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident." Migrant Smuggling Protocol, *supra* note 125, at art. 3(a). This definition *Seems* to take a neutral position on the conduct and complicity of the smuggled migrants themselves. However, the underlying core distinction between those who are trafficked and those who are 'merely' smuggled is intimately intertwined with the dichotomy of coercion v. consent. Article 3(a) to the Trafficking Protocol defines "trafficking in persons" to mean:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Trafficking Protocol, *supra* note 4, art. 3(a) (emphasis added).

The definition goes on to deem the victim's consent irrelevant where any of the means of coercion, deception, and abuse set forth in subparagraph (a) have been used, and in any case involving the trafficking of children. Trafficking Protocol, *supra* note 4, art. 3(b) and art. 3(c). The definition of smuggling stands in stark contrast to the definition of trafficking in that it leaves out any references to the means by which the procurement of the migrant to be smuggled occurs or any subsequent means to extort financial gain once the illegal entry has taken place. *Compare* Migrant Smuggling Protocol, *Id.* at art. X, *with* Trafficking Protocol, *supra* note 4, at art. X.

does not involve coercion has underlined much of the discussion surrounding trafficking.[166] That dichotomized view, however, fails to acknowledge the extreme vulnerability of migrant workers and the circumstances which bring people to take inordinate risks in trying to pursue what they believe to be better opportunities elsewhere to sustain themselves and their families.[167]

All over the world, adult human trafficking victims are primarily recruited by promises of legitimate employment opportunities, only to be subjected to coercion, violence, and exploitation upon arrival to their destination.[168] Moreover, the realities of contemporary labor migration significantly undermine the assumption that the relations between the recruiter/smuggler and the migrant to be smuggled across the border are simply a manifestation of a business transaction in which the migrant purchases for money the illegal services of the smuggler.[169] More often than not, the recruitment, transportation, transfer, harboring, or receipt of the migrant worker entails the abuse of a position of vulnerability and the desperation of those agreeing to be smuggled across borders in hope of better opportunities to survive.[170]

This is not to suggest that every instance of migrant smuggling amounts to human trafficking. The line is often blurred. If one looks at the end-point exploitation, "[i]n fact, many victims of human trafficking look

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[166] *See also Free Labor*, *supra* note 101, at 554-55. This distinction is flawed, serving to mask the often symbiotic relationship between the two types of transboundary movement by shrouding migrant smuggling and human trafficking in contrasting types of illegality and vilification, instead of placing them along a continuum of rational and less-to-more exploitative responses to the contradictory international economic and migration systems. *Id.*

[167] Jennifer Chaćon argues, for example, that the limited impact of the TVPA and the ineffectiveness of the U.S. efforts to stop human trafficking stem from the United States doing almost nothing to develop an immigration strategy that deals with the global forces that drive migration and instead putting in place immigration laws and policies that render migrants vulnerable to exploitation and trafficking. *See Misery and Myopia*, *supra* note 121, at 2977 (2006).

[168] *See* Sarah Richelson, *Trafficking and Trade: How Regional Trade Agreements Can Combat the Trafficking of Persons in Brazil*, 25 ARIZ. J. INT'L & COMP. L. 857, 858 (2008); *See also* Shamir, *A Labor Paradigm*, *supra* note 101, at 105-06; Jonathan Todres, *Human Rights, Labor, and the Prevention of Human Trafficking: A Response to a Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. Discourse 142, 145-46 (2013).

[169] *See* e.g. U.S. DEPT. STATE, TRAFFICKING IN PERSONS REPORT 26-29 (2011), http://www.state.gov/documents/organization/164452.pdf.

[170] While there is no clear definition as to what amounts to abuse of a position of vulnerability, there is some support to a broad interpretation of the term. For example, the Explanatory Report to the European Convention on Action Against Trafficking, which reproduced the Trafficking Protocol definition, states that "the vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic . . . the situation can be any state of hardship in which a human being is impelled to accept being exploited." Council of Europe, *Explanatory Report on the Convention on Action Against Trafficking in Human Beings*, CETS 197, 16.V.2005 para. 83.

quite like exploited agricultural laborers and factory workers, and in fact they are often one and the same."[171] Trafficking depends not only on the coercive means by which the victim is obtained or held, but also on the purpose of exploitation such as sexual exploitation, forced labor or services, slavery, or practices similar to slavery and servitude.[172] The prototypical narrative of trafficking, for example, tells the story of young women or parents of children who fall prey to the traffickers' promise of employment or educational opportunities abroad and consent to be illegally transported across borders only to find themselves in coerced sex work, domestic servitude, or other forms of forced labor.[173] Similarly, many migrant workers find themselves held in debt bondage for a "debt" owed to their traffickers, which they supposedly incurred as a result of the cross-border, and previously consented to, smuggling.[174] Both scenarios clearly fall within the definition of human trafficking, regardless of their origin as consensual smuggling.[175]

Rather than putting most of our efforts on maintaining these distinctions, we should focus our efforts on understanding and addressing the factors and dynamics that create economic deprivations and social conditions that limit individual choices and make individuals vulnerable to exploitation and trafficking. Furthermore, receiving countries like the United States need to recognize that current immigration and labor policies drive migrant workers underground and expose them to abuse by their recruiters, transporters, and employers.[176]

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[171] 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, 44-45 (2009).

[172] Trafficking Protocol, *supra* note 4, art. 5. "Trafficking in Persons" under the Protocol is defined in art. 3. *Id.* art 3; *See also* 22 U.S.C. §§ 7102-7106.

[173] The annual TIP reports highlight many such stories from all over the world. *See* e.g., U.S. DEPT. STATE, TRAFFICKING IN PERSONS REPORT 8, 11, 14, 17, 23 (2012), http://www.state.gov/documents/organization/192587.pdf; U.S. DEPT. STATE, TRAFFICKING IN PERSONS REPORT 13, 17, 24, 29, 42, 46 (2013), http://www.state.gov/documents/organization/210737.pdf; U.S. DEPT. STATE, TRAFFICKING IN PERSONS REPORT 15, 23, 28, 29, 40 (2014), http://www.state.gov/documents/organization/226844.pdf.

[174] In debt bondage or bonded labor the trafficker uses debt to keep a person under subjugation. Traffickers, recruiters and destination employers unlawfully exploit an initial debt the worker assumed as part of the terms of employment, or when workers inherit debt in more traditional systems of bonded labor (generations in South Asia), and use it to withhold wages, deduct housing and food costs, or confiscate passports and visa documents. Children and migrant workers are particularly vulnerable to this type of exploitation. *See* e.g. U.S. DEPT. STATE, TRAFFICKING IN PERSONS REPORT 18-19, 26 (2007), http://www.state.gov/documents/organization/82902.pdf.

[175] *Cf. Free Labor*, *supra* note 101, at 575 ("The lines between labor exploitation, migrant smuggling, and human trafficking are not clear. However, it is clear that labor exploitation and migrant smuggling are the *See*dbed from which human trafficking grows.").

[176] *Misery and Myopia*, *supra* note 121, at 3039.

In conclusion, what may initially seem like illegal migration may very well amount to human trafficking; what may initially seem like consent may very quickly turn into abuse, coercion, and exploitation. More often than not, as pointed out by Janie Chuang, "trafficking is labor migration gone horribly wrong in our globalized economy."[177]

V. REFRAMING HUMAN TRAFFICKING AS A GLOBAL ECONOMIC ISSUE

The current discourse on trafficking fails to admit that human trafficking is, as the International Labor Organization (ILO) points out, the "underside of globalization."[178] There is no real commitment to reframe trafficking as a global migratory response to a global market that seeks out cheap, unregulated, and exploitable labor and the goods and services that such labor can produce. [179] There is no willingness to admit that human trafficking greases the wheels of the global economy. Instead, this Article argues, we need to develop an economic analysis of human trafficking, one which primarily looks at globalization, trade liberalization, and labor migration as the core areas that need to be explored to advance the prevention of human trafficking.

Although the international community has generally recognized some of the factors that make individuals vulnerable to trafficking, there is no real acknowledgment of the economics of trafficking. While the Trafficking Protocol, for example, requires states (in an aspirational way) to "take or strengthen measures . . . to alleviate the factors that make persons, especially women and children, vulnerable to trafficking"[180] as well as place "exploitation" at the core of the definition of trafficking, it does not otherwise acknowledge the economic forces and market practices that drive trafficking and labor exploitation more broadly.[181] Even the ILO, which is significantly ahead of the current discourse on human trafficking, in recognizing human trafficking as a labor and migration issue, doesn't truly engage in a critical analysis of global markets, as if root causes of trafficking including "poverty, lack of employment and inefficient labour migration systems"[182] exist in a vacuum.

The current approaches to human trafficking view it as distinct and exceptional extreme forms of human exploitation. They pretend not to notice that our markets perpetuate the commodification of labor and that trafficking is merely the extreme manifestation of an "entire spectrum of

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[177] *Preventing Human Trafficking*, *supra* note 1, at 138.
[178] U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT, 5 (2003).
[179] Preventing Human Trafficking, *supra* note 1, at 139; *See also* GALLAGHER, *supra* note 6, at 432; *Misery and Myopia*, *supra* note 121, at 3039.
[180] *Trafficking Protocol*, *supra* note 4, art. 9(4).
[181] *Cf. A Labor Paradigm*, *supra* note 101, at 105.
[182] INT'L. LABOUR ORG, ILO ACTION AGAINST TRAFFICKING IN HUMAN BEINGS, 2 (2008).

forms of economic coercion and commodification."[183] As Hila Shamir points out, "the difference between exploitation of workers and trafficking is a matter of degree and not kind."[184]

Accordingly, Shamir, for example, advocates for a paradigm shift to a labor approach "that targets the structure of labor markets prone to severely exploitative labor practices."[185] She focuses on workers' vulnerability, the power disparities between workers and employers, and workers' inferior bargaining power in the workplace. Her labor approach calls for policies to empower workers vis-à-vis their employers, including protective employment legislation and expansion of collective action and unions.[186]

Shamir's labor approach is premised exactly on the understanding that "the trafficked individual is a worker who is exploited in a market context."[187] She is absolutely correct in arguing that we need to understand human trafficking as "an issue of economic labor market exploitation,"[188] and to focus on power disparities and economic and social conditions that exacerbate vulnerability to trafficking.[189] She acknowledges that to fully understand how power relations in the labor market operate we need to investigate, amongst other things, private market rules, immigration regimes, and trade policies.[190] With that in mind, this Article argues that a true confrontation of the exploitive market dynamics that perpetuate trafficking requires a major shift in how we structure our global economy and the whole spectrum of our market practices. Shamir's efforts to ameliorate the power disparities between vulnerable workers and their employer simply do not go far enough.

Similarly, focusing on labor flows within the global economy, Karen Bravo's call to apply economic and trade liberalization principles to labor migration and human trafficking begins to engage in a true inquiry of our global market structures.[191] Recognizing that "the modern traffic in human beings cannot be separated from the forces of globalization,"[192] she argues

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[183] *A Labor Paradigm*, *supra* note 101, at 110.
[184] *Id.*
[185] *Id.* at 76.
[186] *Id.* at 108. Shamir proposes five labor-focused anti-trafficking measures: prevent the criminalization and deportation of workers who report exploitation to ensure workers' access to the justice system; eliminate visa arrangements binding workers to specific employers; regulate debt-based contracting; 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 and to sectors susceptible to trafficking. *Id.* at 112-19.
[187] *Id.* at 106.
[188] *Id.* at 80.
[189] *Id.* at 81.
[190] *Id.* at 81-82.
[191] Free Labor, *supra* note 101, at 545.
[192] *Id.* at 549.

that the only way to undermine the structural foundations of human trafficking is to "target the economic bases of the labor and other exploitation."[193] Specifically, argues Bravo, we need to acknowledge the connection between the growing problem of human trafficking, the increase in trade liberalization and globalization, and the simultaneous closing of borders and state imposition of restrictions on labor migration.[194] Consequently, labor should receive the same "free mobility" status as that of other goods, capital, and services in the international trading system.[195]

While the opening of markets under the contemporary trade liberalization global framework removed barriers to the trans-border movement of capital, goods, and services, labor is the only production factor that has not been similarly liberalized.[196] On the one hand, labor is clearly treated as a commodity in the global production chains in the race for cheap and efficient production and for profit maximization.[197] On the other hand, labor is treated as a passive immobile economic unit and constrained by state borders and restrictive immigration policies.[198] Moreover, the international trade regime facilitates the movement of some labor—that of skilled workers.[199] By leaving out the movement of unskilled workers, whose labor is nonetheless much in demand, the international trade regime creates the economic incentives for human trafficking and increases (unskilled) labor providers' vulnerability to exploitation.[200] Therefore, in order to successfully fight against human trafficking, argues Bravo, we should recognize labor's role in the global economic system and give human capital (labor) analogous status to other production and economic inputs within the international open trade system.[201]

Bravo is amongst the few who recognized early on that human trafficking takes place within the legitimate economic activities rather than just being limited to illegal and aberrational activity.[202] She correctly observes how restrictive immigration policies perpetuate the exploitation of migrants and would-be migrants while allowing entire industries, both legitimate and illegal, to flourish financially.[203] Bravo remains amongst the

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[193] *Id.*
[194] *Id.* at 550, 560-61.
[195] *Id.* at 550-51. Bravo suggests doing so by adopting a new multilateral annex to the WTO Agreement – the General Agreement on Trade in Labor (GATL). *Id.* at 550-51, 597-607.
[196] *Id.* at 563-64.
[197] *Id.* at 562-63.
[198] *Id.* at 563-64.
[199] *Id.* at 575 ("The status quo in the transnational labor market is a system of exploitation that is fatal to the poor, vulnerable, and unskilled, existing alongside a more flexible and open regime for highly skilled labor.").
[200] *Id.* at 568, 571-72.
[201] *Id.* at 597.
[202] *Id.* at 550, 561-62.
[203] *Id.* at 597.

few who directly confront the international trade regime in an effort to undermine the economic foundations of human trafficking,[204] even if it requires radical rethinking of transnational relations.[205]

Bravo's trade and labor market analysis, however, is primarily focused on liberalizing and regulating the supply of workers.[206] While she does, of course, explicitly acknowledge that the global labor market distortion is tied to the demand for cheap labor, she nonetheless claims that "it is the vulnerability of human labor providers to that demand that allows human trafficking to flourish."[207] Therefore, although exploitation is not likely to completely cease, Bravo does think that by severely decreasing the potential supply, human trafficking will become an aberrational practice.[208]

This Article suggests that this is not likely to be the case, exactly because the demand for exploitable cheap labor, both domestically and across borders, is a structural feature of our liberalized, global economy and converging production chains. Labor exploitation, and with it human trafficking, is needed to sustain open markets, international trade, and the global economy. Until we are willing to admit the true costs of globalization and until we are willing to redistribute wealth allocation between nations and within nations, human trafficking will continue to increase.

In a global market that seeks out cheap, unregulated, and exploitable labor to produce goods and services that generate GDP and propel economic growth, human trafficking is anything but limited to the illegal activity of criminals.[209] Trafficking of people is not merely part of the shadow economy but is in fact part of the structured global economy and serves leading economic sectors and places worldwide.[210] Countries compete in the global marketplace to offer other countries and multinational

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[204] *Id.* at 616.
[205] *Id.* at 607.
[206] *See supra* notes 191-201 and accompanying text.
[207] *Free Labor*, *supra* note 101, at 608.
[208] *Id.* at 608.
[209] *Preventing Human Trafficking*, *supra* note 1, at 139; *See also* GALLAGHER, *supra* note 6, at 432; Misery and Myopia, *supra* note 121, at 3039.
[210] *See* Anne T. Gallagher, Understanding Exploitation, Vol. XXXIII, No. 3 HARV. INT'L REV. 4-5 (Fall 2011), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1021&context=anne_gallagher. No country is exempt from the pandemic of human trafficking: The main region for forced labor is by far Asia and the Pacific, and in the industrialized world, the Middle East and transition economies the majority of forced laborers are also trafficking victims. Jens Lerche, *A Global Alliance against Forced Labour? Unfree Labour, Neo-Liberal Globalization and the International Labour Organization*, 7(4) J. OF AGRARIAN CHANGE 425, 427-429 (2007). For a full exploration of how the global economy is sustained on the back of exploited and trafficked labor *See* Dana Raigrodski, *Economic Growth on the Backs of Human Trafficking Victims – The Dependency of Global Trade and Economic Development on Forced Labor and the Trafficking of Humans*, (forthcoming 2015) (on file with author).

businesses the cheapest and exploitable labor.[211] The economies of developing and under-developed regions benefit from exploiting and exporting their populations as cheap labor in various ways. Migrant wage remittance, including from forced and trafficked labor, accounts for a huge part of the GDP in many such nations, and entire communities and some governments are increasingly dependent on those remittances.[212] The economic growth and global market competitiveness of countries such as BRICS countries, which may be exporting cheaply produced products and raw materials to fulfill demand in countries with much higher production costs, depend on their ability to continue to produce significantly cheaper products, quite often at the expenses of those people in these countries who are doing the work.[213]

Similarly, some governments continue to relax labor protections in order to attract foreign investment and transnational corporations who prefer to use the cheaper labor services in those countries.[214] Transit

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[211] Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER, RACE AND JUST. 27, 29 (2006).

[212] *See* Saskia Sassen, *Strategic Gendering As Capability: One Lens into the Complexity of Powerlessness*, 19 Colum. J. Gender & L. 179, 191 (2010) ("many governments are increasingly dependent on their remittance…through their work and remittances, migrants enhance the government revenue of deeply indebted countries."). Of the 300 billion dollars generated annually by migrant worker remittance, possibly as high as 20% goes off to pay traffickers/recruiters commission and debt bondage. U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 22(2008), *available at* http://www.state.gov/documents/organization/105501.pdf.

[213] *See* Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER, RACE AND JUST. 27, 29 (2006) ("The new sources of comparative advantage in the global economy is cheap labor"). Whereas the concept of "comparative advantage" in international trade initially referred to countries trading commodities, natural resources and raw materials in the global marketplace, we have now commodified the labor of workers in poor countries. *Id.* at 33. *See also* Don Wells, *"Best Practices" in Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement*, 27 COMP. LAB. L. & POL'Y J 357, 357 (2006) ("employers use lower labor standards as a source of comparative advantage").

[214] *Cf. Preventing Human Trafficking*, *supra* note 1, at 143-144 (arguing that poor governments turn a blind eye to the exploitation of local labor by foreign companies).

India's development, for example, aggressively relied on cheap and exploitable labor in both the formal and informal employment sectors. Government development policies, supported by Indian employers and accelerated since liberalization in the 1990s, encouraged (1) non-unionized docile workforce contributing more than 60% of the GDP; (2) manufacturing and services based on cheap unskilled labor, allowing for short term labor and unregulated employment relations; (3) absolute poverty of labor in the informal economy; (4) industry restructuring shifting certain sectors, such as the textile production, to the informal sector and outside the realm of labor laws; and (5) significant control of employers over the unorganized workers. Jens Lerche, *A Global Alliance against Forced Labour? Unfree Labour, Neo-Liberal Globalization and the International Labour Organization*, 7(4) J. OF AGRARIAN CHANGE 425, 443-444 (2007). Such policies significantly increase the susceptibility of workers to human trafficking. *Id.* at 444.

countries benefit economically from the flows of trafficking which utilize available services for transportation, telecommunication, hospitality, and banking; [215] human trafficking directly contributes to the revenue of those industries, which are regularly used by traffickers in the recruitment, transportation, transfer, harboring or receipt of trafficking victims.[216] Lastly, with much of the economic industries of wealthier destination countries depending on cheap, often migrant labor, on the one hand, but with most countries refusing to formally recognize these economic realities and ease restrictions on legal migration flows for all forms of labor, on the other hand, most of the demand for labor is met through the underground economy including human trafficking.[217]

Much like the cross Atlantic slave trade that sustained the economy of the United States and other nations prior to the abolition of slavery, so does our global economy continue to grow on the backs of these modern slaves, except now they are hidden from sight. Until and unless we acknowledge that the global economy thrives on the vulnerability of certain individuals and populations to exploitation, we will not be able to truly address human trafficking.

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[215] *See* Saskia Sassen, *Strategic Gendering As Capability: One Lens into the Complexity of Powerlessness*, 19 Colum. J. Gender & L. 179, 180, 196 (2010).

[216] *Id.*

[217] *See Preventing Human Trafficking*, *supra* note 1, at 140 and *Free Labor*, *supra* note 101, at 597; *supra* notes 125-128 and 154-158 and accompanying text. *See also* Raigrodski, *supra* note 210.

SEX WORK, MIGRATION, AND THE UNITED STATES TRAFFICKING IN PERSONS REPORT: PROMOTING RIGHTS OR MISSING OPPORTUNITIES FOR ADVOCACY?

Carole J. Petersen*

I. INTRODUCTION

While the feminist debate on commercial sex reflects strong theoretical differences, all sides acknowledge the importance of studying women's experiences in particular situations.[1] Post-colonial feminist theory has sharpened the analysis of sex work by demonstrating the dangers of assuming a single narrative of victimization.[2] Women's accounts of sex work are affected by a multitude of factors, including economic inequality; the presence or absence of legal rights; and gender, ethnic, and class discrimination.[3] The state plays an important role as it largely determines whether sex workers (both migrant and domestic) are viewed as victims, criminals, or working persons.[4]

In addition to domestic politics, the treatment of sex work is also increasingly affected by the global anti-trafficking movement and

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[1] *See generally* Moshoula Capous Desyllas, *A Critique of the Global Trafficking Discourse and U.S. Policy*, 4 J.SOC. & SOC. WELFARE 57 (2007); Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006). Due to space constraints, this article focuses on the potential impact of the Trafficking In Persons Report [hereinafter TIP Report] on female sex workers; it does not directly discuss other female migrant workers. This article frequently uses the terms "sex work" and "sex workers," although recognizing that this terminology is contentious and that structural feminists refer instead to "prostitution" and "prostituted women."

[2] *See generally* Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002).

[3] *See* Ratna Kapur, *Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern*, 78 DENV. U.L. REV. 855, 856-65 (2001).

[4] *See generally* Jane Scoular, *What's Law Got to Do With It? How and Why Law Matters in the Regulation of Sex Work*, 37 J. L. & SOC'Y 12 (2010); Marjan Wijers, *Criminal, Victim, Social Evil or Working Girl: Legal Approaches to Prostitution and their Impact on Sex Workers*, presented at the Institute de la Mujer, Madrid, Spain, 2001, *available at* http://www.nswp.org/sites/nswp.org/files/WIJERS-CRIMINAL.pdf.

http://dx.doi.org/10.18060/7909.0007

international law, as evidenced by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), a treaty that supplements the United Nations Convention Against Transnational Organized Crime and currently has 161 states parties.[5] Although the Trafficking Protocol does not require states to prohibit sex work, it does require governments to prohibit all forms of human trafficking.[6] Opponents of commercial sex often conflate sex work with trafficking, hoping to use the Trafficking Protocol as a tool to eradicate the sex industry. United States foreign policy also has been influential in shaping governments' anti-trafficking laws and policies.[7]

Since the enactment of the Victims of Trafficking and Violence Protection Act of 2000[8] (VTVPA), the U.S. State Department has been "ranking" countries in an annual Trafficking in Persons (TIP) Report.[9] On the positive side, the TIP Report has drawn more attention to the issue of human trafficking. It has also inspired many governments around the world to enact laws against human trafficking and to create programs to assist victims.[10] But the annual TIP Report has been widely criticized, partly because of weaknesses in the methodology and perceived political bias but also because of the tendency to equate sex work with sex trafficking.[11]

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[5] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the Convention Against Transnational Organized Crime, U.N. Doc. A/55/383 at 25, Nov. 15, 2000, 2237 U.N.T.S. 319 (listing states parties to the Protocol as of June 2014), *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en [hereinafter Trafficking Protocol]. For background information on the Trafficking Protocol and the Convention Against Transnational Organized Crime, see *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, U.N. OFFICE ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/treaties/CTOC/ (last visited Jan. 19, 2015).

[6] Trafficking Protocol, *supra* note 5, at art. 5.

[7] *See generally* Anne Gallagher, *Human Rights and Human Trafficking: A Reflection on the Influence and Evolution of the U.S. Trafficking in Persons Reports*, *in* FROM HUMAN TRAFFICKING TO HUMAN RIGHTS: REFRAMING CONTEMPORARY SLAVERY (Alison Brysk and Austin Choi-Fitzpatrick, eds. 2011).

[8] The Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, Div. A § 102, 114 Stat.1466 (2000) (codified as 22 U.S.C. § 7101); The Trafficking Victims Protection Reauthorization Act of 2003 (H.R. 2620); The Trafficking Victims Protection Reauthorization Act of 2005 (H.R. 972); the Trafficking Victims Protection Reauthorization Act of 2008 (H.R. 7311); The Trafficking Victims Protection Reauthorization Act of 2013 (Title XII of the Violence Against Women Reauthorization Act of 2013) U.S. DEP'T OF STATE, *available at* http://www.state.gov/j/tip/laws/ (last visited Nov. 30, 2014).

[9] *Trafficking in Persons Report*, U.S. DEP'T OF STATE, http://www.state.gov/j/tip/rls/tiprpt/ (last visited Nov. 30, 2014).

[10] *See* Anne Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VIR. J. OF INT'L L. 789, 827 (2009).

[11] *See generally* Anne Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Report*, 12 HUM. RTS. REV. 381 (2010), *available at* http://works.bepress.com/anne_gallagher/16.

Although the TIP Reports released in the past five years indicate a greater effort to address labor trafficking, the criteria for ranking governments continues to reflect strong disapproval of sex work. The United States has adopted this approach without making any concerted effort to listen to the voices of sex workers or to appreciate the possibility of collateral damage from anti-trafficking laws and policies.[12]

This article attempts to fill that gap by analyzing the impact of the United States TIP Report on sex workers in the Asia-Pacific region, focusing on the experiences of local and migrant sex workers in Hong Kong. A British colony from 1842 to 1997, Hong Kong is now a Special Administrative Region of China but continues to maintain its own immigration border and common-law legal system.[13] Although Hong Kong does not have an elected government,[14] it is respected for its commitment to the rule of law, independent judiciary, strong laws against corruption, and general respect for human rights.[15] From 2001 to 2008, Hong Kong was ranked "Tier 1" in the U.S. TIP Reports, significantly above Mainland China.[16] Hong Kong, however, was demoted to Tier 2 in 2009, and it has

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[12] *See, e.g.*, Desyllas, *supra* note 1; Ann Jordan, *Nothing About Us Without Us*, ON THE ISSUES MAG., (Summer 2008) http://www.ontheissuesmagazine.com/july08 /july2008_2.php; Rhacel Salazar Parreñas, *Trafficked? Filipino Hostesses in Tokyo's Nightlife Industry*, 18 YALE J.L. & FEMINISM 145 (2006).

[13] For a general introduction to the "one country, two systems" model, see generally YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW (2d ed. 1999).

[14] The central government of the People's Republic of China currently appoints the Chief Executive of Hong Kong following an "election" by a committee 1200 members. *See* The Basic Law of the Hong Kong Special Administrative Region of Hong Kong art. 45 and Annex I. For discussion of recent proposals for reform, see *Academic Roundtable: "Universal Suffrage and Nomination Procedures: Imperatives from Article 25 ICCPR,"* H.K.U. CTR. FOR COMP. & PUB. L. (Mar. 20, 2014), http://www.law.hku.hk/ccpl/events/Article25ICCPR.html. For a sample of the recent coverage of pro-democracy demonstrations in Hong Kong, see Keith Bradsher, Michael Forsythe & Chris Buckley, *Huge Crowds Turn Out for Pro-Democracy March in Hong Kong, Defying Beijing*, N.Y. TIMES, July 1, 2014, *available at* http://www.nytimes.com/2014/07/02/world/asia/hong-kong-china-democracy-march.html.

[15] This is not to suggest that Hong Kong does not have controversies, but it ranks above many countries in the Asia-Pacific region (particularly in civil liberties) and well above Mainland China. *Compare* Carole J. Petersen, *From British Colony to Special Administrative Region of China: Embracing Human Rights in Hong Kong*, *in* HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE, AND THE UNITED STATES 224 (Randall Peerenboom, Carole J. Petersen & Albert H.Y. Chen eds., 2006), *with* Randall Peerenboom, *Human Rights in China*, *in* HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE, AND THE UNITED STATES, *supra*, at 413.

[16] *See* U.S. DEP'T OF STATE, *supra* note 9 (listing Hong Kong as Tier 1 from 2001 to 2008). In contrast China was placed in the Tier 2 Watch List for many years, dropped to Tier 3 in 2013, and returned to the Tier 2 Watch List in 2014. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 132–134 (2014), *available at* http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226700.htm.

remained there for the past six years[17] despite the government's insistence that it has intensified efforts to combat human trafficking since 2009.[18] The territory thus provides an interesting case study of the TIP Report and the policy decisions that the United States would like the Hong Kong government to make in order to regain its Tier 1 ranking.

Part II of the article reviews the feminist debate on commercial sex and the four main approaches that have been adopted in domestic laws around the world: (1) prohibitionist; (2) partial decriminalization; (3) full legalization; and (4) abolitionist (which treats sex workers as victims but punishes pimps and also those who purchase sex).

Part III analyzes the relationship between this feminist debate and the global anti-trafficking movement, particularly the definition of "trafficking" that was adopted in the Trafficking Protocol, the criteria that the U.S. State Department applies when ranking nations in the annual TIP Report, and the incentive for countries placed in low tiers to adopt laws and policies that discourage or prohibit commercial sex.

Part IV then analyzes the relationship among sex work, migration, and trafficking in the context of Hong Kong.[19] The research on local and migrant sex workers in Hong Kong reveals significant variations in women's motivations, exposure to violence, and ability to exercise agency in their working lives. It also reveals that local sex workers are using general human rights treaties and the U.N. treaty-monitoring bodies to advocate for their rights. This raises serious concerns regarding the approach taken by the TIP Report, which unilaterally ranks governments' anti-trafficking measures according to criteria set by U.S. politicians (rather than by international law) and may undermine the efforts of local sex workers to improve their working conditions. While the State Department has correctly highlighted a number of weaknesses in Hong Kong's legal framework, particularly in the legal definition of trafficking and in the system for identification of potential victims, this article concludes that the TIP Report has oversimplified the issues and ignored the potential for collateral damage if Hong Kong were to fully implement the recommendations in the TIP Report.

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[17] *See* U.S. DEP'T OF STATE, *supra* note 9, *available at* http://www.state.gov/j/tip/rls/tiprpt/ (listing Hong Kong as Tier 1 from 2001 to 2008 and as Tier 2 from 2009 to 2014).

[18] *See infra* Part IV(D).

[19] This article focuses on local and migrant sex workers in Hong Kong and does not directly address migrant domestic workers, who also feature prominently in the U.S. TIP Reports. For previous research on this group and recommendations for the Hong Kong government, see Peggy W.Y. Lee & Carole J. Petersen, Occasional Paper No. 16, *Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers*, H.K.U. CTR. FOR COMP. & PUB. L. (2006), *available at* https://www.law.hku.hk/ccpl/pub/Documents/16-LeePetersen.pdf.

II. THE FEMINIST DEBATE ON SEX WORK AND DOMESTIC LEGAL FRAMEWORKS

Although the legal treatment of commercial sex around the world is complex,[20] the various legal frameworks can be grouped into four main approaches: (1) prohibitionist (the approach taken by most states in the United States, which involves criminalizing the actions of sex workers, pimps, and customers); (2) partial decriminalization (which generally does not prohibit sex work itself but does prohibit many associated activities, such as soliciting, pimping, and operating a brothel); (3) full legalization (although often within a regulatory framework that seeks to prevent trafficking and the involvement of minors); and (4) abolitionist (which punishes pimps and also those who purchase sex but treats sex workers as victims).[21] This section of the article analyzes these four approaches and the feminist debate on the legal treatment of commercial sex, which has fundamentally affected the international anti-trafficking movement.

Although sex work has been one of the most strongly contested issues in feminist legal theory, feminists generally agree that the prohibitionist approach taken by most states in the United States works to the disadvantage of women.[22] The American Civil Liberties Union (ACLU) argued, as early as the 1970s, that state-level criminal prohibitions on sex work violate the right to equal protection because the laws primarily have the effect of punishing female sex workers.[23] However, with few exceptions (e.g. certain counties in Nevada), sex work continues to be prohibited under state law, and sex workers are regularly prosecuted in the United States for soliciting and other offenses.[24] Despite these strict laws, there is a thriving

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[20] For examples of different legal frameworks in the Asia-Pacific region, see generally JOHN GOODWIN, SEX WORK AND THE LAW IN ASIA AND THE PACIFIC (2012), *available at* http://www.undp.org/content/dam/undp/library/hivaids/English/HIV-2012-SexWorkAndLaw.pdf.

[21] While the term "abolitionist" is sometimes used to refer generally to legal systems that prohibit all forms of commercial sex, in this article it will be used to refer to systems that prohibit the buying of sex and pimping while simultaneously decriminalizing the actions of sex workers themselves.

[22] *See generally* APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION 187–98 (D. Kelly Weisberg ed., 1996) (summarizing approaches taken by liberal, radical, Marxist, and social feminists and introducing essays written by Judith R. Walkawitz, Lars O. Ericsson, Carole Pateman, Catharine MacKinnon, Jody Freeman, Mary Joe Frug, and Margaret A. Baldwin).

[23] *See* Lars O. Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment, as reprinted in* APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION, *supra* note 22, at 208–26.

[24] *See generally* Penelope Saunders, et al., *Human Rights Violations of Sex Workers, People in the Sex Trades, and People Profiled as Such: Submission to the United Nations Universal Periodic Review of the United States of America Second Cycle 22nd Session of the Working Group on the Universal Periodic Review*, HUMAN RIGHTS COUNCIL, May 2015 (documenting prosecution of sex workers throughout the United States, with the exception of certain counties in Nevada where sex

underground commercial sex industry throughout the United States.[25]

In contrast to the "prohibitionist" approach, classic liberal philosophy views sex work as a legitimate form of work, provided that there is no coercion. This is derived from the broader liberal position that private and consensual sexual conduct should not be regulated by criminal law. Liberal feminists generally support either decriminalization or legalization within a regulatory framework. Liberal feminists typically concede that sex workers run a greater risk of gender-based violence than the typical working woman, but they believe that legalization can reduce the risk of violence as sex workers are then less vulnerable to exploitation by organized crime and can seek police protection from violent clients or pimps.[26] Although the Netherlands is widely considered the leading example of this approach, legalization has also been pursued in Germany, Iceland, Switzerland, Austria, Denmark, Greece, Turkey, Hungary, and Latvia.[27] Certain agencies of the United Nations (including UNAIDS and UN Women) also have embraced this position and expressed support for legalization of sex work when conducted by consenting adults.[28] In the Asia-Pacific region, full legalization of sex work is rare, but it has been pursued in New Zealand and parts of Australia. Partial decriminalization or toleration of sex work in certain "red light" districts is far more common among Asia-Pacific jurisdictions.[29]

Structural feminists (also referred to as radical feminists) disagree vehemently with the legalization of commercial sex because they view it as inherently forced and violent.[30] This approach is often referred to as

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work is heavily regulated), *available at* http://www.bestpracticespolicy.org/wp-content/uploads/2013/01/2014UPRReportBPPPDASWOPNYC1.pdf.

[25] *See generally* MERIDITH DANK ET AL., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR AMERICAN CITIES (2014).

[26] For additional examples of how legalization may reduce harms to sex workers, see, for example, Michele Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward a Reformation of Drug and Prostitution Regulations*, 78 UMKC L. REV. 101 (2009); WHO, *Violence Against Sex Workers and HIV Prevention*, 3 INFORMATION BULLET SERIES (2005), *available at* http://www.who.int/gender/documents/sexworkers.pdf.

[27] *See* ELAINE MOSSMAN, INTERNATIONAL APPROACHES TO DECRIMINALISING OR LEGALISING PROSTITUTION 6, 12 (2007), *available at* www.procon.org/sourcefiles/new_zealand_gov.pdf (prepared for the New Zealand Ministry of Justice); Erika Schulze, SEXUAL EXPLOITATION AND PROSTITUTION AND ITS IMPACT ON GENDER EQUALITY 31 (2014) (study completed for the European Parliament's Committee on Women's Rights and Gender Equality), *available at* http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf.

[28] *See* U.N. WOMEN, NOTE ON SEX WORK, SEXUAL EXPLOITATION AND TRAFFICKING (OCT. 9, 2013), http://www.nswp.org/sites/nswp.org/files/UN%20Women's%20note%20on%20sex%20work%20sexual%20exploitation%20and%20trafficking.pdf.

[29] *See generally* GOODWIN, *supra* note 20.

[30] *See e.g.*, Jane Scoular, *The 'Subject' of Prostitution: Interpreting the discursive, Symbolic and Material Position of Sex/Work in Feminist Theory*, 5(3) FEMINIST THEORY 343, 344 (2004); Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 20 (1993).

"abolitionist" (or "neo-abolitionist") because it advocates for the complete abolition of commercial sex.[31] Abolitionists do not use the term "sex worker" because they do not view commercial sex as the sale of services; rather, they view commercial sex as the sale of a human being and use the term "prostituted woman" to convey the lack of individual choice. [32] They compare prostitution to slavery, rape, and torture, and they view "prostituted women" as victims of crime.[33] Abolitionists deny that a woman could ever enter prostitution of her own free will; rather, they argue that a woman in prostitution suffers so much physical torture and psychological trauma that she eventually loses her free will as well as her identity and ability to express feelings.[34] In any event, just as society does not permit an individual to sell herself into slavery, abolitionists do not recognize any right to become a prostituted woman.

While abolitionists strongly oppose legalization or decriminalization of commercial sex, they do not support prosecuting "prostituted women."[35] Instead, they argue that the criminal law should prohibit only the buying of sex and the selling of a person, thus punishing customers and pimps but not sex workers themselves. Swedish law is the leading example of this approach,[36] and abolitionists often point to it as a model for other nations.[37] There are competing views on whether the Swedish model is in the best interest of sex workers.[38] A Norwegian Working Group that was appointed to study the Swedish model concluded that it was difficult to enforce and

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[31] However, some commentators prefer to use "prohibitionist" to describe this approach. *See, e.g.*, Ronald Weitzer, *The Mythology of Prostitution: Advocacy Research and Public Policy*, 7 SEXUALITY RES. SOC. POL'Y 15, 16 (2010).

[32] Catherine A. MacKinnon, *Trafficking, Prostitution and Inequality*, 46 HARV. C.R.-C.L.L. REV. 271, 272-74 (2011).

[33] *See, e.g.*, MacKinnon, *supra* note 30; SHEILA JEFFREYS, THE IDEA OF PROSTITUTION (1997).

[34] *See* Melissa Farley, *Sex for Sale: Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly* 18 YALE J.L. & FEMINISM 109, 131–132 (2006).

[35] *See generally* Janice G. Raymond, *Prostitution on Demand: Legalizing the Buyers as Sexual Consumers*, 10 VIOLENCE AGAINST WOMEN 1156 (2004), *available at* http://www.sagepub.com/walshstudy/articles/section12/Raymond.pdf.

[36] *See* Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings*, 10 VIOLENCE AGAINST WOMEN 1187 (2004) (presenting a positive view of the Swedish legislative framework), *available at* http://www.prostitutionresearch.com/pdf/EkbergVAW.pdf.

[37] *See, e.g.*, Raymond, *supra* note 35, at 1158 (describing the Swedish Law as a model in targeting demand for sex and "men who use and abuse women in prostitution").

[38] *See, e.g.*, Gwladys Fuche, *Prostitution, Nordic Style: Why sex workers say they're more at risk than ever*, THE GLOBE & MAIL (Apr. 28, 2014, 7:36 AM), http://www.theglobeandmail.com/news/world/prostitution-nordic-style-why-sex-workers-say-theyre-more-at-risk-than-ever/article18297909/; May-Len Skilbrei & Charlotta Holmstrom, *The 'Nordic Model' of Prostitution Law is a Myth*, THE CONVERSATION (Dec. 16, 2013, 6:43 AM), http://theconversation.com/the-nordic-model-of-prostitution-law-is-a-myth-21351.

made life more dangerous for many sex workers because the industry had been pushed underground.[39] Nonetheless, in 2008, the Norwegian Parliament decided to follow the Swedish model and criminalize the purchase of sexual services.[40] Modified versions of the Swedish approach have since been adopted in Finland and in South Korea.[41] A bill criminalizing the purchase of sexual services was adopted by the French Assembly in December 2013 but it was then rejected by the French Senate in 2014.[42] Canada also recently enacted a bill based upon the Swedish model, which will almost certainly be challenged in court.[43]

Abolitionists are also very active in the United States, but they have not made much headway with state legislators. Indeed, many states still treat juveniles found in prostitution as delinquents (rather than as victims), although there is a movement to change this through "safe-harbor" laws.[44] Some states have also increased the penalties for customers or made more of an effort to enforce the laws against customers, rather than simply targeting sex workers.[45]

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[39] WORKING GROUP ON THE LEGAL REGULATION OF THE PURCHASE OF SEXUAL SERVICES, PURCHASING SEXUAL SERVICES IN SWEDEN AND THE NETHERLANDS (2004) (Nor.), *available at* http://www.regjeringen.no/en/dep/jd/Documents-and-publications/Reports/Reports/2004/Purchasing-Sexual-Services.html?id=106214.

[40] For the announcement and text of the bill in Norwegian and English, see *Criminalizing the Purchase of Sexual Activity*, NOR. MINISTRY J. & POLICE (Dec. 1, 2008), http://www.regjeringen.no/en/dep/jd/whats-new/News/2008/criminanlizing-the-purchase-of-sexual-ac.html?id=537854.

[41] *See* Ji Hye Kim, *Korea's New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature's Intent to Protect Prostitutes from Abuse*, 16 PAC. RIM L. & POL'Y J. 493, 508 (2007) (providing analysis of the law and unintended consequences).

[42] In December 2013, the French National Assembly (the lower house of the French national parliament) voted to criminalize the purchase of sex while decriminalizing sex workers; the bill was considered by the French Senate in the summer of 2014 but rejected. *See Turning Off the Red Light*, ECONOMIST, Dec. 7, 2013, at 55, *available at* http://www.economist.com/node/21591220/; International Committee on the Rights of Sex Workers in Europe, *French Senate's Special Commission Rejects Criminalization of Clients* (July 8, 2014), http://www.sexworkeurope.org/news/general-news/french-senates-special-comission-rejects-criminalisation-clients.

[43] *See* M.D., *Dearer for Johns*, ECONOMIST (June 5, 2014, 7:41 AM), http://www.economist.com/node/21603429/; Julie Kaye, *Canada's Flawed Sex Trade Law*, N.Y. TIMES, Jan. 20, 2015, *available at* http://www.nytimes.com/2015/01/21/opinion/canadas-flawed-sex-trade-law.html. Ironically, the legislation was prompted by the unanimous decision by the Canadian Supreme Court in Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101 (Can.) (declaring unconstitutional criminal laws that prohibited certain actions associated with sex work, including living on avails of prostitution and communicating in public for purposes of prostitution, but suspending the declaration of invalidity for one year).

[44] Some states are also starting to allow women to expunge convictions if they can demonstrate that they were victims of sex trafficking. *See* Carrie N. Baker, *The Influence of International Human Trafficking on United States Prostitution Laws: The Case of Expungement Laws*, 62 SYRACUSE L. REV. 171, 180 (2012).

[45] *See How to Eliminate Demand*, DEMAND ABOLITION, http://www.demandabolition.org/how-to-eliminate-demand/legislation/ (last visited June 1, 2014).

While the feminist debate on sex work is often presented as an argument between two clearly defined sides (liberal and structural feminists), many different strains of feminist theory have contributed to the debate. For example, essentialist and third-wave feminists have moved beyond the "harm reduction" analysis, arguing that women can find liberation and empowerment through sex work.[46] Post-colonial feminist theory has challenged the very concept of a universal narrative and the tendency to focus only on gender discrimination while overlooking imperialism, ethnic discrimination, and the capacity of sex workers to exercise agency.[47] It is also clear that even societies with similar cultural traditions can come to very different conclusions on sex work, as evidenced by the fact that legal systems with predominantly Chinese populations have taken a variety of different approaches. For example, the People's Republic of China prohibits sex work and subjects sex workers and customers to periodic "crackdowns" by the police.[48] In contrast, in Singapore, sex work itself is legal and even brothels are permitted in certain "red light" districts through a *de-facto* licensing system.[49] The government of Taiwan also decided to legalize sex work within restricted areas,[50] a move that was, however, strongly opposed by certain organizations in Taiwan that take a

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[46] *See, e.g.*, APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION, *supra* note 22, at 191.

[47] *See generally* RATNA KAPUR, EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM (2005); CHANDRA TALPADE MOHANTY, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, *in* THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM 51 (Chandra Talpade Mohanty, Ann Russo & Lourdes Torres, eds., 1991).

[48] *See* K.M., *Crackdown on Sin City*, ECONOMIST (Feb. 14, 2014, 12:39 AM), http://www.economist.com/blogs/analects/2014/02/prostitution-china.

[49] For an explanation of this system from the point of view of a sex worker advocacy organization and how it leaves sex workers vulnerable to abuse by the police, see *Situation in Singapore*, PROJECT X, http://theprojectx.org/situation-in-singapore/ (last visited Jan. 19, 2015, 9:45 PM). *See also* Tan Shin Bin & Alisha Gill, *Containing Commercial Sex to Designated Red Light Areas: An idea past its prime?*, LEE KUAN YEW SCH. PUB. POL'Y, NAT'L UNIV. SING. (2013), *available at* http://lkyspp.nus.edu.sg/wp-content/uploads/2014/04/Containing-Commercial-Sex-to-Designated-Red-Light-Areas.pdf.

[50] In 2011, Taiwan decriminalized commercial sex in certain "penalty-free" zones but also amended the legal framework so that pimps and customers (as well as sex workers) will be fined if they engage in commercial sex outside the penalty-free zones. *See* Amber Wang, *Effectiveness of Legal Sex Industry Zones Debated*, TAIPEI TIMES, Nov. 07, 2011, at 2, *available at* http://www.taipeitimes.com/News/taiwan/archives/2011/11/07/2003517701. For media coverage of the history of the legislation, see Loa Iok-sin & Shih Hsiu-chuan, *Ministry Proposes Legalizing Sex Trade*, TAIPEI TIMES, June 13, 2009, at 1, *available at* http://www.taipeitimes.com/News/front/archives/2009/06/13/2003446058; Amber Wang, *Groups Oppose Legalizing Sex Trade*, TAIPEI TIMES, July 10, 2009, at 2, *available at* http://www.taipeitimes.com/News/taiwan/archives/2009/07/10/2003448261; Flora Wang and Loa Iok-sin, *Legislator Proposes Bill to Decriminalize Prostitution*, TAIPEI TIMES, Apr. 13, 2009, at 2, *available at* http://www.taipeitimes.com/News/front/archives/2009/04/13/2003440944.

more abolitionist approach.[51] Finally, in Hong Kong, which is discussed in detail in Part IV of this article, a local woman may legally engage in sex work so long as she works alone and does not solicit; but migrant sex workers are regularly prosecuted for immigration offenses.[52]

This summary of the wide variations in national approaches to sex work provides the background for the next section of the article, on the definition of human trafficking in international law, the criteria used in the U.S. TIP Report, and the potential impact on domestic laws concerning sex work.

III. SEX WORK, TRAFFICKING, AND THE POWER OF THE ANNUAL TRAFFICKING IN PERSONS REPORT

The feminist debate on sex work has fundamentally affected the development and application of international instruments against human trafficking. Although the Trafficking Protocol is not limited to sex trafficking (but rather includes labor trafficking and other forms of exploitation), the disagreement on how to address sex work in the treaty dominated the negotiations and almost prevented the drafters from agreeing upon an international definition of human trafficking.[53] Abolitionists argued that any third party who facilitates a woman's movement into the sex industry should be considered a "trafficker" under international law, regardless of whether the sex worker consented.[54] During the negotiation of the Trafficking Protocol, this view was represented by the International Human Rights Network, an alliance of feminist and religious organizations

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[51] *See Taiwan – Stop Legalising Prostitution, NGOs Tell Taiwan Government*, FORUM-ASIA (Nov. 30, 2009, 9:08 PM), http://www.forum-asia.org/?p=6848; *Fight Against the Legalization of Prostitution in Taiwan*, COAL. AGAINST TRAFFICKING IN WOMEN (Nov. 6 2009), http://www.catwinternational.org/Home/Article/29-fight-against-the-legalization-of-prostitution-in-taiwan (endorsing views of the Garden of Hope Foundation and the Taipei Women's Rescue Foundation and warning against "state sponsored" prostitution). *See also* Editorial, *Taiwan's Prostitution Conundrum*, TAIPEI TIMES, June 17, 2009, at 8, *available at* http://www.taipeitimes.com/News/editorials/archives/2009/06/17/2003446355. For a summary of the debate in Taiwan on the nature of the regulatory framework that should be adopted and whether a married sex worker should obtain her spouse's consent, see *Married Prostitutes May Have to Get their Spouses' Consent*, CHINA POST (Feb. 3, 2010, 9:38 AM), http://www.chinapost.com.tw/taiwan/national/national-news/2010/02/03/243389/Married-prostitutes.htm6.

[52] *See generally*, Karen Joe Laidler, Carole J. Petersen, & Robyn Emerton, *Bureaucratic Justice: The Incarceration of Mainland Chinese Women Working in Hong Kong's Sex Industry*, 51 INT'L J. OFFENDER THERAPY AND COMP. CRIMINOLOGY 68 (2007); *infra* Part IV.

[53] These negotiations are only briefly summarized here. For more detailed discussion, see Robyn Emerton, Karen Joe Laidler & Carole J. Petersen, *Trafficking of Mainland Chinese Women into Hong Kong's Sex Industry: Problems of Identification and Response*, 2 ASIA-PAC. J. ON HUM. RTS. & L. 35, 42–50 (2007).

[54] *Id. See also* Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law & Policy*, 158 U. PA L. REV. 1665, 1676 (2010).

led by the Coalition Against Trafficking in Women (CATW).[55]

In contrast, organizations that hold a labor rights perspective argued for a distinction between voluntary sex work and sex trafficking. During the negotiations of the Trafficking Protocol, this was the position of the Human Rights Caucus, which included the Global Alliance Against Traffic in Women (GAATW) and the Global Network of Sex Work Projects.[56] It was also consistent with the views of Ms. Radhika Coomeraswamy, who was at that time the United Nations Special Rapporteur on Violence against Women. [57] The United States, which was under the leadership of the Clinton administration at the time, also supported this position during the negotiation of the Trafficking Protocol.[58] That would change dramatically, however, under the administration of George W. Bush.

This debate on the relationship between commercial sex and the definition of trafficking is significant for governments because the Trafficking Protocol requires states parties to criminalize human trafficking and to take law enforcement measures to prevent and punish it.[59] The Trafficking Protocol also calls upon states parties to provide assistance and protection to victims of trafficking (although these provisions are phrased in weaker language than the law enforcement provisions[60]) and to provide remedies for victims of trafficking.[61] Thus, if the abolitionist approach had been adopted in the treaty, the number of individuals who should be considered "victims of trafficking" (and thus warrant assistance) would naturally increase. Countries that had already legalized or partly decriminalized commercial sex would also have been pressured to amend their criminal laws and adopt an abolitionist approach.

Eventually, a compromise was reached, one that reveals the influence

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[55] For information and publications from CATW, see COALITION AGAINST TRAFFICKING IN WOMEN, http://www.catwinternational.org (last visited Feb. 2, 2014).

[56] For examples of policy papers that take a labor-rights perspective, see generally GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, http://www.gaatw.org (last visited Jan. 19, 2015, 9:54 PM), or GLOBAL NETWORK OF SEX WORK PROJECTS, http://www.nswp.org (last visited Jan. 19, 2015, 9:55 PM).

[57] Ms. Coomeraswamy argued that the definition of trafficking should focus on coercion and lack of consent; she also included situations of debt-bondage. *See* Special Rapporteur on Violence Against Women, *Integrations of the Human Rights of Women and the Gender Perspective, Violence against Women*, Comm'n on Human Rights, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) (by Radhika Coomeraswamy).

[58] *See* Halley, Kotiswaran, Shamir & Thomas, *supra* note 1, at 355–60 (noting criticism of the Clinton administration by abolitionists and religious groups).

[59] Trafficking Protocol, *supra* note 5, ¶¶ 5, 10.

[60] *Id.* ¶¶ 6–8. The victim assistance provisions contain a good deal of discretionary language such as, "in appropriate cases" and "endeavor to provide." *Id.* ¶ 6(1)–(5). In contrast, the treaty states that states parties "shall" criminalize trafficking and take various law enforcement actions. *Id.* ¶¶ 5, 10.

[61] *See generally* ANNE T. GALLAGHER, THE RIGHT TO AN EFFECTIVE REMEDY FOR VICTIMS OF TRAFFICKING IN PERSONS: A SURVEY OF INTERNATIONAL LAW AND POLICY (2010), available at http://www.ohchr.org/Documents/Issues/Trafficking/Bratislava_Background_paper1.pdf.

of both the abolitionist and the liberal perspectives on sex work. The definition of "trafficking in persons" contained in Article 3 of the Trafficking Protocol requires three elements if the alleged victim is an adult: (i) an "action" (e.g. recruitment, transportation, transfer, harboring, or receipt of persons); (ii) an improper "means" (e.g. threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, or the giving or receiving of payments or benefits to achieve consent of a person having control over another person); and (iii) that the action be taken for the purpose of exploitation.[62] Article 3a further provides that "exploitation" shall include, at a minimum "the exploitation of the prostitution of others or other forms of sexual exploitation," and Article 3b states that the "consent of a victim to the intended exploitation . . . shall be irrelevant where any of the means set forth in subparagraph (a) have been used." [63]

Unfortunately, two key terms—"exploitation of the prostitution of others" and "abuse of power or of a position of vulnerability"—are not defined in the treaty. While the last-minute inclusion of these somewhat vague terms helped to achieve consensus for the purposes of drafting the treaty, they also made it possible for all sides of the feminist debate on sex work to argue that the Trafficking Protocol endorses their view.[64] For example, abolitionists can argue that the definition of trafficking includes situations in which a woman may have appeared to have given consent but was actually recruited into the sex industry by means that exploited her poverty or lack of education—as these could combine to constitute a position of vulnerability. The Travaux Préparatoires (the official interpretative notes to the Trafficking Protocol) do not provide much guidance, noting only that an "abuse of a position of vulnerability" can arise in a situation in which the person involved "has no real and acceptable alternative but to submit to the abuse involved."[65]

The drafting history does, however, make it clear that governments should be able to ratify the Trafficking Protocol while continuing to take

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[62] Trafficking Protocol, *supra* note 5, ¶ 3a. If the alleged victim is a child then there is no need to show that the action was accomplished through one of the listed means; elements (i) and (iii) are sufficient.

[63] *Id*. ¶¶ 3a, 3b.

[64] *See generally* U.N. OFFICE ON DRUGS AND CRIME, ABUSE OF A POSITION OF VULNERABILITY AND OTHER "MEANS" WITHIN THE DEFINITION TRAFFICKING IN PERSONS (2013), *available at* http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf.

[65] Rep. of the Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime on the Work of its First to Eleventh Sessions, ¶ 63, U.N. Doc. A/55/383/Add.1; GAOR, 55th Sess. (Nov. 3, 2000) [hereinafter *Travaux Préparatoires*], *available at* http://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf.

different approaches to sex work within their domestic legal systems.[66] This should mean that the legal definition of "trafficking victim" can also vary among states parties to the Trafficking Protocol. For example, if a government purports to embrace the abolitionist view, then it should view every "prostituted woman" as a victim of trafficking. Alternatively, governments that do not adopt the abolitionist approach to sex work should not be criticized if they adopt a somewhat narrower definition of "trafficking victim" (although they should, of course, develop a screening system to determine whether a person found working in the sex industry has acted under her own volition or is a victim of trafficking).

In addition to affecting debates on how to define human trafficking, the competing views of sex work have also affected debates on how best to deter it. Proponents of legalization often argue that this will bring the sex industry into the light of day and make it easier for the authorities to limit participation to adult women who have a legal right to work in the jurisdiction.[67] In theory, legalization would also provide an incentive for sex workers and customers to report abusive situations (e.g. the presence of minors), as they need not fear prosecution themselves.

In contrast, abolitionists believe that legalization only increases the demand for commercial sex and that customers and pimps will continue to seek young girls and migrant women, either because they are considered more exotic or because they are more compliant and easily manipulated.[68] Abolitionists, therefore, argue that strong laws against the purchase of sexual services are the best way to prevent trafficking. The Swedish government certainly believes that its abolitionist approach has worked and that it now has fewer trafficking victims than neighboring countries.[69] Thus, even governments that do not fully accept the structural feminist account of commercial sex (that all "prostituted women" are victims) might rationally decide to adopt an abolitionist approach on the basis that it may help to decrease demand for commercial sex and thus deter sex trafficking. For

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[66] *Id.* ¶ 64 (noting that the "terms 'exploitation of the prostitution of others' or 'other forms of sexual exploitation' are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws").

[67] RONALD WEITZER, LEGALIZING PROSTITUTION: FROM ILLICIT VICE TO LAWFUL BUSINESS 76-77 (2012) (noting that jurisdictions that legalize sex work generally regulate it, with the objective of reducing the harms of sexual commerce).

[68] *See, e.g.*, Janice G. Raymond, *Ten Reasons For Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 J. TRAUMA PRAC., 315-32 (2003), *available at* http://www.embracedignity.org/uploads/10Reasons.pdf. *See also* Ambassador Swanee Hunt, *Deconstructing Demand: The Driving Force of Sex Trafficking*, 19 BROWN J. WORLD AFF. (SPRING-SUMMER ISSUE) 2 (2013) (arguing that "[l]egalizing the buying and selling of bodies does not have the dignifying and regulating effect" that proponents hope for and that "the average age in which a girl enters prostitution in the United States is 13"), *available at* http://www.demandabolition.org/deconstructing-demand/.

[69] *See* Ekberg, *supra* note 36, at 1199.

example, the Norwegian government cited its desire to reduce "the trafficking of foreign nationals into Norway for sexual exploitation" as the primary reason for criminalizing the buying of sex, although individual transactions for sexual services had been decriminalized in Norway for more than a century.[70] This demonstrates how local sex workers—who may not view themselves as "victims of trafficking" —can nonetheless be affected by the global anti-trafficking movement.

This phenomenon became particularly apparent during the second Bush administration, when the United States appointed itself as a sort of "global sheriff" of the anti-trafficking movement and also adopted an abolitionist approach—not only in the annual TIP Report, but also in federal regulations requiring non-governmental organizations to adopt a policy against prostitution in order to receive funding.[71] The impact on sex workers and migrant women generally has become increasingly controversial,[72] particularly in the Asia-Pacific region.[73]

South Korea provides a striking example of how structural feminist views of sex work and the U.S. TIP Report can combine to inspire changes to domestic laws. In 2000, a coalition of Korean feminists (Korean Women's Association United or "KWAU") began an abolitionist campaign in hopes of enacting a law based upon the Swedish model.[74] The South Korean government initially endorsed KWAU's proposal but not necessarily because it accepted the structural feminist analysis of sex work. Rather, the U.S. State Department had placed South Korea in "Tier 3" in its 2001 TIP Report, and the South Korean government was, no doubt, hoping to improve its dismal rating.[75] Unfortunately, the legislation that was

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[70] State Sec'y Astri Aas-Hansen, Speech at Third European Union Anti-Trafficking Day (Oct. 20, 2009), http://www.regjeringen.no/en/dep/jd/aktuelt/taler_og_artikler/politisk_ledelse/statssekretaer-aas-hansen/2009/speech-at-the-third-eu-anti-trafficking-.html?id=582338. Until November 2008 Norway permitted individuals to buy and sell sexual services, prohibiting only acts of organizing prostitution. *Id.*

[71] *See generally* Edi C. Kinney, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS*, 21 BERKELEY J. GENDER L. & JUST. 158, 170–172 (2006).

[72] *See, e.g.*, Desyllas, *supra* note 1; Parrenas, *supra* note 12; Jordan, *supra* note 12.

[73] *See, e.g.*, Ratna Kapur, *The "Other" Side of Globalization: The Legal Regulation of Cross-Border Movements*, 22 CAN. WOMEN'S STUD. 6, 7–8 (2003), *available at* http://pi.library.yorku.ca/ojs/index.php/cws/article/viewFile/6408/5596; Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 HARV. HUM. RTS. J. 107, 113–15 (2003), *available at* http://www.law.harvard.edu/students/orgs/hrj/iss18/kapur.pdf.

[74] *See* Kim, *supra* note 41, at 519–20. At that time prostitution was officially prohibited in South Korea but largely tolerated in certain "red-light" districts. The KWAU publicized examples of human rights violations in the industry, including a tragic fire that killed five sex workers who were locked in a room by the brothel owner after working hours. *Id.* at 493, 495.

[75] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REP. 97 (2001), *available at* http://www.state.gov/documents/organization/4107.pdf. Although the U.S. recognized that South Korea generally had a positive human rights record, the U.S. placed South Korea in Tier 3,

eventually enacted in 2004 did not fully embrace the Swedish approach, but, rather, the law continued to criminalize the selling (as well as the buying) of sex, leaving it to prosecutors to determine whether a sex worker was a "victim" or a law-breaker.[76]

After the new law was enacted, more than two thousand South Korean sex workers took to the streets in protest and some threatened suicide.[77] They argued that the law would deprive them of their right to work, push the sex industry further underground, and increase their vulnerability to violence.[78] Nonetheless, the South Korean government was duly rewarded by the U.S. State Department, which ranked South Korea in "Tier 1" and, praised it for enforcing tough legislation against the sex industry, helping former sex workers to start other businesses, and sending men convicted of purchasing sex to "John School" (a slang term for a mandatory education program regarding the evils of commercial sex).[79] The TIP Reports have not mentioned the protests and hunger strikes by sex workers who opposed the law.[80] Nor does the State Department appear to be concerned by the fact that the legislation has not really implemented the "abolitionist" approach initially proposed by feminists because sex workers continue to be prosecuted in Korea.[81] Indeed, there are frequent arrests, and even poor elderly women have been ordered to pay fines for violating the anti-prostitution law.[82] There also have been constitutional challenges to the law (a case filed in 2013 was pending in the Constitutional Court of Korea as of this writing).[83] The U.S. TIP Report does not mention these

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primarily on the ground that "the Government has done little to combat this relatively new and worsening problem of trafficking in persons." *Id.* at 97.

[76] Kim, *supra* note 41, at 508–16.

[77] Kim, *supra* note 41, at 506.

[78] *Id*. at 506.

[79] *See, e.g.*, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REP. 136, 136–37 (2005), *available at* http://www.state.gov/documents/organization/47255.pdf (citing South Korea's "sweeping" new legislation against prostitution); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REP. 155, 155-56 (2006), *available at* http://www.state.gov/g/tip/rls/tiprpt/2006/65989.htm. For critique of the decision to place South Korea in Tier 1, see generally Ayla Weiss, *Ten Years of Fighting Trafficking: Critiquing the Trafficking in Persons Report Through the Case of South Korea*, 13 ASIAN- PAC. L.& POL'Y J. 305 (2012).

[80] For further discussion of the protests and critique of the legislation, see Seling Chang, *Korean Sex Trade 'Victims' Strike for Rights*, ASIA TIMES ONLINE (Dec. 22, 2004), http://www.atimes.com/atimes/Korea/FL22Dg01.html.

[81] *See* Shin Park Jin-yeong, *Ten Years After the Enactment of the Anti-Prostitution Act: It's Time to Remind Ourselves of the Spirit of the Law*, STOP! SEX TRAFFICKING KOREA (2014), http://www.stop.or.kr/webzine12/0103.html.

[82] *See* Heo Seung, For the Elderly, the Most Important Factor in the Choice to Engage in Prostitution Is Poverty, HANKYOREH (May 4, 2013, 9:06 AM), http://english.hani.co.kr/arti/english_edition/e_national/585888.html.

[83] For a critique of the petition and a defense of the law, see Lee Na-yeong, *A Decade of the Special Act on Prostitution: Suggestions for the Further Promotion of Women's Human Rights*, STOP! SEX TRAFFICKING KOREA (2014), http://www.stop.or.kr/webzine12/0101.html (last visited Feb. 25, 2015).

controversies and the criteria for assessing governments does not take into account the collateral damage that anti-prostitution laws might have on sex workers.[84]

The South Korean legislation demonstrates the inherent complexity in any comprehensive law reform exercise that is inspired by a desire to obtain a higher ranking in the U.S. TIP Report. Government officials and legislators may start out by promising to treat women working in the sex industry as victims but wind up treating them as criminals, perhaps because that is how the police and other public authorities tend to view sex workers. Indeed, many governments have been accused of adopting overtly punitive approaches, which are far from the victim-assistance approaches that structural feminists would endorse. For example, in Cambodia sex workers "were rounded up and held in detention," allegedly as part of the Cambodian government's response to U.S. pressure to prohibit all sex work as a means of combating trafficking.[85] In 2010, it was reported that Cambodian military police were actually selling women and girls back to the brothels after their detention.[86] In other cases, governments have responded to the TIP Report by simply reducing the opportunities for migrant women workers. For example, the Japanese government imposed tougher visa requirements for migrant entertainment workers (nightclub hostesses), after the U.S. TIP Report cited migrant Filipino entertainers as a reason for giving Japan low rankings. Yet it is not at all clear that the Filipino bar hostesses were victims of trafficking, and at least one scholar concluded otherwise after conducting extensive interviews with them.[87]

During the Obama administration, there have been clear shifts in the U.S. government's approach to the annual TIP Report. For example, the State Department now places more emphasis on labor trafficking, and it assesses the problem of human trafficking in the United States as well as in foreign countries.[88] These are healthy developments. It is noteworthy, however, that the TIP Reports have continued to emphasize the need to reduce the demand for commercial sex as an important strategy for combating human trafficking.[89] Thus, any country that hopes to raise its

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[84] For discussion of the general problem of collateral damage from the TIP Reports, see Gallagher, *supra* note 11.

[85] Jordan, *supra* note 12.

[86] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REP. 100–03 (2010), *available at* http://www.state.gov/documents/organization/142982.pdf.

[87] *See* Parreñas, *supra* note 12, at 179–80.

[88] *See, e.g.*, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REP. 2 (2010), *available at* http://www.state.gov/documents/organization/142979.pdf; Gallagher, *supra* note 7, at 179; Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 92 (2012).

[89] *See, e.g.*, U.S. DEP'T OF STATE, PREVENTION: FIGHTING SEX TRAFFICKING BY CURBING DEMAND FOR PROSTITUTION (2013) (noting "the need for continued strong efforts to enact policies and promote cultural norms that disallow paying for sex"), *available at* http://www.state.gov/documents/organization/211845.pdf; U.S. DEP'T OF STATE, TRAFFICKING

ranking in the TIP Report has a clear disincentive to legalize sex work. The United States has adopted this criterion for assessment despite the fact that the Trafficking Protocol itself does not assume that sex work necessarily involves trafficking. Moreover, the language used in many of the country narratives in the TIP Reports reflects assumptions about women in the sex industry that are rarely backed up by solid research. Nor does the U.S. government make an effort to listen to the voices of sex workers from other countries regarding the legal framework that they think would best protect them from exploitation.

The remaining sections of this article thus analyze the situation of local and migrant sex workers in Hong Kong and consider the impact that the U.S. TIP Report may have on them.

IV. THE POTENTIAL IMPACT OF THE U.S. TIP REPORT ON LOCAL AND MIGRANT SEX WORKERS IN HONG KONG

The case study is divided into four sections. Section IV(A) analyzes the shifts in Hong Kong's legal treatment of sex work over the past 170 years, which provides a background for understanding the difficult policy decisions that the Hong Kong government must make when considering how to respond to recommendations in the U.S. TIP Report regarding the prevention of sex trafficking. Section IV(B) analyzes the experiences of local sex workers and their ongoing campaign for greater legal space and better protection of their rights. Section IV(C) then examines the situation of migrant sex workers in Hong Kong, the vast majority of whom come from Mainland China. In 2007, my colleagues and I published a study that concluded that the Hong Kong authorities were not adequately screening this group of sex workers for potential victims of trafficking,[90] which likely contributed to Hong Kong's demotion from Tier 1 to Tier 2 of the annual TIP Report.[91] Section IV(D) thus analyzes what the Hong Kong

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VICTIMS PROTECTION ACT: MINIMUM STANDARDS FOR THE ELIMINATION OF TRAFFICKING IN PERSONS (2014), *available at* http://www.state.gov/j/tip/rls/tiprpt/2014/226655.htm (last visited Jan. 20, 2015). Of course certain jurisdictions (particularly those that are considered solid allies of the U.S. such as the Netherlands, Germany, New Zealand, and parts of Australia) have received high rankings in the annual TIP Report despite the fact that they have legalized commercial sex. However, it is easy to see how those governments that have been given low rankings would rationally conclude that the best way to raise their ranking would be to follow the example of South Korea and enact a strong anti-prostitution law.

[90] *See generally infra* Section IV(C). For a full discussion of the interview data, see Emerton, Laidler & Petersen, *supra* note 53. We obtained fifty-eight valid interviews from a group of seventy-five Mainland Chinese women incarcerated in Hong Kong prisons for immigration and other offenses related to sex work.

[91] Another important factor in Hong Kong's demotion is the situation of migrant domestic workers. Although Hong Kong law provides extensive protections for migrant domestic workers, certain flaws in the immigration rules and the enforcement system make this group of women vulnerable to exploitation, particularly if they rely upon an employment agency to find their employer. *See generally* Lee & Petersen, *supra* note 19.

government has done since publication of our study and considers why it might be reluctant to adopt some of the outstanding recommendations that the U.S. State Department has suggested are necessary in order for Hong Kong to regain its Tier 1 status in the U.S. TIP Report.

A. The History of Sex Work in Hong Kong: From Regulated Brothels to Legal Ambiguity

When the British established the colony of Hong Kong in 1842, the colonial legislature largely imported the law of England, including English common law and Acts of Parliament.[92] However, in matters affecting family law and the status of women, British policy was not to interfere in local customs, including concubinage and the *mui tsai* system.[93] A *mui tsai* was a Chinese child who was sold by her parents into domestic servitude, but some were then re-sold to brothels or trafficked to households in Singapore.[94] Poverty, wars, and natural disasters in Mainland China produced "a steady supply of girls"[95] for sale, many of whom were purchased by wealthy Chinese families in Hong Kong. Social reformers lobbied against the *mui tsai* system as early as the 1870s and London also wanted it abolished.[96] The local Chinese elite resisted reforms, arguing that the system was a traditional custom and a form of social welfare, as wealthy families provided for destitute girls and found husbands for them when the period of indentured servitude ended, generally at the age of 18.[97] In practice, however, *mui tsai* were a cheap source of labor for upper-class households.[98]

Researchers have frequently compared the history of the *mui tsai* to

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[92] *See* Peter Wesley-Smith, *The Reception of English Law in Hong Kong*, 18 H.K. L.J. 183, 183–85 (1988).

[93] *See* Carol Jones, *New Territories Inheritance Law: Colonization and the Elites*, *in* WOMEN IN HONG KONG 172, 172–76 (Veronica Pearson & Benjamin K.P. Leung eds., 1995); Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335, 368–72 (1996) (discussing how the prohibition on female inheritance, which was derived from Chinese customary law, was finally repealed in Hong Kong in 1994).

[94] *Id.* at 463.

[95] *Id.* at 463-64.

[96] *See* ACW Lee & KT So, *Child Slavery in Hong Kong: Case Report and Historical Review*, 12 H.K. MED. J. 463, 464 (2006), *available at* http://www.hkmj.org/article_pdfs/hkm0612p463.pdf.

[97] *Id.* at 464; Maria Jaschok & Suzanne Miers, *Women in the Chinese Patriarchal System: Submission, Servitude, Escape and Collusion*, *in* WOMEN AND CHINESE PATRIARCHY: SUBMISSION, SERVITUDE AND ESCAPE 1, 11–12 (Maria Jaschok & Suzanne Miers eds., 1994) (containing chapters on the experiences of *mui tsai* in China, Singapore, and Hong Kong).

[98] The legislature took steps to abolish the system in 1923, but the government was slow to enforce the new laws, and the system continued to be practiced in some parts of Hong Kong until the 1950s. Jaschok & Miers, *supra* note 97, at 12.

the history of prostitution in Hong Kong.[99] While *mui tsai* were sometimes resold to brothels, there were also women in early colonial Hong Kong who identified as *ziyouan* (voluntary sex workers). Interestingly, the British social reformers were chiefly interested in rescuing the "enslaved girls" (the *mui tsai*) from the brothels and largely ignored the *ziyouan*.[100] The other important difference is that the *mui tsai* system was a Chinese institution that was tolerated by the colonial government.[101] In contrast, the legal treatment of prostitution was initially modeled on British law and reflected the colonial power's interests. Brothels were commonplace in the early days of colonial rule and licensed by the colonial government.[102] Certain brothels catered to British soldiers while others served Chinese men who sought employment in Hong Kong.[103] The colonial government regularly inspected the brothels and required medical examinations to prevent the spread of sexually transmitted diseases.[104]

In the late 1800s, Hong Kong's system of licensed brothels began to clash with social reforms in England. By 1886, England had abolished licensed prostitution, largely due to the campaigns of the Social Purity movement and a Royal Commission Inquiry into the English Contagious Diseases Act.[105] A similar inquiry was held in Hong Kong, and in 1887 the local legislature dutifully repealed the ordinance requiring medical examinations.[106] Interestingly, however, this did not lead to the abolition of prostitution, "despite numerous instructions from London that Hong Kong was to follow England's example."[107]

Instead, new legislation was enacted in 1889 requiring Hong Kong brothel owners to register with the Register of Brothels and to display, in a conspicuous place, a notice informing women that they could not be

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[99] *See, e.g.*, Angela Chin, *The Management of Women's Bodies: Regulating Mui Tsai and Prostitution in Hong Kong Under Colonial Rule 1841-1935*, 1 E-J. ON H.K. CULTURAL & SOC. STUD. 12, 14 (2002); Suzanne Miers, *Mui Tsai Through The Eyes of the Victim: Janet Lim's Story of Bondage and Escape*, *in* WOMEN AND CHINESE PATRIARCHY: SUBMISSION, SERVITUDE AND ESCAPE, *supra* note 97, at 108, 119.

[100] Chin, *supra* note 99.

[101] *See generally* Carol Jones, *Women and the Law in Colonial Hong Kong*, *in* 25 YEARS OF SOCIAL AND ECONOMIC DEVELOPMENT IN HONG KONG (Benjamin K.P. Leung & Teresa Y.C. Wong eds., 1994).

[102] Henry Lethbridge, *Prostitution in Hong Kong: A Legal and Moral Dilemma*, 8 H.K. L.J. 149, 152 (1978). A similar inspection regime in Singapore in the early days of British colonial rule. *See generally* James Francis Warren, *Prostitution and the Politics of Venereal Disease: Singapore, 1870–98*, 21 J. SOUTH EAST ASIAN STUD., 360-83 (1990).

[103] Lethbridge, *supra* note 102102, at 153.

[104] *Id.*

[105] Jones, *supra* note 101101, at 123–24.

[106] *Id.* at 124; Lethbridge, *supra* note 102102, at 153–54.

[107] Jones, *supra* note 101101, at 124–25.

detained against their will.[108] Certain government officers (including the Colonial Surgeon) had a statutory right to enter and inspect the brothels.[109] In essence, this was a covert attempt to reintroduce the system of compulsory medical examinations and perpetuate a system of regulated prostitution, despite its abolition in England.[110] Colonial officials argued that abolishing prostitution would antagonize the local Chinese elite, although opinion was divided on the issue (just as it was on the *mui tsai* system).[111] Hong Kong thus managed to keep the basic system of licensed brothels intact in Hong Kong until the 1930s. A 1921 census reported 249 brothel keepers (all women) employing 2,700 prostitutes.[112]

In the end it was international pressure that finally forced Hong Kong to change its policy. In the 1920s, the League of Nations began to dispatch commissions of inquiry to investigate trafficking of women and girls (which was referred to at that time as the "white slave trade"). A commission visited Hong Kong and expressed its strong disapproval of the brothels, and the colonial government finally agreed to phase them out. Brothels serving Europeans closed between 1931 and 1932, and the last brothels serving Chinese clients closed in 1934.[113] Although the Japanese reinstated licensed prostitution during the occupation of Hong Kong (from late 1941 to 1945), these brothels quickly disappeared or went underground after the British regained control in 1945.[114] As explained in the next two sections however, commercial sex did not disappear from Hong Kong.

B. Local Sex Workers in Modern Hong Kong and the Development of Rights-Based Advocacy

Although the Crimes Ordinance now prohibits brothels and many activities associated with sex work, there is no law prohibiting a resident of Hong Kong from engaging in sex work in her own home, in a situation commonly referred to in Cantonese as *yeit lao yeit fong* (which loosely translates to "one-woman brothel" in English[115]). This limited state of decriminalization prevailed in the late colonial period and continued after 1997, when Hong Kong became a Special Administrative Region of China

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[108] Lethbridge, *supra* note 102, at 154 (citing the Protection of Women and Girls Ordinance, No. 19 (1889)).
[109] *Id*., at 154.
[110] *Id*. (citing the Protection of Women and Girls Amendment Ordinance, No. 31 (1899)).
[111] Jones, *supra* note 101, at 124–26.
[112] Lethbridge, *supra* note 102, at 155.
[113] *Id*. at 156.
[114] *Id.*
[115] *See* Laidler, Petersen, & Emerton, *supra* note 52. *See also*, *The Sex Trade Industry in Hong Kong: A Call for Activism and Transformation*, ZI TENG (noting that the phrase "yeit lao yeit fong" is understood in Hong Kong to refer to a situation in which a woman conducts sex work alone in an apartment), http://www.ziteng.org.hk/platform/pfc03_e.html (last visited Feb. 24, 2015).

under the "one country, two systems" model.[116]

Many of the activities associated with sex work are, however, prohibited in Hong Kong, including: soliciting for an immoral purpose,[117] putting up public signs advertising prostitution,[118] and running a vice establishment.[119] From the government's point of view, these criminal offenses help to reduce the involvement of organized crime and also the visibility of sex work, striking a "reasonable balance" between the rights of sex workers and the prevailing moral values.[120] In practice, however, these criminal offences are often used to harass sex workers. This is partly because the term "vice establishment" is defined very broadly, so as to include the use of premises "wholly or mainly" by two or more persons for the purpose of prostitution.[121] Thus, two sex workers sharing an apartment can be convicted of running a vice establishment and become liable for imprisonment of up to ten years. An individual sex worker also may not legally employ a security guard because that person would be guilty of the offense of knowingly living "wholly or in part on the earnings of prostitution of another."[122] This makes the job of a sex worker unnecessarily dangerous, as she cannot legally have co-workers or assistants on the premises. Although Hong Kong is generally quite safe for a city of its size, sex workers are particularly vulnerable to attack when they work alone in one-woman brothels.[123]

Sex workers also complain of police harassment, even when they are careful not to violate the law. A survey conducted by a nongovernmental organization concluded that sex workers are regularly subjected to verbal abuse, noting that the police "scolded them and forced them to leave the streets, even when the women were only standing on the streets or simply passing by, without any intention of soliciting."[124] Another study of police methods (based upon field observations and interviews with police officers)

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[116] Under the "one country, two systems model," Hong Kong maintains its pre-existing common legal system and enacts its own legislation; the criminal law of Mainland China does not apply in the territory. For in-depth analysis of the "one country, two systems" model, see generally GHAI, *supra* note 13.

[117] Crimes Ordinance, (2012) Cap. 200, BLIS, § 147 (H.K.).

[118] *See id.* § 147A.

[119] *See id.* § 139.

[120] SEC. BUREAU, H.K. POLICE FORCE, POLICY AND MEASURES FOR ENHANCING THE SAFETY OF SEX WORKERS, LC Paper No. CB(2)1742/07-08(01) (2008) (paper prepared for May 5, 2008 discussion by the Legislative Council's Panel on Security), *available at* http://www.legco.gov.hk/yr07-08/english/panels/se/papers/se0505cb2-1742-1-e.pdf.

[121] Crimes Ordinance, *supra* note 117, § 117(3).

[122] *Id.* § 137.

[123] *See* Deena Guzder, *Hong Kong Alarmed Over Sex-Worker Murders*, TIME (Feb. 10, 2009), http://www.time.com/time/world/article/0,8599,1878395,00.html.

[124] ACTION FOR REACH OUT, A SURVEY ON HONG KONG POLICE'S ATTITUDES TOWARDS FEMALE SEX WORKERS (SURVEY REPORT) 9 (2005).

concluded that the Hong Kong police have developed informal strategies to discourage sex work.[125] For example, police will question a sex worker's landlord about her activities, hoping that she will be asked to move out of the building. The police know that they cannot enter and search a private apartment without a warrant, but they find excuses to knock on the doors of sex workers, hoping to frighten clients. As one officer reported, "we can knock on the door to make an enquiry about the crime situation in the neighborhood or remind her to be cautious when a stranger visits her apartment . . . Sooner or later she will move out because we are targeting her." [126] The criminal offences associated with sex work also give the police an excuse to undertake elaborate undercover operations. For example, if an officer pretends to be a client and finds two sex workers working in the same apartment, he can charge them with running a vice establishment and charge their landlord with letting premises for use as a vice establishment.[127] Once under arrest, sex workers are subjected to humiliating body searches at the police station and feel pressured to confess to illegal acts.[128]

In 2000 to 2001, criminologist Travis S.K. Kong partnered with a sex worker advocacy group to conduct a large-scale study of sex workers' experiences in Hong Kong.[129] Most respondents reported negative feelings regarding their profession, but these feelings generally did not arise from the nature of their work. Rather, respondents complained about legal constraints, harassment from the police, abuse by some clients, and the stigma of working in an industry that is only barely legal.[130] Kong described the respondents as performing a skilled emotional labor and explained how they coped with social stigma, police surveillance, and the inherent dangers of their workplaces.[131]

In recent years, however, sex worker organizations and their supporters have become increasingly visible, using rights-based arguments to challenge Hong Kong's laws and policies. Action for REACH OUT (Rights of Entertainers in Asia to Combat Human Oppression and Unjust Treatment) was established as a nongovernmental charitable organization in

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[125] Yiu Kong Chu & Carlie C.Y. Chan, *Policing One-woman Brothels in Hong Kong: Alternative Strategies*, 5 J. ASIAN ASS'N POLICE STUD. 3 (2007).
[126] *Id.* at 16.
[127] *See* Crimes Ordinance, *supra* note 117, § 117 (3).
[128] *See March on the International Day to End Violence Against Sex Workers 2007*, ZI TENG, http://www.ziteng.org.hk/events/2007DEC18_e.php (last visited June 1, 2014). For additional information regarding Zi Teng and its advocacy work, see *About Us*, ZI TENG, http://www.ziteng.org.hk/aboutus/aboutus_e.html (last visited June 1, 2014).
[129] *See* TRAVIS S.K. KONG & ZI TENG, A RESEARCH REPORT ON THE WORKING EXPERIENCES OF HONG KONG'S FEMALE SEX WORKERS (2003).
[130] *Id.*, at ii (Executive Summary).
[131] *See* Travis S.K. Kong, *What it Feels Like for a Whore: The Body Politics of Women Performing Erotic Labour in Hong Kong*, 13 GENDER, WORK & ORG. 409, 413-43 (2006).

1993 to offer services and support to women working in the sex industry. This group has become increasingly vocal in lobbying for repeal of Hong Kong's criminal offenses related to sex work so that women will not have to work alone in one-woman brothels in order to avoid arrest.[132]

Another prominent organization is Zi Teng, which gained significant public support during its campaign against undercover agents who were receiving sexual services under false pretenses. In 2006, Zi Teng retained Simon Young, a law professor at the University of Hong Kong. Professor Young produced a detailed written opinion for Zi Teng, which concluded that the practice of receiving sexual services during undercover operations was unethical except in rare circumstances[133] (such as when an undercover officer risks losing his cover and suffering injury if he declines an offer of sexual services[134]). Professor Young studied police codes of conduct around the world, and concluded that Hong Kong's policy fell well below the general standards of ethical conduct.[135] The Legislative Council's Security Panel then held hearings and asked the government to justify the practice.[136] Although the government claimed that there was sometimes a "strong operational need" for the undercover officer to receive sexual services in order to maintain his cover and obtain evidence, it could not answer legislators' questions regarding the frequency with which sexual services were being received.[137] Officials conceded, however, that agents often made more than one visit to a "massage establishment" and might receive sexual services on more than one occasion.[138] While the police apparently viewed this as a legitimate way to gather evidence against those who are unlawfully operating vice establishments, the women who were tricked into providing these services viewed it as clear abuse.

In addition to seeking support from the local legislature, Zi Teng and Action for REACH OUT regularly submit alternative reports (also known

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[132] *See* ACTION FOR REACH OUT, ANNUAL REPORT 2007/2008 2, 8 (2008).

[133] Memorandum from Simon Young to Elaine Lam of Zi Teng on the Legal Implications of Police Conduct During Undercover Operations for Vice Activities, First Submission (Apr. 3, 2006) [hereinafter *Young First Submission*], *available at* http://www.hku.hk/ccpl/pub/submissions/index.html.

[134] Memorandum from Simon Young to Elaine Lam of Zi Teng on the Legal Implications of Police Conduct During Undercover Operations for Vice Activities, Second Submission (Sept. 25, 2006) [hereinafter *Young Second Submission*], *available at* http://www.hku.hk/ccpl/pub/submissions/index.html.

[135] *Young Second Submission*, *supra* note 134, at 4–6.

[136] SECURITY BUREAU, SUPPLEMENTARY INFORMATION ON POLICE'S UNDERCOVER OPERATIONS AGAINST VICE ACTIVITIES, LC Paper No. CB(2)3021/05-06(01) (2006) (paper prepared for the Legislative Council Panel on Security), *available at* http://www.legco.gov.hk/yr05-06/english/panels/se/papers/se0404cb2-3021-1-e.pdf.

[137] *Id*. at 1-3, 5 (noting the numbers of persons arrested, charged, and convicted with keeping a vice establishment in 2005 but that "we do not maintain statistics on cases involving a complete course of masturbation").

[138] *Id*. ¶ 4 (b)-(c).

as "shadow reports") to the international treaty bodies that monitor Hong Kong's compliance with human rights treaties, a strategy that is regularly employed by women's and human rights organizations in Hong Kong.[139] For example, Zi Teng submitted an alternative report in 2006 when Hong Kong was reviewed by the Committee on the Elimination of Discrimination Against Women and in 2008 when Hong Kong was reviewed by the Committee Against Torture.[140] Zi Teng's lengthy alternative report accused the police of receiving sexual services well beyond the extent admitted by the Security Bureau in its report to the Legislative Council.[141] Other NGOs also featured sex worker issues in their alternative reports to the Committee Against Torture, and the Human Rights Monitor discussed the mistreatment of sex workers in great detail in its report.[142] Sex workers were also highlighted (as one of several minority groups who are vulnerable to police abuse) in the reports of the Civil Human Rights Front, the Hong Kong Human Rights Commission, and Society for Community Organization.[143]

The Committee Against Torture took note of the NGO reports on police harassment of sex workers and requested the Hong Kong government to supplement its official report with additional information regarding the treatment of sex workers during undercover operations and interrogations, including the allegations of strip searches and the reported receiving of free sexual services by the police.[144] The Hong Kong government responded at length, informing the Committee that it had

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[139] *See generally* Carole J. Petersen, *Preserving Traditions or Breaking the Mold? A Comparative Study of the Impact of Transnational Human Rights Processes in the People's Republic of China and the Hong Kong Special Administrative Region, in* TRANSNATIONAL LEGAL PROCESSES AND HUMAN RIGHTS (Kyriaki Topidi & Lauren Fielder, eds., 2013).

[140] ZI TENG, ALTERNATIVE REPORT TO U.N. COMMITTEE AGAINST TORTURE, *available at* http://www2.ohchr.org/english/bodies/cat/docs/ngos/ZiTengHongKong41.pdf.

[141] *Id.* at 3 (noting that a judge had criticized one officer for receiving sexual services twelve times before arresting a particular sex worker).

[142] *See* H.K. HUM. RTS. MONITOR, SHADOW REPORT FOR THE U.N. COMMITTEE AGAINST TORTURE ON THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN THE H.K. SPECIAL ADMIN. REGION, THE PEOPLE'S REPUBLIC OF CHINA, at 44-60 (2008), *available at* http://www2.ohchr.org/english/bodies/cat/docs/ngos/HRMHongKong41.pdf.

[143] *See* H.K. HUMAN RIGHTS COMM'N & SOC'Y FOR CMTY. ORG., REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE ON THE SECOND REPORT BY H.K. SPECIAL ADMIN. REGION UNDER ARTICLE 19 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, ¶ 26 (2008), *available at* http://www2.ohchr.org/english/bodies/cat/docs/ngos/uncat_apr2008_CH_41.pdf; *see also* CIVIL HUMAN RIGHTS FRONT, 1 (2008), *available at* http://www2.ohchr.org/english/bodies/cat/docs/ngos/CHRFHongKong41.pdf.

[144] Written replies by the Hong Kong Special Administrative Region to the list of issues (CAT/C/HKG/Q/4) to be taken up in connection with the consideration of the fourth periodic report of HONG KONG addressed to the Committee Against Torture (CAT/C/HKG/4), ¶¶ 133–39, U.N. Doc. CAT/C/HKG/Q/4/Add.1 (Sept. 26, 2008) [hereinafter Written Replies of Hong Kong to CAT], *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fHKG%2fQ%2f4%2fAdd.1&Lang=en.

revised its internal guidelines for anti-vice operations, so that supervisors exercise more vigorous control over the scope and extent of the evidence to be gathered.[145] Similar assurances have been made to the Legislative Council.[146] As these changes were not made until after Zi Teng and Professor Young made their submissions, it appears that the legislative investigation, as well as pressure from international human rights bodies, inspired the government to tighten its internal guidelines. The government has also developed new guidelines on searching sex workers and other people held in detention. Although strip searches and "body cavity" searches still occur, there is an effort to conduct them with greater sensitivity and care than in the past.[147]

In November 2008, the Committee Against Torture issued its Concluding Observations on the Hong Kong Special Administration and included two sections that are particularly relevant to sex workers. With regard to invasive body searches, the Committee welcomed the new guidelines for police but expressed concern that the Hong Kong Police Commissioner had, nonetheless, decided to make body searches automatic for all individuals in police custody, regardless of whether there was any objective justification for it.[148] The Committee also expressed concern regarding the allegations of police abuse during "operations in the context of prostitution-related offences."[149]

The Committee did not specifically mention the policy of allowing officers to receive free sexual services during certain undercover operations. This was somewhat surprising, given the space devoted to the issue in the alternative reports of Zi Teng and Human Rights Monitor. The Hong Kong Legislative Council, however, has asked the government to start recording the number of cases in which the police receive sexual services, and it appears that it is now less common for an officer to be given permission to do so.[150] Thus, while the Hong Kong government has not completely

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[145] *Id.* ¶ 135.

[146] Letter from Security Bureau to Raymond Lam, Clerk to the Legislative Council's Panel on Security, on Follow up to Panel Meeting held on 27 October 2008 to Raymond Lam, Clerk to the Legislative Council's Panel on Security, (Dec. 8, 2008) (on file with the author), *available at* http://www.legco.gov.hk/yr08-09/english/panels/se/se_phsw/papers/se_phsw1209cb2-417-2-e.pdf.

[147] Written Replies of Hong Kong to CAT, *supra* note 144, ¶¶ 124–28. For further details of the improvements made to protect the rights of persons who are arrested in Hong Kong, see Hong Kong's Fifth periodic report to the Committee Against Torture (submitted on June 20 2013), ¶¶ 11.9-11.11, *available at* http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=HKG&Lang=en.

[148] Hong Kong's Fifth periodic report to the Committee Against Torture, *supra* note 147, ¶ 10.

[149] *Id.* ¶ 13.3.

[150] For example, in one three-month period, the government reported that one undercover officer received permission in one case to receive sexual services as part of an undercover operation. *See* Sec. Bureau & H.K. Police Force Legislative Council Panel on Security- Subcommittee on Police's

backed down from its position on undercover operations, Zi Teng's rights-based advocacy appears to have had a positive impact on the treatment of sex workers by the police. This provides an interesting contrast between the reporting process for international human rights treaties (in which sex worker groups can and do participate) and the process by which the annual U.S. TIP Report is generated, which systematically ignores the rights and opinions of local sex workers.

Of course, guidelines and monitoring are not the same as law reform, and the policy changes announced by the Hong Kong government, thus far, fall well short of what Zi Teng, Action for REACH OUT, and other supporting organizations are seeking. The criminal offences associated with sex work still give the police an excuse to harass and arrest them. Sex worker groups are, therefore, lobbying for full (or at least greater) legalization of sex work, which would give the police fewer excuses to entrap, detain, search, and prosecute sex workers. They are increasingly focusing on the need to amend the definition of "vice establishment" so that sex workers can work together for greater safety. This argument gained strength in recent years because of a spat of violent attacks on sex workers.[151] For example, in July 2009, a man was convicted of three consecutive murders of sex workers, all in one-woman brothels.[152] The trials generated support for sex workers in the press and Action for REACH OUT intensified its campaign for law reform, either full legalization or at least an amendment to the definition of "vice establishment" to allow two sex workers to work together on the same premises.[153] In early 2014, a large coalition of academic groups and NGOs submitted an alternative report on Hong Kong's compliance with the Convention on the Elimination of All Forms of Discrimination Against Women,[154] which recommended, "The legal definition of 'vice establishment' should be reviewed to equally protect sex workers' lives and personal safety. Relevant legislative reform should be introduced to allow at least two sex workers to co-work in a single

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Handling of Sex Workers and Searches of Detainees, Information on Anti-Vice Operation Conducted by Law Enforcement Agencies in Overseas Jurisdictions (Mar. 2009).

[151] *See* Guzder, *supra* note 123.

[152] *See* Yvonne Tsui & Martin Wong, *Murderer of 3 Prostitutes Jailed for Life*, S. CHINA MORNING POST (July 29, 2009, 12:00 AM), http://www.scmp.com/article/688248/murderer-3-prostitutes-jailed-life.

[153] *See 21 Questions about Sex Work*, ACTION FOR REACH OUT, http://www.afro.org.hk/EN/info_21questions.php (last visited June 1, 2014).

[154] Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (Sept. 3 1981) [hereinafter CEDAW], *available at* http://www.un.org/womenwatch/daw/cedaw/. Hong Kong has been bound by the CEDAW since 1996, and women's organizations have been very active in the international reporting process. *See* Carole J. Petersen & Harriet Samuels, *The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organizations in the United Kingdom and Hong Kong*, 26 HASTINGS INT'L & COMP. L. REV. 1, 1–50 (2002).

premise for mutual support."[155] The CEDAW Committee[156] responded to this alternative report by directly raising the issue of sex workers' safety in the "list of issues" for its next review of Hong Kong's compliance with the treaty, which was held in the last quarter of 2014. The Committee noted that it had received "reports that women in prostitution in Hong Kong are forced to work alone in isolated settings where they are exposed to higher risk of abuse, exploitation and even life-threatening violence at the hands of the clients," and it asked the government to describe "what measures have been taken to ensure greater protection of sex workers."[157] When the Hong Kong government responded rather weakly (by suggesting that individual sex workers could install alarms for emergency situations), the Committee repeated its concern and recommended, in its Concluding Observations, that Hong Kong amend the law relating to "vice establishments" so that sex workers can work together on the same premises without violating the law.[158] This recommendation is potentially important for organizations that lobby for the rights of sex workers, as the CEDAW Committee's Concluding Observations have been influential in previous law and policy reforms in Hong Kong.[159]

Of course, structural feminists would argue that the Hong Kong

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[155] H. K. WOMEN'S COAL. ON EQUAL OPPORTUNITIES, SUBMISSION TO CEDAW PRE-SESSIONAL WORKING GROUP ON THE IMPLEMENTATION OF CEDAW IN HONG KONG, § IA (2014) (comprising Action for REACH OUT and eleven other organizations), *available at* http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CHN/INT_CEDAW_NGO_CHN_18386_E.pdf.

[156] The Committee on the Elimination of Discrimination Against Women is the treaty-monitoring body for CEDAW. For information on the CEDAW Committee, see http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx.

[157] Comm. on the Elimination of Discrimination Against Women, List of issues and questions in relation to the combined seventh and eighth periodic reports of China, ¶ 11, U.N. Doc. C/CHN/Q/7-8, (March 10, 2014), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW %2fC%2fCHN%2fQ%2f7-8&Lang=en. The CEDAW Committee also asked the government to provide information on "provisions that are available for rehabilitation and reintegration of women in prostitution into society, especially by enhancing other livelihood opportunities." *Id.*

[158] *See* Comm. on the Elimination of Discrimination Against Women, List of issues and questions in relation to the combined seventh and eighth periodic reports of China, Addendum: Replies of China, 29, U.N. Doc. C/CHN/Q/7-8/Add.1 (Aug. 15, 2014), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCHN%2fQ%2f7-8%2fAdd.1&Lang=en; and Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the combined seventh and eighth periodic reports of China (including Hong Kong), ¶ 56 and 57(e), U.N. Doc. C/CHN/CO/7-8 (Nov. 15, 2014), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCHN%2fCO%2f7-8&Lang=en. The Committee also recommended that the government offer "exit programs" to sex workers who wished to leave prostitution.

[159] Petersen & Samuels, *supra* note 154, at 36-41 (analyzing previous law and policy reforms undertaken by the Hong Kong government in response to the CEDAW Committee's Concluding Observations).

government's greatest sin is its toleration of the sex industry and that the only way to remedy the inherent violence of commercial sex is to abolish it.[160] Structural feminists would likely support repeal of the offences related to the selling of sexual services by individual women (because they view "prostituted women" as victims), but they would simultaneously request the government to criminalize the buying of sexual services and to enthusiastically prosecute customers of sex workers. Clearly groups like Zi Teng would not support this option. But such a proposal might receive support from members of the general public who disapprove of sex workers and would like to eradicate the sex industry on aesthetic or moral grounds. Thus, sex worker organizations must be careful not to request that the government initiate a broad law reform process unless they are confident that it will not backfire. Seeking incremental law reform (such as allowing two sex workers to legally work on the same premises) is probably the more cautious strategy.

In this context, however, it should be recognized that the annual U.S. TIP Report could easily undermine any campaign for even modest law reform to make Hong Kong sex workers safer. This is because the criteria set by the U.S. State Department includes "making a serious and sustained" effort to reduce the demand for commercial sex acts, which would probably not be consistent with any legislation that reduces existing restrictions on the sex industry.[161] The Hong Kong government has already been embarrassed by the fact that it was lowered from Tier 1 to Tier 2 in 2009, and it claims to have been working hard to raise itself back to Tier 1. The last thing that the government would want to do is to support a law reform effort that might be perceived as widening the legal space for the commercial sex industry, even if it has the effect of making Hong Kong sex workers safer. This illustrates one of the key problems with the U.S. TIP Report—it ignores the voices and the immediate needs of local sex workers in the countries that are being reviewed.

The next section of this article discusses Hong Kong's legal framework concerning trafficking and the experiences of migrant sex workers in Hong Kong, the vast majority of whom come from Mainland China and are in a far more vulnerable position than local sex workers.

C. Migrant Sex Workers and the Need to Screen for Victims of Trafficking

In contrast to the state of "partial decriminalization" for local sex workers, Hong Kong law prohibits anyone who is not a resident of Hong

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[160] *See generally* MacKinnon, *supra* note 32.

[161] *See, e.g.*, TRAFFICKING VICTIMS PROTECTION ACT: MINIMUM STANDARDS FOR THE ELIMINATION OF TRAFFICKING IN PERSONS, *supra* note 89, ¶ 12.

Kong from conducting sex work in the territory.[162] Hong Kong authorities regularly conduct raids on illegal "vice establishments" and arrest and prosecute thousands of migrant women every year for immigration offences arising from sex work (including breaching the "conditions of stay" in their tourist visas, using forged or altered documents, or "making a false statement to an immigration officer").[163] From the period of 2005 to 2007, approximately 12,000 Mainland Chinese women were admitted to Hong Kong prisons, representing about half of Hong Kong's female prison population.[164] The high rate of imprisonment of migrants found working illegally is a deliberate strategy, adopted by the Hong Kong government to discourage Mainland Chinese from coming to Hong Kong to work in the sex industry.[165]

Given the large number of women who are regularly detained in the course of raids on illegal brothels, one might expect to see Hong Kong report a significant number of cases of sex trafficking. Yet Hong Kong has always reported a fairly small number of trafficking cases. This is particularly surprising because of the legal framework, which appears to take (at least on paper) a very dim view of anyone who facilitates cross-border movement of women into the sex industry. For example, Section 129 of the Crimes Ordinance provides:

> (1) A person who takes part in bringing another person into, or taking another person out of, Hong Kong for the purpose of prostitution shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.
> (2) It shall not be a defence to a charge under this section to prove that the other person consented to being brought into or taken out of Hong Kong whether or not she or he knew it was for the purpose of prostitution or that she or he received any advantage therefor.[166]

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[162] A nonresident needs a visa to work legally in Hong Kong, and work visas are never issued for sex work.

[163] Immigration Ordinance (1997), Cap. 115, BLIS, §§ 41–2 (H.K.). For a detailed study of the offenses convictions and range of sentences, see generally Laidler, Petersen, & Emerton, *supra*, note 52.

[164] Written Replies of Hong Kong to CAT, *supra* note 144, ¶¶ 108–09 (providing this data in response to a question from the U.N. Committee Against Torture as to why the female imprisonment rate in Hong Kong is so high).

[165] For further discussion and a critique of the government's tough policies towards migrant sex workers, see Laidler, Petersen & Emerton, *supra* note 52, at 80–81. It should be noted that the female prison population in Hong Kong did decrease from 2005 to 2007, which may indicate that the tough sentencing discouraged some migrant sex workers from coming to Hong Kong. *Id.*

[166] Crimes Ordinance, *supra* note 117, § 129.

Thus, in the area of cross-border trafficking for the purposes of prostitution, the criminal offense is defined quite broadly in Hong Kong—more broadly than is required under the Trafficking Protocol.[167] At first reading, this provision might be interpreted as expressing a legislative intent to take an abolitionist or prohibitionist approach to sex work—at least when migrant sex workers are brought to Hong Kong by third parties. Yet despite this provision, in practice the Hong Kong government does not apply an abolitionist approach to migrant sex workers, and it identifies only a few cases of sex trafficking each year.[168] This is not to suggest that the authorities ignore the third parties who run illegal vice activities. Men are arrested during raids,[169] and they can be prosecuted for a range of offenses, including running a vice establishment[170] and knowingly living "wholly or in part on the earnings of prostitution of another."[171] However, the small number of prosecutions for "trafficking" is one of the key concerns that has been raised regarding Hong Kong's commitment to preventing trafficking for sexual exploitation, and it thus deserves careful analysis.

In 2005 to 2006, my colleagues and I gained some initial insight into Hong Kong's approach to this issue by surveying a random sample of migrant women, all of whom had been convicted of immigration offenses related to sex work.[172] While one of our purposes was to ascertain how the Hong Kong criminal justice system treated these women,[173] an additional

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[167] While the Trafficking Protocol also provides that the consent of the victim to exploitation is irrelevant, this is limited to situations in which a person has been trafficked by certain means (e.g. force, coercion, deception, abuse of power or abuse of a position of vulnerability). Trafficking Protocol, *supra* note 5.

[168] Legis. Council Panel on Const. Aff., *Hearing of the United Nations Human Rights Committee on the Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights*, App. III (May 2013), *available at* http://www.cmab.gov.hk/upload/LegCoPaper/ca0520cb2-1117-1-e.pdf. *See also* Written Replies of Hong Kong to CAT, *supra* note 144, ¶ 69, n. 9 (explaining that there was only one trafficking case in 2007 and that two other suspected cases eventually were not classified as trafficking because the investigation revealed that the women had come to Hong Kong to conduct sex work voluntarily, without any force, coercion, or fraud).

[169] *See* Paggie Leung, *Police Arrest 241 People During Anti-vice Crackdown*, S. CHINA MORNING POST (Nov. 4, 2004, 12:00 AM), http://www.scmp.com/article/476728/police-arrest-241-people-during-anti-vice-crackdown (reporting that 204 women and 37 men were arrested in a coordinated anti-vice operation that involved raids on many different premises).

[170] Crimes Ordinance, *supra* note 117, § 117(3).

[171] *Id.* § 137.

[172] The Department of Correctional Services gave permission for the interviews in prison, which allowed us to access women who had worked under third-party management, a group that is traditionally difficult to study because they are hidden away in illegal brothels. Using an interpreter, we interviewed seventy-five women for approximately one hour and obtained fifty-eight valid interviews. Funding for the study was provided by a grant from the University Grants Council, University of Hong Kong.

[173] Previously, migrant women who were convicted of minor immigration offenses as a result of their engagement in sex work were typically given a suspended sentence and sent home. By the

research question was whether potential victims of trafficking were being overlooked by the Hong Kong authorities.[174] The interviewees were asked about their age, hometown in China, work experience before coming to Hong Kong, and motivations for coming to Hong Kong. They were also asked whether a third party had facilitated their travel to Hong Kong and their entry into sex work, whether they had worked under third-party management, and whether they had been deceived, coerced, or mistreated by any third parties.

The majority of these women (forty-six of our fifty-eight interviewees) readily admitted that they had come to Hong Kong to engage in sex work. Indeed, some told us that they had already made previous trips to Hong Kong to conduct sex work, had previously avoided detection, and had returned safely to the Mainland after a period of weeks with substantial profits.[175] Their reasons for working illegally in Hong Kong were fairly simple—they had low-paying jobs in Mainland China and needed more money to meet their financial needs or to address a recent crisis, such as the unemployment or illness of a family member. Although some of these women made their own visa and travel arrangements (especially those who had undertaken more than one trip to Hong Kong), most were initially recruited by a third party (generally an acquaintance) who had offered to organize their visa, travel, and working arrangements in Hong Kong.[176] The women knew that they would be doing sex work and would need to reimburse the "middlemen" before keeping any profits for themselves. From the point of view of the Hong Kong authorities, these women would not be "victims" because they had voluntarily travelled to Hong Kong with the intention of conducting sex work and had done so, in violation of the law. We also did not classify these women as victims of trafficking under international law, as they did not allege that they were deceived or coerced into sex work.[177]

In contrast, however, we concluded that twelve of the fifty-eight women in our study (21%) should have been considered victims of trafficking if their stories could be confirmed. These women described how they had been lured to Hong Kong by false promises of jobs outside the sex

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time we conducted our study, however, the Hong Kong government had adopted harsher policies, including sentencing women to prison and a blacklist system for women deported for suspected involvement in sex work, and we wanted to assess the impact of these policy decisions. *See generally* Laidler, Petersen & Emerton, *supra* note 52, at 71.

[174] The interviews are briefly summarized here; for a more detailed discussion of the results, see generally Emerton, Laidler & Petersen, *supra* note 53, at 42-50.

[175] For example, one woman claimed that she had earned the equivalent of $10,000 USD on a previous visit to Hong Kong.

[176] See Emerton, Laidler & Petersen, *supra* note 53, at 42-50.

[177] It should be noted that some women in this category felt that they had been misled at some stage regarding the legality of sex work in Hong Kong, but the authorities probably would not consider this relevant because it is illegal for a migrant to do any work in Hong Kong without a legitimate work visa, and this fact is well publicized at the border.

industry (such as dishwashing, cleaning, foot massage, or hairdressing jobs). It was not until their arrival that they were taken to a brothel or other vice establishment, where the middleman, boss, or *mamasan* informed them that they were expected to do sex work. These young women were told that they could make a great deal of money if they cooperated but that they could not return to the Mainland until they serviced enough clients to at least pay back the visa and travel fees.

While a few of the women in this group told us that they agreed to do sex work fairly quickly, others said that they resisted for several days and were subjected to a variety of pressures (e.g. they were locked up in a room, threatened, or denied food). Five of these women said that they felt they were ultimately forced into sex work. In some cases, the interviewees were arrested in circumstances that should have alerted the authorities to the possibility of trafficking. For example, one woman told us that when the police conducted the raid on the brothel, they found her in a room that had been locked from the outside—but they nonetheless arrested and prosecuted her. Another interviewee (who claimed to be only fifteen years of age at the time of her arrest) told us that she was so miserable after serving the first client that the minders allowed her to leave the brothel. The doorman of the building told her how to get back to the border between Hong Kong and Mainland China, where she was promptly arrested for possession of a forged travel document. Despite her youth, the Hong Kong authorities prosecuted her for immigration offenses.

We had no way of confirming the truth of the stories told to us by the twelve women who we classified as victims of trafficking. It is, however, worth noting that these women were already serving their sentences and the interviewer made it clear that the results would have no impact on individual cases; thus they did not have any obvious incentive to lie.[178]

While it may seem surprising that none of these twelve women were identified as potential victims of trafficking by the Hong Kong authorities, it was understandable given Hong Kong's legal and policy framework at the time. First, although the offense of trafficking for sexual exploitation is drafted quite broadly, Hong Kong does not have a similarly broad definition of "trafficking victim," and this concept has never been defined in Hong Kong legislation. There is also no specific statute providing victims of trafficking with rights to protection or assistance. As a matter of policy, if a migrant woman escapes or is rescued from an obvious situation of forced prostitution, the government's policy is not to charge her with any offenses committed as a direct result of being trafficked.[179] The Hong Kong authorities will also grant immunity from prosecution to women who agree

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[178] We also discarded interview results if the answers revealed inconsistencies, which is why we ultimately had only fifty-eight valid interviews out of a total of seventy-five.

[179] *See, e.g.*, U.S. DEP'T OF STATE, *supra* note 86, at 167–68 (listing Hong Kong as Tier 2 in 2010).

to act as witnesses against their traffickers. However, this has all been a matter of policy, leaving the government with a great deal of discretion.

Moreover, given the large number of migrant women who were being arrested and processed at the time of our study—in a system that my colleagues and I informally dubbed the "migrant sex worker conveyer belt"—it was easy to see how victims of trafficking could be overlooked by the authorities. Virtually all of our fifty-eight interviewees (both the trafficked and non-trafficked women) described a very hurried and standardized procedure after their arrest. They were all taken to the police station, provided with an interpreter if they needed one (because many did not speak Cantonese, the local language in Hong Kong), quickly interviewed, and then asked to sign a statement. None of our interviewees recalled being asked whether they experienced any deception or coercion in the process of being recruited for sex work. Nor were they encouraged to tell the full story of how they were recruited in China, how they arrived in Hong Kong, or how they wound up working in the sex industry. Indeed, one interviewee insisted that she was never even interviewed by the police but rather asked to sign a pre-prepared statement admitting that she was present in the vice establishment when she was arrested. Thus, at the time of our study, the Hong Kong police were not even asking questions that might elicit stories of being trafficked.

It also appeared that at least some authorities may have actively discouraged women from telling personal stories that would compel the police to open a trafficking investigation. For example, one of the twelve women whom we identified as a potential victim of trafficking told us that she attempted to tell the police that she had been deceived and forced into sex work, and that a friend who had traveled with her to Hong Kong might still be under the control of a "boss" in a vice establishment. She claimed that the police expressed no interest in her story and that she was discouraged from repeating it—even by a social welfare officer, who pointed out that her friend would also probably be sent to jail if the police located her in a vice establishment.

Although none of the women in our study were assisted by a lawyer during the statement taking process, they were invited to consult a "duty lawyer" (Hong Kong's equivalent of a public defender) the following day when they were brought to the magistrate's court. Without exception, our interviewees reported that they were advised that their experiences (including the deception by the middlemen, the financial hardship that they had suffered in the Mainland, and the coercion they experienced once they were in Hong Kong) would not constitute a defense to the relevant charges, although they might constitute "mitigating factors" in the sentencing

process.[180] The women were also made aware that a guilty plea would normally lead to a reduction in the standard sentence. Thus, the women had a strong incentive to plead guilty and start serving their time and all fifty-eight of our interviewees had eventually done that. The women who pled guilty to the relatively minor offense of "breach of condition of stay" received sentences from two to three months. However, women convicted of more serious offenses (such as remaining in Hong Kong without authority or making a false statement to an immigration officer by showing a forged or altered visa) received longer sentences, of up to ten months.

After the interviews were concluded, we tested our interviewees' memories through observations in a magistrate's court that regularly tries Mainland Chinese women arrested for suspected involvement in sex work. These observations confirmed what our interviewees had told us: the procedures were highly standardized, and it took almost no time to convict a migrant woman from Mainland China who had been arrested for immigration offenses arising from suspected sex work. In one morning session, sixty-five defendants were convicted of "breach of condition of stay" and all but one (who was only sixteen years of age) were sentenced to two months in prison. Thus, it took an average of three minutes to convict and sentence each individual defendant.[181]

Our follow-up discussions with police, magistrates, and others involved in the system also confirmed that the police were not carefully screening women who were arrested in vice establishments to ascertain whether they might be victims of trafficking. A woman might be considered a victim of sex trafficking (and receive assistance) if she escaped from a brothel and presented herself to the authorities. But the police apparently presumed that women arrested during raids were in the brothels by choice. Moreover, a woman who told the police that she had been deceived about the nature of the job she would do in Hong Kong would not be automatically investigated as a potential victim of trafficking. Rather, her statement would likely be viewed as an admission that she had knowingly traveled to Hong Kong to work illegally. In the eyes of the authorities, the fact that she had intended to work illegally in some other field did not change her status from "lawbreaker" to "victim."

We concluded that the Hong Kong government should reassess its definition of trafficking victim and conduct more careful interviews of migrant women when they are apprehended, so that those who have been deceived and coerced can benefit from Hong Kong's victim-protection policies. We did not recommend, however, that Hong Kong treat all

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[180] The Administrator of the Duty Lawyer Service advised us that this was standard advice at the time because the court would not consider the fact that a woman was deceived about the nature of the work she would be doing in Hong Kong to be a defense, only a mitigating factor.

[181] For a more detailed report of the court observations, see Laidler, Petersen & Emerton, *supra* note 52, at 78.

migrant sex workers as victims of trafficking. The majority of the women in our study had knowingly chosen to come to Hong Kong for sex work and some had made their own travel or working arrangements, without any assistance from third parties—which tends to undermine abolitionist claims that all migrant women found in the sex industry are necessarily victims of trafficking.[182] To label all of these women as victims would deny their agency and could have the additional negative impact of diluting resources from efforts to assist women who are deceived and then find themselves trapped in coercive situations.

The next section reviews developments in Hong Kong since the 2009 TIP Report, including steps that the U.S. TIP Reports have recommended but which might prove controversial in Hong Kong given the history of migration from Mainland China into the territory and the sensitivity of cross-border relations.

D. Hong Kong's Response to the U.S. TIP Reports

Hong Kong was ranked in Tier 1 in the U.S. TIP Reports from 2001 to 2008 but demoted in 2009 to Tier 2, where it has remained for the past six years.[183] Although Hong Kong still ranks higher than Mainland China,[184] the Hong Kong government is clearly aggrieved by its placement in Tier 2 and has tried to persuade the U.S. State Department and the international community that it has a robust anti-trafficking program.[185] For example, in the area of trafficking for sexual exploitation, Hong Kong has continued to emphasize its anti-vice operations, and it recently claimed to have successfully broken up a number of syndicates that operate illegal vice

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[182] My colleague and I drew similar conclusions from a small study of migrant women who work in hostess bars in Hong Kong but occasionally do escort work. *See generally* Robyn Emerton & Carole J. Petersen, *Filipino Nightclub Hostesses in Hong Kong: An Analysis of Vulnerability to Trafficking and Human Rights Violations*, *in* TRANSNATIONAL MIGRATION AND WORK IN ASIA 126 (Kevin Hewison & Ken Young, eds., 2006).

[183] *See* U.S. DEP'T OF STATE, *supra* note 9.

[184] China has languished in the Tier 2 Watch List for many years and then dropped to Tier 3 in 2013. China had to be either raised to Tier 2 or lowered to Tier 3 in 2013 because Congress placed a limit on the number of years that a country can remain on the Tier 2 Watch List. For an explanation of how this mechanism was applied in 2013, see Teleconference, Luis CdeBaca, Ambassador-at-Large, Office to Monitor and Combat Trafficking in Persons, Briefing on the 2013 Trafficking in Persons Report (June 19, 2013), http://www.state.gov/j/tip/rls/rm/2013/210906.htm. China was placed back on the Tier 2 Watch List in 2014. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 132–34 (2014), *available at* http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226700.htm.

[185] *See, e.g.*, Press Release, Gov't of H.K., Response to U.S. Report on Trafficking in Persons (June 20, 2014), *available at* http://www.info.gov.hk/gia/general/201406/20/P201406201050.htm; Danny Lee, *US Human Trafficking Report Misleading, Says Hong Kong*, S. CHINA MORNING POST (last updated June 22, 2014, 10:37 AM), http://www.scmp.com/news/hong-kong/article/1538010/us-human-trafficking-report-misleading-says-hong-kong.

establishments.[186] The authorities have, however, also continued to arrest thousands of migrant sex workers each year[187] and those who are arrested in raids of illegal brothels were likely working under some form of third-party management.[188] Yet Hong Kong continues to report a small number of cases of sex trafficking—fewer than five cases each year from 2009 to 2013.[189] This naturally raises concerns as to whether Hong Kong has improved its procedures for identifying potential victims of trafficking since we conducted our research.

In this regard, the government has reported that immigration and police officers now receive regular training on human trafficking, including the skills of victim identification.[190] In 2013, the government also distributed an "action card" to guide police and immigration officers on how to identify potential victims of trafficking when they conduct raids on illegal brothels and arrest migrant sex workers.[191] Immigration and police officers are now supposed to be on "high alert for any potential victims of human trafficking in the course of their duties," and should "endeavor [sic] to identify these victims for each operation at the vice-establishments and provide the victims with appropriate assistance including urgent intervention, legal aid, medical consultation and treatment, counseling [sic], shelter or temporary accommodation, and other support services."[192] If implemented sincerely, these developments (all of which were developed after Hong Kong was demoted to Tier 2 in the U.S. TIP

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[186] Replies of Hong Kong, China to the list of issues in relation to the second periodic report of China (E/C.12/CHN/2), including Hong Kong, China (E/C.12/CHN-HKG/3) and Macao, China (E/C.12/CHN-MAC/2) ¶ 53, Comm. on Econ., Soc. and Cultural Rights, U.N. Doc. E/C.12/CHN/Q/2/Add.2 (Mar. 31, 2014) [hereinafter *Replies of Hong Kong to CESCR*] (reporting that five illegal vice syndicates had been broken up and that the offenders had received sentences to up to thirty months' imprisonment), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCHN%2fQ%2f2%2fAdd.2&Lang=en.

[187] *See* Clifford Lo, *64 Mainland Chinese Women Held in Vice Raids at Kowloon Hotels*, S. CHINA MORNING POST (June 12, 2014, 4:31 AM) (citing figures from the Immigration Department indicating that 1,500 sex workers, most of whom were from the Mainland, were arrested in anti-vice operations launched by police and immigration officers in the first four months of 2014; if this rate continues then the authorities will arrest in the range of 6,000 migrant sex workers in the year 2014), http://www.scmp.com/news/hong-kong/article/1530312/64-mainland-chinese-women-held-vice-raids-kowloon-hotels.

[188] The government claims to conduct an average of 5,000 anti-vice operations every year, with 3,000–6,000 sex workers arrested each year. *See Replies of Hong Kong to CESCR*, *supra* note 186, ¶ 54.

[189] *See Replies of Hong Kong to CESCR*, *supra* note 186, ¶¶ 53–54.

[190] *Id.* ¶ 55.

[191] *Id.*

[192] *Id.* ¶ 54. The Hong Kong government also assured the Committee that immigration officers can grant victims of trafficking an extension of stay or defer their repatriation so that they can assist the government in investigations. However, this is not a new policy and it continues to be applied on a case-by-case basis.

Report) should bring about some improvement over the very cursory interviews at the police station that were described to us by our interviewees in 2005.

Another recent development is that Hong Kong's Department of Justice has issued, in September 2013, a revised Prosecution Code that contains a new section on "human exploitation cases."[193] The purpose is to provide guidance to prosecutors in identifying and addressing potential victims of exploitation, "having regard to international standards and practices concerning victims of human trafficking in order to promote fair, just and consistent decision-making at all stages of the prosecution process in these cases."[194] While this Code would not necessarily provide an individual with the legal status of "victim of trafficking," the goal should be to ensure that a person is not prosecuted for actions committed simply as a result of their victimization.

What Hong Kong has not done is to agree to be bound by the Trafficking Protocol.[195] Although this is not something that the U.S. TIP Report requires,[196] it would be a positive step from the point of view of the international community. If Hong Kong is not yet ready to be bound by the entire Trafficking Protocol, it could at least agree to amend its domestic anti-trafficking legislation so as to comply with the definition of trafficking contained in the Trafficking Protocol. This has been recommended by the U.S. State Department, which is justifiably concerned by the fact that there is no law expressly prohibiting labor trafficking, despite the well-publicized cases of abuse of migrant domestic workers, both by employment agencies and by employers.[197] Similarly, in

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[193] *Id.* ¶ 57.

[194] *Id.*

[195] Although China became a state party to the treaty in 2010, the Hong Kong government asked to be left out and thus is not bound by the treaty. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, China-H.K., Feb. 8, 2010, C.N. 45.2010.TREATIES-1 (Depository Notification), *available at* https://treaties.un.org/doc/Publication/CN/2010/CN.45.2010-Eng.pdf; Declaration in Respect of Hong Kong and Macao, China-H.K.-Mac., Feb. 8, 2003, C.N 46.2010.TREATIES-2 (Depository Notification), *available at* https://treaties.un.org/doc/Publication/CN/2010/CN.46.2010-Eng.pdf.

[196] For example, South Korea was raised to Tier 1 after enacting its tough new law against commercial sex, despite the fact that it still has not ratified the Trafficking Protocol.

[197] *See, e.g.*, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORTS 198–200 (2014), *available at* http://www.state.gov/documents/organization/226846.pdf. To be fair, however, Hong Kong does have laws protecting the rights of migrant domestic workers and has frequently initiated prosecutions against abusive employment agencies and employers. The problem (in this author's view) is primarily the "two-week" rule, which makes it difficult for migrant domestic workers to move to a better employer and/or to remain in Hong Kong while seeking remedies for abuses of the law. Interestingly, the two-week rule has not been emphasized in the TIP Reports, but it has been raised frequently by the international treaty monitoring bodies that review Hong Kong; for discussion, see Lee & Petersen, *supra* note 19.

2014, a member of the Hong Kong Legislative Council asked the government whether it would consider updating the legislation so as to better comply with the Trafficking Protocol.[198]

Thus far, however, the government has maintained that the existing legislation is adequate.[199] This is unfortunate because even in the context of sex trafficking, Hong Kong's existing legislation is outdated and inadequate. This is partly because it prohibits only cross-border movement for the purposes of prostitution (in or out of Hong Kong), and residents can be victims of sex trafficking without ever leaving Hong Kong. A primary example is the phenomena of "compensated dating" in Hong Kong, which can easily lead to child prostitution.[200] Under the Trafficking Protocol, when the alleged victim is a child (defined as a person under the age of eighteen), trafficking has occurred when there has been "recruitment, transportation, transfer, harbouring [sic] or receipt" of the child for the purpose of exploitation; it is not necessary to show that any of the unscrupulous "means" listed in Article 3(a) were used.[201] Adult men who offer money to have sex with young teenaged girls in Hong Kong can already be prosecuted,[202] but they might think more carefully about their actions if they could be prosecuted for trafficking.

Moreover, our interviews with the twelve young women in our study who were deceived and then coerced into sex work in Hong Kong indicate that they were not necessarily victimized by just one "trafficker" who brought them across the border. Rather, the acts of trafficking were spread among several people and some of them (e.g. the *mamasan* or boss who coerced our interviewees to work in the brothels) were operating entirely in Hong Kong and played no apparent role in recruiting the young women or bringing them across the border. A definition of trafficking based upon the Trafficking Protocol would be more useful for prosecuting these individuals because the "act" of trafficking would include not only the transportation but also the harboring or receipt of a person through improper means for the purpose of exploitation.

This is not to suggest, however, that all migrant sex workers from Mainland China should be considered victims under a definition of

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[198] *See* Press release, The Gov't of H.K., LCQ8: Combating Human Trafficking (Feb. 12, 2014), *available at* http://www.info.gov.hk/gia/general/201402/12/P201402120349.htm.

[199] *Id*.

[200] *See, e.g.*, Clifford Lo, *Undercover Officers Nab Over 20 Men in Compensated-Dating Scheme*, S. CHINA MORNING POST, (last updated Sept. 6, 2012, 3:40 AM), http://www.scmp.com/news/hong-kong/article/1030392/undercover-officers-nab-over-20-men-compensated-dating-sting; Yvonne Tsui, *Girl Chopped Up, Flushed Down Toilet, Court Told*, S. CHINA MORNING POST (July 21, 2009) (describing the murder trial of a man who met his 16-year old victim through a compensated dating scheme and then killed her during a sexual encounter), http://www.scmp.com/article/687464/girl-chopped-flushed-down-toilet-court-told.

[201] Trafficking Protocol, *supra* note 5, at art. 3.

[202] For example, they can be charged with soliciting for an immoral purpose.

"trafficking" based upon the Trafficking Protocol. The majority of the women in our study did not claim to have been coerced or deceived into sex work. This is an important point and one that seems entirely overlooked in the annual TIP Report. For example, in 2010, the U.S. TIP Report complained, "contrary to international standards, Hong Kong authorities continued to consider whether potential victims knew that they would engage in prostitution before travel as a factor that excludes them from being identified as victims."[203] This language implies that Hong Kong should be taking an abolitionist perspective on sex work, which is not required by international law. Rather, under the definition of trafficking in the Trafficking Protocol, the question of whether migrant women knew that they would engage in sex work prior to their voluntary travel to Hong Kong is relevant, as it goes directly to the question of whether a woman was deceived and/or coerced by a third party. Indeed, that was one of our major concerns when we conducted our study—the failure of the police and immigration officers to ask those important questions when they arrested migrant women. The TIP Reports should not be discouraging Hong Kong authorities from asking these questions. Recent TIP Reports have muddled the issue further by complaining that Hong Kong is deporting "thousands of potential victims" of sex trafficking.[204] This loose language gives readers the impression that the typical migrant sex worker is a victim of sex trafficking. Yet our interviews of a random sample of women in prison indicate that the majority knowingly came to Hong Kong to conduct sex work, and there is nothing in the literature to suggest any dramatic change in this pattern. Indeed, recent reports indicate that Mainland Chinese sex workers are deliberately coming to Hong Kong to avoid law enforcement in Mainland China, which takes a prohibitionist approach and is known for its harsh treatment of sex workers.[205]

In addition to making unfounded assumptions of victimhood, the TIP Reports have simultaneously urged the Hong Kong government to grant victims "permission to work and study while participating in trafficking investigations and prosecutions" and to "provide permanent residency visas as a legal alternative to those who may face hardship or retribution in their home countries."[206] While these are admirable goals, they are not required

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[203] *See* U.S. DEP'T OF STATE, *supra* note 86, at 167–68.

[204] *See, e.g.*, U.S. DEP'T OF STATE, *supra* note 197.

[205] *See* Lana Lam & Mandy Zuo, *Hong Kong Police Fear Prostitute Influx After Dongguan Vice Crackdown*, S. CHINA MORNING POST (last updated Feb. 16, 2014, 3:42 PM), http://www.scmp.com/news/hong-kong/article/1428709/hong-kong-police-fear-prostitute-influx-after-dongguan-vice-crackdown.

[206] *See, e.g.*, U.S. DEP'T OF STATE, *supra* note 197.

by the Trafficking Protocol.[207] Moreover, such policies could easily become unsustainable if applied to the thousands of migrant sex workers from Mainland China who travel to Hong Kong each year—as virtually all of these women could credibly allege that they are likely to face hardship when returned to the Mainland.[208]

By giving an unduly expansive interpretation of the obligations contained in the Trafficking Protocol, the TIP Report may make the Hong Kong government even more reluctant to become bound by the treaty or to adopt a legislative definition of trafficking that is based upon it. In order to fully understand this effect, one must appreciate the history of immigration from Mainland China and the rising tensions between Hong Kong residents and Mainland Chinese, despite the fact that the vast majority of Hong Kong residents are the descendants of refugees from Mainland China.[209] The Hong Kong colonial government initially maintained a liberal policy, allowing anyone who managed to escape China and reach Hong Kong's urban areas to remain.[210] A huge wave of migration occurred during China's civil war and immediately after the Communist Party won control in 1949. As result, the population of Hong Kong swelled from only 600,000, at the end of World War II, to 2,360,000 in 1951.[211] But the liberal immigration policies became problematic in the 1960s and 1970s, partly because the Chinese government would occasionally throw open its borders or allow thousands of people to climb the fences and make their way into Hong Kong, overwhelming the territory's supply of housing.[212] By the early 1980s, the colonial government had reached an agreement with China limiting the number who could migrate to Hong Kong, and it was also

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[207] While the Trafficking Protocol requires states parties to criminalize trafficking, it only requests that states parties consider providing various forms of victim assistance; nor does it require that a country provide permanent residence for victims of trafficking.

[208] Hong Kong arrest and deportation statistics for recent years indicate that the number may have declined since our study. *See, e.g.*, *Facts and Statistics*, H.K. IMMIGR. DEP'T, http://www.immd.gov.hk/en/facts/investigation.html (last visited Jan. 21, 2014). However, this is a very difficult number to calculate, partly because women are also being arrested by the police but also because of the evidence that many Mainland Chinese sex workers are moving back and forth across the border, working for a short period of time in Hong Kong and then returning to the Mainland with their profits before they are detected by either police or immigration officers. Interestingly, in 2009, Zi Teng estimated that there were as many as 50,000 migrant sex workers in Hong Kong and that the vast majority comes from Mainland China. *See* ZI TENG & MIGRANT SUPPORT NETWORK, POSITION PAPER ON THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2009), *available at* http://www.ziteng.org.hk /aboutus/2009JUN01_e.php (last visited Jan. 20, 2014).

[209] *See generally* Johannes Chan, *The Evolution of Immigration Law and Policies: 1842-2003 and Beyond, in* IMMIGRATION LAW IN HONG KONG: AN INTERDISCIPLINARY STUDY (Johannes Chan & Bart Rwezaura, eds., 2004).

[210] *Id.*, at 6-12.

[211] NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 34 (5th ed. 1991).

[212] *Id.*, at 234–35.

strictly enforcing laws against illegal migration.[213] Reunification in 1997 did not change this basic policy, except that the definition of who enjoys the "right of abode" in Hong Kong is now contained in the Hong Kong Basic Law.[214]

The vast majority of Mainland Chinese citizens still do not enjoy the right of abode and, thus, cannot resettle in Hong Kong. Indeed, there are still many "split families," with spouses and/or children waiting on the Mainland side of the border for permission to join a family member who has secured residence in Hong Kong.[215] Although this certainly causes hardship, the ability to control its immigration border is considered an essential element of Hong Kong's autonomy from Mainland China.[216]

It has, however, become much easier for Mainland Chinese to visit Hong Kong, under the "individual visit" endorsement scheme created in 2003. Mainland Chinese also have become more prosperous in recent decades and they are eager to travel and to shop for the high-quality goods that are available in Hong Kong.[217] As a result of these factors, the total number of annual visitors from Mainland China to Hong Kong has soared in the past decade, to more than 40 million in 2013—a staggering number given that Hong Kong's permanent population is only about 7 million.[218] While this influx of visitors stimulates Hong Kong's economy, it has also generated angry protests among some residents, who feel that the small territory is being overrun.[219] The anti-Mainland feelings have been further exacerbated by the rising political tensions between the Central Government and Hong Kong's democracy movement, the unfortunate delays in the promised democracy reforms, and an ill-conceived "White Paper" in which Beijing insisted that Hong Kong's autonomy is subject to the overall supervision of the Central Government.[220]

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[213] *Id.*

[214] *See* The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China art. 24, § 6.

[215] *See generally*, Athena Liu, *The Right to Family Life and the Phenomena of Split Families in Hong Kong*, *in* IMMIGRATION LAW IN HONG KONG: AN INTERDISCIPLINARY STUDY, *supra* note 209.

[216] Hong Kong invests enormous resources in keeping illegal migrants out of the territory, in preventing visitors from working illegally in the territory, and even preventing pregnant women from Mainland China from giving birth in Hong Kong. For a summary of these efforts, see the H.K. IMMIGRATION DEP'T, ANNUAL REPORT 2012, ch. 4, *available at* http://www.immd.gov.hk/publications/a_report_2012/en/ch4/index.htm#c_4_2b.

[217] *See, e.g.*, Bryan Borzykowski, *The Rise of China's Super-Rich*, BBC (Feb. 4, 2014), http://www.bbc.com/capital/story/20140203-the-rise-of-chinas-wealth-dragon.

[218] *See Tourism Performance in 2013*, GOV'T OF H.K, http://www.tourism.gov.hk/english/statistics/statistics_perform.html (last visited Jan. 20, 2015).

[219] *See* Editorial, *Protests Targeting Mainland Chinese Visitors Put Hong Kong to Shame*, S. CHINA MORNING POST (Feb. 18, 2014, 5:07 AM), http://www.scmp.com/comment/insight-opinion/article/1429630/protests-targeting-mainland-chinese-visitors-put-hong-kong?page=all.

[220] INFO. OFF. OF THE ST. COUNCIL, THE PRACTICE OF THE "ONE COUNTRY, TWO SYSTEMS" POLICY IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION (2014), *available at*

This political and social context inevitably influences the perception of Mainland Chinese sex workers in Hong Kong, who are finding it fairly easy to enter Hong Kong for sex work (now that they can arrange their own tourist visas) but are regularly arrested and prosecuted for violating the terms of that visa or for other offenses related to sex work. The local sex-worker advocacy group, Zi Teng, has worked hard to build sympathy for these women and to protest when the authorities do not respect their rights.[221] Zi Teng recognizes that migrant sex workers from Mainland China cannot openly fight for their rights and that they suffer from a double stigma. While this phenomenon is certainly not unique to Hong Kong,[222] it has a particularly strong impact there because the large numbers of migrants and visitors from Mainland China are increasingly seen as a threat to Hong Kong's autonomy and way of life. In this context, it would be unrealistic to expect Hong Kong to take a truly abolitionist approach and treat all migrant sex workers as victims. It would make more sense to encourage the Hong Kong government to amend its legislation so as to adopt the international definition of trafficking and to carefully screen migrant women who come into contact with the authorities to ascertain whether individuals genuinely meet that definition.[223]

V. CONCLUSIONS

The authors of the U.S. TIP Reports deserve credit for drawing attention to weaknesses in Hong Kong's legal framework, particularly the outdated definition of trafficking and its failure to expressly prohibit labor trafficking. Unfortunately, in the field of sex trafficking, the TIP Reports continue to use weak methodology and to assume without evidence or careful analysis that the typical migrant sex worker is likely to be a victim of sex trafficking. The effect of this assumption—particularly when

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http://news.xinhuanet.com/english/china/2014-06/10/c_133396891.htm. For a collection of recent articles in Hong Kong's South China Morning Post on this very controversial document, see *Beijing White Paper* 2014, S. CHINA MORNING POST (last visited Jan. 21, 2015), http://www.scmp.com/topics/beijing-white-paper-2014.

[221] For example, when the UN Committee on Racial Discrimination reviewed Hong Kong and China, Zi Teng and the Migrant Support Network issued a joint position paper that identified police discrimination and abuse as one of the most serious problems faced by migrant sex workers in Hong Kong. *See* ZI TENG & MIGRANT SUPPORT NETWORK, *supra* note 208.

[222] *See* Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605 (2009) (discussing of how otherness marginalizes individuals and impedes responses to human trafficking).

[223] Even that reform may be difficult to obtain as Hong Kong has already faced considerable challenges in complying with its obligation under the Convention Against Torture not to deport a person who claims that s/he will be subjected to torture if returned to his home jurisdiction. *See generally* Kelley Loper, *Toward Comprehensive Refugee Legislation in Hong Kong? Reflections on Reform of the 'Torture Screening' Procedures*, 39 H.K.L.J. 253, 253-59 (2009). For a summary of what the new Torture Claims Assessment Branch does to screen claimants, see H.K. IMMIGRATION DEP'T, *supra* note 216.

combined with the implied requirement that governments must make a serious and sustained effort to reduce the demand for commercial sex in order to raise their ranking in the TIP Report—is to project an abolitionist view of sex work. There is a strong incentive for governments that have received low rankings to try to please the U.S. State Department, either by cracking down on commercial sex generally and/or by adopting very harsh immigration policies to prevent young migrant women from entering their territories. Yet these are public policy decisions that are not required under international law and should not be imposed through American foreign policy.

Of course, in some countries, an abolitionist approach may well be the most effective way of reducing sex trafficking and the violence against women that can arise in the sex industry. However, this is a decision that should be made locally, with full consideration given to the voices of sex workers in the respective jurisdiction. For example, if the Hong Kong government were to propose criminalizing the purchase of sexual services in order to raise its ranking in the U.S. TIP Report (as South Korea did), there would almost certainly be a very loud protest by Hong Kong's local sex workers, who have been actively lobbying in the opposite direction—for greater legal space and the right of two sex workers to work together for enhanced safety. The Hong Kong feminist movement would also find itself in a difficult position, not only because of the traditional split on this issue within the feminist movement but also because sex worker advocacy groups are active participants in the Hong Kong women's movement and often join coalitions of women's organizations to lobby on particular issues.

The Hong Kong case study reveals the dangers of assuming a single narrative of sex work and of relying upon generalizations rather than careful research of particular jurisdictions. It also calls into question the entire purpose of the annual TIP Report. In theory, the TIP Report is supposed to encourage governments to adopt and enforce the standards set in the Trafficking Protocol. In practice, the TIP Report has become a political tool for certain members of Congress, who have set criteria and "minimum standards" that are not based on international norms. To that extent, the TIP Report may be missing opportunities for advocacy rather than promoting human rights.