



State and the Law

Beyond Trafficking and Slavery Short Course | Volume 3



Edited by Prabha Kotiswaran and Sam Okyere

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State and the Law

Beyond Trafficking and Slavery Short Course
Volume Three

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Beyond Trafficking and Slavery Supporters



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A wide range of activists, academics, trade unions, governments and NGOs are currently trying to understand and address forced labour, trafficking and slavery. *Beyond Trafficking and Slavery* (BTS) occupies a unique position within this larger movement, one which combines the rigour of academic scholarship with the clarity of journalism and the immediacy of political activism. It is an independent, not-for-profit marketplace of ideas that uses evidence-based advocacy to tackle the political, economic, and social root causes of global exploitation, vulnerability and forced labour. It provides original analysis and specialised knowledge on these issues to take public understanding beyond the sensationalism of many mainstream media depictions. It further works to bring citizens, activists, scholars and policy-makers into conversation with each other to imagine pioneering policy responses.

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The role of the state and law in trafficking and modern slavery

Beyond Slavery editors introduce this volume on the state and the law, elements which not only define slavery but shape the channels through which it is addressed.

Prabha Kotiswaran and Sam Okyere

The role of the state, and national legislation in particular, is absolutely crucial to the ‘modern slavery’ debate. This is because construction of the concept of ‘modern slavery’ and legal responses to the ‘problem’ are both primarily reliant on individual states and the international and regional organisations they constitute. National legislation and international legal conventions determine the conditions under which phenomena are discursively constructed as instances of ‘modern slavery’ and when they are not. Likewise, state authority and complicity determines whether and when the forced movement of individuals and groups across borders into unwanted settings and conditions is classed as ‘deportation’ (and hence acceptable) or ‘human trafficking’ and a form of ‘modern slavery’. The point being advanced here is that the social relations and practices classified as modern slavery exist in much the same way as they have existed historically and spatially, but their legal classification as crimes, ‘modern slavery’, or as entirely different phenomena takes place exclusively at the behest of the state. To put it rather crudely, without the state and the laws it creates, ‘modern slavery’ could not become a legal category in the manner made possible by legislation such as the UK Modern Slavery Act 2015.

With this in mind, modern abolitionists have long lobbied politicians and governments in an attempt to legitimise their own understanding of contemporary forms of slavery. The result is that today, modern abolitionism appears to be one of the few spaces in which the oddest of bedfellows manage to find common-ground: left and right wing poli-

ticians, corporate institutions, ethical consumer groups, human rights activists, academics, and actors from what has been termed the ‘rescue industry’. These actors are united in their demands for states to enact or enforce legislation thought to prevent ‘modern slavery,’ and to pursue and punish those deemed to be contributing to the phenomenon.

Many states have obliged. However, as the articles in this volume amply demonstrate, this claim starts to unravel when the laws are subjected to any real scrutiny. A number of these laws have been problematised on the basis that they fail to address the root causes of vulnerability, such as humiliating poverty, persecution, or socio-political conflict, which lead many into the conditions defined as ‘modern slavery’. Other laws are vehemently opposed, even by those they purport to benefit, because of their adverse consequences coupled with their failure to recognise any choice or agency on behalf of the so-called ‘victims’. Overall, scrutiny of these laws shows that while state power and legislation can be used for positive ends, they can equally be employed in the pursuit of measures that run contrary to human rights concerns.

The real problem we identify is that ‘modern slavery’ is an entirely political subject, one which has been depoliticised by modern abolitionists and the state. What gets defined as ‘modern slavery,’ and the laws that are consequently formulated to address it, mirror and promote certain political and socio-economic interests or concerns of politicians and national governments. Across North America, Western Europe, and elsewhere in the global north, far from exclusively serving human rights interests, ‘anti-trafficking’ legislation and related measures such as border militarisation have actually created conditions for gross human suffering and needless deaths. In many cases, state actions or inactions have also been found to be directly linked to the creation of the conditions they purportedly aim to eradicate.

The state's hand in labour exploitation

This point is evident from the first article in this volume, in which Kate

Roberts, an advocate at Kalayaan, explores the vulnerability-inducing restrictions placed on migrant domestic workers in the UK through the tied visa system. Although there were commitments to review this practice within the then Modern Slavery Act, there are still no resultant changes in the immigration rules. Consequently, overseas domestic workers, similar to other migrant workers on work sponsorship visas across the world, are prevented from legally exiting dangerous and abusive situations for as long as they remain in the UK. This measure, Roberts argues, violates the fundamental freedom of workers to change employers and ultimately creates a pool of human beings ripe for exploitation. The fact that the UK government's promise is yet to be realised makes Judy Fudge's article even more poignant. Fudge problematises support for the Modern Slavery Act, pointing out the various elements of legal governance, criminal law, and border controls that are mobilised in its cause; systems that target marginal players rather than the social processes normalising exploitation and creating vulnerabilities. In the same vein, Caroline Robinson also critically deconstructs the then modern slavery bill. She concludes that despite assertions by many UK law makers that it represents a righteous cause, many victims of exploitation do not share the simplistic moral narrative underlying it. They seek practical solutions, not benevolence.

The point above is lent credence by Carol Leigh. Her article traces the ways in which legislation purporting to target human trafficking has been used historically to harm the rights of sex workers rather than protect them from violence and exploitation. Contemporary strategies to address 'modern slavery', as she argues, broaden stigmatisation and criminalisation while adversely impacting a range of vulnerable communities. Similarly, Nandita Sharma's article forcefully flags up the fact that anti-trafficking programmes often give a humanitarian gloss to national anti-immigration controls. Paradoxically, she adds, the immigration and citizenship policies of nation-states pose the biggest danger to many migrants today.

The case of Filipina entertainers in South Korea highlighted in the next article by Sealing Cheng is a clear example of why state anti-trafficking legislation is often rejected by the people who purportedly benefit. In this instance, neither migrant wives nor migrant workers find the language of ‘trafficking’ helpful in addressing their concerns because it privileges a criminal justice approach over the human rights approach to their situation. Such a framing also narrowly interprets ‘trafficking’ in terms of prostitution and undermines the rights of sex workers in Seoul. Anne Elizabeth Moore’s piece on anti-trafficking programmes in Cambodia discusses similarly worrying observations. In contrast to the smiling faces featured on glossy anti-trafficking campaign materials, Moore’s investigations revealed that anti-trafficking programmes instead place women into the clothing manufacturing sector. This is promoted as the only viable and, crucially, moral labour opportunity available. At the same time, its low-pay, high-risk nature and limited benefits to ‘rescued women’ are conveniently ignored.

A potential solution to such gross state approved or legal labour exploitation is offered in the next article by Zuzanna Muskat-Gorska and Jeroen Beinhart, both of the International Trade Union Confederation. The authors convincingly argue that states’ adoption of the criminal justice paradigm has not brought about any significant reduction in the numbers of trafficked victims. Arguing for a paradigm shift, they suggest the adoption of preventive measures that focus on equal treatment, income insecurity, living wages, real collective bargaining power, and recruitment and employment protection, such as the recently passed ILO Convention NO. P029—Protocol of 2014 to the Forced Labour Convention, 1930.

Judith Sutherland and Bill Frelick discuss the role of regional bodies, such as the European Commission, in the ‘modern slavery’ and ‘trafficking’ debate. As they argue, the European Union’s misplaced response to increased flows of migrants and asylum seekers, including the failure to rescue boats in distress and pushbacks at land borders, is

risking lives. At a time of severe humanitarian crises around the world, the authors argue against alarming signs that the EU is doubling down on externalising its border management and asylum responsibilities while migrants continue to die at sea. Alice Miller, meanwhile, suggests that the US's current anti-trafficking policy, which produces a tangle of finite beneficial and possibly infinite harmful effects, is the product of a very modern twist on the classic 'bait and switch' game of law-making. As Miller asserts, it employs the 'bait' of sexual harm—stories of 'sex slaves' produced by advocates and propagated with alacrity by the media and accepted by some US law makers—to justify the constantly changing 'switch', an incoherent spectrum of immigration and criminal law enforcement operating without much critical oversight, let alone public understanding. Part of the problem, in Miller's view, is that such little research has been done on the intersection of labour importing and rights restrictions within anti-trafficking regimes.

Katie Cruz offers a different take on this subject. She argues that prevailing accounts of a division between sex work and 'trafficking' obscure the routine fact of economic compulsion and exploitation, and their basis in the law. Thus, her article calls for the centring of immigration law in these debates as part of more ambitious political enquiries and actions. Continuing to examine the role of law in these debates, Prabha Kotiswaran suggests that the confusions arising from the conflation of trafficking with slavery and forced labour can be traced to the inadequacy of law for addressing what are fundamentally complex socio-economic problems of transnational import. As such, her article promotes the understanding that while laws are significant to the anti-trafficking movement, a measured appreciation of its strengths and drawbacks is essential in crafting a realistic strategy to combat trafficking.



Section one

The 2015 UK Modern Slavery Act

The Modern Slavery Bill: migrant domestic workers fall through the gaps

UK immigration rules currently prevent migrant domestic workers from changing employers. This removes these migrant workers' fundamental rights and leaves them vulnerable to abuse.

Kate Roberts

Editor's note: The articles in this section were written in early 2015 as part of the debate on the Modern Slavery Bill, which was passed into law on 26 March 2015. They have been left unchanged to give the reader a sense of the voices weighing in on the deliberations at the time, even though this causes some problems with verb tense from a current perspective.

“Domestic workers are imprisoned and made to work all hours of the day and night for little or no pay... We must put a stop to these crimes, and stamp out modern slavery.”

—*Theresa May, Home Secretary, [foreword to the Modern Slavery Strategy](#), Nov 2014.*

Effective laws and policies by the state are central to the promotion of human rights and the ending of conditions deemed to be modern slavery. The UK's Modern Slavery Bill has aspirations to set a [world-class example](#) in combating modern slavery. However, scrutiny of the bill and the government's own immigration policies raise a number of critical questions in relation to migrant domestic workers. The UK's current immigration rules for migrant domestic workers, which were introduced in April 2012, tie domestic workers to their employers. They [have resulted in an increase in the reported abuse and exploitation](#) of these already vulnerable workers. On 25 March 2015 the House of Lords will vote on an amendment to address this issue. This is the final opportunity to close a shameful gap in the Modern Slavery Bill.

Domestic servitude and forced labour are forms of human trafficking, and the UK government is very keen to demonstrate its commitment to the eradication of these and other forms of exploitation counted as modern slavery. Paradoxically, the laws and policies applied by government to migrant domestic workers in the UK do not substantiate this rhetoric.

The April 2012 changes to the immigration rules for overseas domestic worker (ODW) visas removed the right of migrant domestic workers to change employer. Many workers now actually have their employer's name written on their UK visa—a clear indication that in practise they are seen as their employer's private concern. This effectively removes any bargaining power from within an already unbalanced employment relationship, with migrant domestic workers left unable to resign, question, or challenge any aspect of their treatment.

Almost three years after migrant domestic workers were tied to their employers, the House of Lords voted in February for [an amendment](#) to the Modern Slavery Bill that would have reinstated the right to change employers and other basic protections. This was overturned in the House of Commons on 17 March 2015 and replaced by the government's amendment in lieu. The government's stated objection to the Lords' amendment is that if domestic workers are able to change employers, workers who are abused may simply leave and get a new job. This would allow abusive employers to remain unreported and unprosecuted. Instead, the government's amendment allows only those workers who have entered the [National Referral Mechanism \(NRM\)](#) and been identified as trafficked to have the possibility of a six month visa as a domestic worker.

To prevent domestic workers from changing employers in order to encourage more prosecutions makes no sense. It misses the fact that being able to change employer did much to prevent abuse. Migrant domestic workers were more likely to go to the police when they had

the right to change employer and [were less fearful of authorities](#). It is Orwellian to leave migrant domestic workers tied to their employers in order to force them, once they are abused, to report their employers to the authorities in order to access any type of protection.

The government's amendment will not be effective. Migrant domestic workers in the UK have now been tied to their employers for almost three years, and since then the only way they can access any advice or protection is if they are positively identified as trafficked via the NRM. To date there has been no upheld conviction for trafficking for the purpose of domestic servitude in the UK. Indeed, in February the [Court of Appeal upheld a diplomat's claim to immunity](#), thereby preventing two domestic workers deemed by the authorities to have been trafficked from bringing a claim for compensation.

The government's stated reason for curtailing the right of migrant domestic workers to change employer in 2012 was to decrease net migration to the UK. However, the percentage impact of migrant domestic workers on UK net migration [was less than 0.5 percent at the time](#). The number of visas issued for migrant domestic workers has remained more or less steady since the changes. Home Office figures show that 16,528 ODW visas were issued in 2013; 15,745 in 2012; 16,187 in 2011; 15,351 in 2010; and 14,887 in 2009, according to data obtained through freedom of information requests. Beyond the 200 workers a year who come to Kalayaan, figures on the number of migrant domestic workers who run away from employers to escape suffering are not available. However, it is certain that those that do run away face a more precarious existence than before the introduction of the tied visa because they are no longer able to remain documented and visible.

In 2009 the Home Affairs Select Committee's Inquiry into Trafficking [found](#) that retaining the protections provided by the pre-2012 ODW visa was "the single most important issue in preventing the forced labour and trafficking of such workers". With this in mind it is incredible

that these very rights were removed so soon after the committee's findings, particularly so because denying migrant domestic workers the right to change their employers by extension denies them the basic negotiating and registration rights that should be available to any worker. As the Joint Committee on the Draft Modern Slavery Bill published in April 2014 [found](#), “in the case of the domestic worker’s visa, policy changes have unintentionally strengthened the hand of the slave master against the victim of slavery.”

The experiences of domestic workers on the tied visa

At present, very little is known about what happens to migrant domestic workers once they enter the UK with their employer. Most available evidence comes from Kalayaan, which registered 402 new migrant domestic workers between April 2012 and April 2014. Of these, 120 workers were on the post-2012 visa and therefore tied to their employers. These workers generally reported less freedom and more control by their employers than those who were not tied. Their experiences, about which [Kalayaan published a briefing](#) in April 2014, are summarised as follows:

- Almost three-quarters of workers tied to their employers reported never being allowed out of the house unsupervised (71 percent), compared to under half on the original visa (43 percent).
- 65 percent of tied migrant domestic workers (MDWs) did not have their own rooms—they shared with the children or slept in the kitchen or lounge—compared with 34 percent of those not tied to their employers.
- 53 percent of tied MDWs worked more than sixteen hours a day, compared to 32 percent of those who had the right to change employer.

- 60 percent of those on the tied visa were paid less than £50 a week, compared with 36 percent of those on the original visa.
- Kalayaan staff internally assessed more than double (69 percent) of those who were tied as trafficked, in contrast with 26 percent of those who had not been tied. Two thirds of referrals into the [NRM](#) for identifying victims of trafficking made by Kalayaan were of domestic workers who were tied to their employers.

The government's amendment in lieu

The government's amendment in lieu does nothing to protect migrant domestic workers against abuse in the way that allowing them to change employers would. Those migrant domestic workers identified as trafficked through the NRM may get a six month visa, but for the worker trapped with her employer the choice remains the same: endure abuse, or break the law and leave.

There is no guarantee of protection until the worker receives a positive decision through the NRM. This requires them to go to the authorities—having already breached the immigration rules by leaving their employer—before they know they are safe. Even for those who do escape, who get good advice and support, and who make the decision to enter the NRM the likelihood of actually finding work on a six month visa is low and the fate of the worker beyond this is unclear. There is also the possibility that prosecutions of employers will be *less likely*, as they can easily suggest that allegations of maltreatment were fabricated in order for the worker to stay in the UK. Only a positive decision as having been trafficked will allow the worker to stay in the UK.

Lord Hylton, who is fighting to return basic protections to migrant domestic workers, has tabled a further [amendment](#) to the government's amendment. This will be debated on 25 March 2015, and asks only for the minimum migrant domestic workers need to be safe: a) the ability to change employer but not sector; b) the ability to renew visas

while employed in full-time domestic work; and c) the ability to obtain temporary visas when found to have been subject to slavery, thereby allowing migrant domestic workers time to look for other jobs. The amendment also requires domestic workers to notify the Secretary of State when they change employers, thereby giving the government the opportunity to follow up with any employers where they are concerned abuse may have occurred.

It would be shameful to have a Modern Slavery Bill in the UK which leaves in place a tied visa regime found to have so facilitated the abuse of migrant domestic workers in the UK. 25 March will be Peers' final opportunity to ensure that this doesn't happen, but no win can be secured without also being passed by the Commons. We have to hope that parliamentarians will see the right of migrant domestic workers to change employer for what it is; a most basic right without which no worker has any bargaining power or means to challenge abuse. To quote Sir John Randall MP, when he [explained his support](#) for the amendment at report stage in the Commons, "I have met too many victims to be able to say that it is a matter for another day".

The dangerous appeal of the modern slavery paradigm

Endorsing the Modern Slavery Bill, even by seeking to include additional protections within it, supports rather than challenges the use of criminal justice frameworks to address 'modern slavery.'

Judy Fudge

How can we explain the appeal of the campaign to end modern slavery? At the rhetorical and emotional level it is self-evident. Slavery conjures up images of cruelty and horrific violations of human rights. The term 'modern slavery' resonates with older forms of slavery such as chattel slavery in the United States, which was depicted so vividly in the celebrated 2013 movie *Twelve Years a Slave*. It also echoes with the campaigns against the 'white slave trade', the term used to describe forced prostitution at the turn of the 20th century in the United States, where the White-Slave Traffic Act was passed in 1910. This act, better known as the Mann Act, was the original anti-trafficking law since it made it a crime to transport any woman or girl in interstate commerce or foreign commerce for the purpose of [prostitution](#) or [debauchery](#). Thus, modern slavery also evokes images of women and children who are victims of sexual exploitation.

The appeal of the term modern slavery is precisely its over-determination; it encompasses a broad range of exploitive practices from traditional understandings of slavery and forced labour to human trafficking and prostitution. As such, it is a cause around which disparate groups, individuals, and states can mobilise; Anti-Slavery International, Liberty, Walk Free, the Pope, the UK coalition government, and the Obama administration all support the eradication of modern slavery. No one is 'for' modern slavery.

Moreover, the goal of many groups is to stretch the meaning of mod-

ern slavery to include an even broader range of exploitative practices, especially those where employment and migration intersect. Increasingly, labour exploitation is a focus for anti-slavery advocates, fueled in part by the International Labour Organisation's work to publicise the extent of forced labour. The aim is also to expand the arsenal for combatting modern slavery to include criminal law, human rights, labour standards and business regulation approaches.

In light of the growing consensus around the modern slavery paradigm, it is crucial to raise a caution about the downside of this approach, which is most visible in the current debate over the [Modern Slavery Bill](#). Introduced in the UK House of Parliament last year, the Bill is nearing the final stages to become law. It defines modern slavery to encompass slavery, servitude, and forced and compulsory labour. The emphasis is on 'traffickers and slave drivers' who coerce, deceive and force individuals against their will into a life of abuse, servitude and inhumane treatment. An anti-slavery commissioner has been appointed, and the strategy for combatting modern slavery builds upon the government's approach to organised crime and counter terrorism. The government's [Modern Slavery Strategy](#), which it introduced to accompany its new legislation, makes it clear that the focus is primarily, although not exclusively, on people who are trafficked across borders.

Instead of objecting to an approach to combatting modern slavery that is deeply embedded in a criminal law and border control frameworks, critics of the government's bill have sought to graft measures that would [address the problem of tied visas for migrant domestic workers](#) and supply chains on to it. The problem with this strategy is that it reinforces, rather than challenges, an approach that emphasises the criminal law and border controls at the expense of labour standards and business regulation. The human rights of exploited workers are brought under the gravitational sway of an agenda that strengthens the government's powers to control and punish at the same time as it closes borders.

As the Modern Slavery Bill has gone through the legislative process, a concerted effort has been mounted to persuade the coalition government to reintroduce the right of domestic workers who enter the UK on an Overseas Domestic Workers Visa—which permits them to reside within the UK for six months while working within the private household of a non-British resident admitted under another visa category or a returning UK expatriate—to change employers. The government revoked this right from migrant domestic workers in April 2012. Advocacy groups such as Kalayaan, supported by the Labour Party and the majority of members of the House of Lords, have argued that the right to change employers must be reinstated because the visa tying domestic workers to their employer creates conditions that are ripe for modern slavery to occur (see previous article).

However, the UK government has been adamant in its refusal to allow migrant domestic workers to change employers. Its only concession, added on 17 March 2015, is to grant a migrant domestic worker who has been the victim of modern slavery six months' leave to stay and work in the UK. Moreover, in announcing this concession, the minister responsible for modern slavery and organised crime, Karen Bradley, spurned the suggestion made by members of the opposition to ratify the ILO convention on the rights of domestic workers. The [minister's reply](#) perfectly captures the government's approach to labour exploitation:

It is important to strike the right balance between protecting vulnerable workers and ensuring that aspects of employment law which can carry criminal sanction are not extended to private households. Ratifying the convention would require the imposition of unnecessarily onerous obligations on, for example, people employing home helps or personal carers, and would be neither practical nor proportionate.

Given that the government is quite willing to use criminal law to combat 'slave drivers' who employ domestic workers in conditions of domestic servitude within their homes, it appears that what it is opposed to is strengthening employment law for the growing legions of workers whose place of work is someone else's home.

The government's Modern Slavery Strategy also pulls other regulatory approaches into the criminal law orbit. In April 2014, the Gangmasters Licensing Authority (GLA), which regulates and investigates labour exploitation in a limited range of sectors, was moved from the Department for Business Innovation & Skills to the Home Office. This change shifted the GLA's orientation from enforcing labour standards to tackling irregular migration and combatting organised crime. In that year [the number of investigations and prosecutions under the GLA fell dramatically](#). The only gesture in the Modern Slavery Bill towards tackling business practices that cultivate labour exploitation is to impose an annual duty of disclosure on businesses regarding the steps they have taken to ensure their supply chains are slavery free. The government prefers light touch regulation that takes the form of providing information that will enable customers, campaigners, and shareholders to hold big businesses to account instead of imposing licensing requirements or enforcing labour legislation.

The problem with the modern slavery paradigm is that it is difficult, if not impossible, to dislodge it from the technologies of legal governance, criminal law and border controls, that are mobilised in its cause. These technologies tend to target marginal players rather than tackle the social processes that normalise exploitation.

Anti-slavery responses should offer solutions not benevolence

The Modern Slavery Bill is seen as a righteous cause for many UK decision makers, however victims of exploitation do not share the simplistic moral narrative. They seek practical solutions not benevolence.

Caroline Robinson

The people exploited for their labour across the UK are likely oblivious to the Modern Slavery Act that has made its way through Parliament over the past year. That this act seeks to be ‘world leading’ is meaningless to many who are being mistreated and see no way out of exploitation. Indeed, even the review of the UK’s support framework—its National Referral Mechanism (NRM)—will have limited value to the victims of severe exploitation in this country.

In ongoing research Focus on Labour Exploitation (FLEX) is conducting with partners in Romania and the Netherlands, we are speaking to trafficked persons, service providers, and government agencies about identification and support in cases of trafficking for labour exploitation. The picture emerging shows a need for practical solutions, not benevolence.

People do not think of themselves as ‘slaves’, ‘trafficked persons’ or ‘victims’, but they know how vulnerable they have been and often still are. Many victims of trafficking talk about a lack of options that led them to their trafficking situation, not a lack of awareness about their rights. We are finding that the point at which people decide to try and leave exploitative work to seek help is therefore not a moment of enlightenment and rarely occurs when they encounter government agencies. Instead people seek to bring an end to exploitation because they can face no more, because a tipping point has been reached. Tragically people will tolerate a great deal of abuse before arriving at this limit. It is

no coincidence, perhaps, that society too normalises significant labour abuse before demanding action.

The Minister for Modern Slavery, Karen Bradley, suggested during the Modern Slavery Act debate that victims need the state because they are vulnerable, but in fact they need the State to *prevent* them from being vulnerable. The problem with the narrative of slavery is that it places a heavy moral burden upon the would-be abolitionist to save slaves from slave masters—terms too often invoked during the Modern Slavery Bill discussions. However the murky truth is that those faced with homelessness, detention, or deportation if they leave a situation of exploitation do not see it as a simple choice between good and evil. Many are unprepared to take the gamble that they might gain access to support for trafficked persons, for they know that the risk of not gaining acceptance as a ‘victim’ is high.

Much of the final stages of the deliberations on the Modern Slavery Act were absorbed by debate on the overseas domestic worker visa, which ties employee to employer for their permitted stay in the UK and creates the perfect conditions for exploitation to flourish. The government is determined to retain the tie, overturning a House of Lords amendment to restore to domestic workers the right to change employers. The government’s logic is that if workers are not legally able to leave an exploitative employer then they will seek help from the authorities rather than friends, communities, unions, or NGOs. The conclusion of this narrative is that the state and its agencies will help you if you ask for help, are a ‘genuine’ victim, and agree to help catch bad people. This belies two simple facts. First, most exploited workers do not want to be victims, they want solutions. Second, help is not as forthcoming as the minister would have us believe. Even where it is available, it too often fails to provide a lasting solution.

On the first of these, any worker I care to think of wants their wages, the job for which they signed up, and the freedom to leave if they are

not happy with the conditions. Yet the government has created an environment of shrinking labour protections and a lack of political will to enforce existing protections. Trafficked persons, interviewed by FLEX, ask why no one came to ask them about their working conditions whilst they were facing severe exploitation, and why their employer seemingly had the power to act with impunity. They wanted to have the chance to ask the authorities if there was a way out of their situation and if the law affords them any power over their employer turned exploiter.

Identifying cases of labour exploitation requires pro-active labour inspection with the primary purpose to help people access their labour rights as human rights. Yet since the 2010 UK Spending Review, key labour inspectorates—including the Gangmasters Licensing Authority (GLA), the Health and Safety Executive, and the Employment Agency Standards Inspectorate—have seen steep cuts in their resources. In line with the government's red tape cutting, de-regulation agenda, pro-active labour inspections have also been restricted.

Perhaps even more damaging, however, has been the GLA's move from the Department for the Environment, Food and Rural Affairs to the Home Office and its new role as part of 'Joint Border Intelligence Units' set out in the Modern Slavery Strategy. For the GLA to effectively monitor and enforce labour license conditions it must not be tarnished by association with immigration inspection—labour rights must take primacy. As our colleagues in the Netherlands are finding during our research, when their labour inspectors conduct joint visits with the 'Aliens Police', workers simply do not come forward and exploitation is left uncovered.

The second problem is the lack of any clear or lasting positive outcomes for trafficked persons who do come forward. Migrant victims in particular see immigration officials (or as many put it 'Home Office') as all powerful, holding all the cards and making opaque decisions

about people's rights to remain in the UK that appear more akin to Russian roulette than logic. Furthermore, once someone has agreed to be 'identified' and is referred in to the NRM, the 45 days of support provided offers little long-term benefit, and is brought to an end once a trafficking determination is made. FLEX hears many cases of victims becoming destitute upon exit from the system, vulnerable to re-trafficking and certain that the authorities have nothing to offer. Interestingly, data on re-trafficking, which would seem to be the best way of testing whether the current system works, is not officially recorded by government.

It will take politicians reflecting on their role as enablers rather than saviours to ensure that all those who work in the UK are assured their labour rights. Some say it is not possible for this type of reflection to take place in a discourse focussed largely on extreme exploitation, but I disagree. Despite the grave failings of the UK's Modern Slavery Act, the debate has provided space for admissions from all parties: that workers are being exploited because our labour market thrives on exploitation; that many are vulnerable because policies and laws make them so; and that the state has a positive obligation to take preventative measures to protect those at risk of trafficking. As the dust settles on the modern slavery debate and the UK gears up for an election, now more than ever we must ensure that those in power are held to account for their rhetoric.

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Section two

The paradox of borders and
antitrafficking campaigns

Anti-trafficking campaigns, sex workers, and the roots of damage

Anti-trafficking campaigns are rooted in nineteenth-century efforts to 'save' white women. New strategies only broaden the stigmatisation.

Carol Leigh

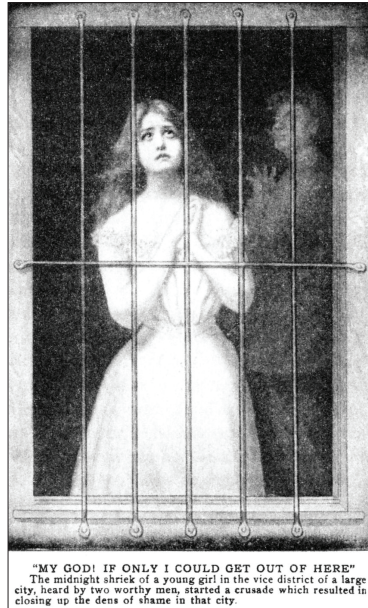
The adverse impact of anti-trafficking laws and policies on sex workers' rights has been documented extensively for the last decade. Despite calls for change from sex workers, human rights activists, academics and a range of other actors, states around the world have been reluctant and slow to respond. Some analysts emphasise that the states' use of anti-trafficking laws to limit immigration is largely responsible for this reluctance. I further add that the analysis of the historical development of contemporary anti-trafficking policies is crucial to understanding the escalating criminalisation and stigmatisation of sex workers, migrants, and other vulnerable populations. I argue that any legal framework centred on 'crime', rather than on rights and the structural causes of social ills, is bound to disproportionately and systematically impact the poor and vulnerable.

Saving women from 'white slavery': the root of anti-trafficking

The roots of contemporary anti-trafficking laws can be firmly located in the prostitution-abolitionist ideology of the late nineteenth century; a period during which trafficking was also referred to as 'white slavery'. The white slavery campaigns portrayed a world filled with sexual danger for young white women, seduced and exploited by sinister dark men. Thus these campaigns were driven by xenophobia, racism, and classism at the peak of British imperialism.

By the mid-1800s [anti-solicitation laws \(targeting prostitutes\)](#) had become a staple of urban codes. Prostitution abolitionists joined other anti-vice crusaders in the 1800s, introducing a new strategy. As a pre-

cursor to the legislative approach taken by Sweden and other countries today, the prostitution abolitionists held that women were forced into prostitution, and were therefore victims rather than criminals. They also opposed legal prostitution, objecting to "...the double standard of sexual morality reinforced by the policing and control of women's bodies [and] ... fought to expand the definition of trafficking to include third party involvement, which they argued should be penalised or criminalised". Then, as today, this legislative and campaign strategy was ostensibly offered in sympathy. However, the criminalisation of third parties drove commercial sex underground and resulted in the dangerous isolation of sex workers, because third parties could include landlords, domestic help, family members, brothel owners and even support among sex workers themselves.



Bell, Ernest, ed. (1910). Wikimedia Commons. Public Domain.

The closure of the brothels also coincided with a rise in property values. The legal status of prostitution was thus subject to the politics of land development, an on-going element of prostitution repression. In the US, marginalised urban populations—from immigrants to newly emancipated African Americans—were targeted under such statutes as the 1910 Mann Act or White Slave Traffic Act. This statute established a central database of 'known prostitutes' and led to the formation of the FBI, in a stark example of how anti-trafficking policies widen police powers. Such repression and criminalisation of most aspects of prostitution soon spread around the globe. This firmly re-located

prostitution deep within the underground economy, exacerbating and causing vulnerability. The murder rate of sex workers has since increased steadily, along with police abuse against adults and youth.

The criminalisation of third parties and the definition of prostitution as an inherent 'evil' was further cemented at the global level by the 1949 UN *Convention on the Traffic in Persons and of the Exploitation of the Prostitution of Others*. As Kamala Kempadoo argued in her paper 'Trafficking for the Global Market: State and Corporate Terror', anxiety over the trafficking-prostitution nexus gained even more momentum following the collapse of the Eastern Bloc:

It would appear that the appearance of women from the former USSR countries in Western European sex industries was a main reason for European governments to pay attention to the problem of trafficking. In many ways, this focus echoes the late nineteenth – early twentieth century crusade ... It would seem yet again, that attention for the lives of white women ... has propelled international action.

The fight for sex workers' rights

In the late 1970s, the sex workers' rights movement radically suggested that sex workers were a class of workers wholly eligible for human, civil and labour rights. This led to the organisation of international conventions for sex workers and human rights activists, beginning with the *International Committee for Prostitutes' Rights in the 1980s*. The analysis offered by these groups reflected development, social justice and harm reduction theory. There was increasing recognition of the flaws of prostitution-abolitionist strategies at these conferences and within academia, as well as calls for the self-representation of sex workers as put forth by *the Network of Sex Work Projects*.

In the 1990s, in response to the growing attention to migration issues, and informed by sex worker rights activism, a collaboration of rights-

based groups created the [Human Rights Standards for Treatment of Trafficked Persons](#). Their intention was to advocate for an anti-trafficking protocol that targeted the abuse of all workers—including sex workers—primarily in the context of migration. The disagreements between this collaborative group and the prostitution abolitionists were laid bare in the late 90s, when both were invited to participate in drafting the new UN Trafficking Protocol. A battle ensued.

It was [apparent that prostitution abolitionists had no interest](#) in including forced labour in the UN Protocol. Rather, they insisted that the Protocol be used as a tool to abolish prostitution. In the compromise reached at the end, the new UN Protocol referred to labour abuses involving the use of force, fraud, coercion, etc. for the purpose of exploitation. More significantly, the UN Protocol [specifically chose not to define 'sexual exploitation'](#). This left individual states to define it as they saw fit, equating prostitution with sexual exploitation or defining sexual exploitation as abuse within prostitution. In this way the UN Protocol could be interpreted as supporting both proponents of legal prostitution and those seeking its abolishment.

These strategies within the UN Protocol have largely failed sex workers as well as migrants and trafficked persons. In addition, [while the included human rights protections are optional, the criminalisation and border controls are mandatory](#). In consequence, the predominantly criminal justice response primarily aims to stop commercial sex through immigration raids and arrests, yet is coupled with limited support for a wide range of victims. Thus, as stated by [Marjan Wijers](#), “This focus on the purity and victimhood of women, coupled with the protection of national borders, not only impedes any serious effort to address the true human rights abuses we are confronted with ... but actually causes harm to real people.”

Under pressure from prostitution abolitionist coalitions, many countries have now enacted domestic anti-trafficking laws that focus exclu-

sively on prostitution, retreating to strategies of the earlier centuries. In the United States, the prostitution abolitionist lobby, in alliance with religious fundamentalists, strenuously lobbied [for all sex workers to be considered victims of trafficking](#) to foreclose the option of legal prostitution and labour rights for those involved. These groups also recommended a bifurcated definition of trafficking, one that separates ‘sex trafficking’ from other forms of labour trafficking. The US Trafficking Victims Protection Act, which partially reflects this proposal, [defines sex trafficking as “the recruitment, harbouring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”](#) [No condition of force, fraud, or abuse is stipulated.](#) Although ‘sex trafficking’ is not included in US criminal codes, [the TVPA certainly paves the way for that possibility.](#)

The focus of enforcement in the United States [has primarily been on suppressing commercial sex](#), rather than on addressing abuses within the sex trade. These repressive ideologies are also actively promoted and exported through channels such as the ‘Anti-Prostitution Loyalty Oath’, which requires beneficiaries of US aid money to guarantee their opposition to legal prostitution. US domestic funding followed a similar direction, rendering sex worker organisations ineligible for funding. Sex workers were also excluded from further participation in policy making in both systematic and informal ways.

State of play

The current neo-abolitionist movement has expanded its strategies to include the ‘Nordic model’ of prostitution repression. Clients are now included in the long list of targets of criminalisation, escalating the isolation of sex workers. Although abolitionist philosophy is ostensibly opposed to the criminalisation of sex workers, internationally such campaigns have been launched where prostitution is legal, or as a means to further criminalise the sex industries, rather than as a means to decriminalise sex workers. It is this crime-based approach that also promotes tighter border controls, as well as the escalating punishment

and targeting of migrants, youth, and people of colour. These ‘solutions’ exacerbate violence and vulnerability in many populations, just as the criminalisation of brothels in the 1800s resulted in a century of isolation and increased violence against sex workers.

Sex workers have long explained that one *of the many* conditions needed to prevent the abuses often conflated as ‘trafficking’ is the decriminalisation of sex work. This principle is supported by [Human Rights Watch](#), the [Global Commission on HIV and the Law](#), the [UN Special Rapporteur on the Right to Health](#), the [United Nations Development Programme](#), [UN Women](#) and [UNAIDS](#), among a growing list of international bodies.

Clearly, some results of anti-trafficking policies have been positive for those individuals [found to qualify for protections](#), affording them specific visas and settlements among other humanitarian advances. At the same time, [substantial evidence of adverse effects has been found](#) following research carried out by the Global Alliance against Traffic in Women. From a rights based-perspective, any legal framework that centres on ‘crime’ rather than on rights and the structural causes for social ills is bound to disproportionately and systematically impact the poor and vulnerable. Meanwhile, the double-edged sword of anti-trafficking places vulnerable populations in competition for justice, because those qualified as *trafficked persons* may obtain recourse from the same systems that punish other, equally vulnerable individuals.

Anti-trafficking: whitewash for anti-immigration programmes

Anti-trafficking programmes give a humanitarian gloss to national anti-immigration controls, but the citizenship and immigration policies of nation-states are still the biggest danger facing many migrants today.

Nandita Sharma

National immigration policies and their enforcement constitute the greatest dangers to people trying to cross national borders. Moreover, the categories into which nation-states slot most migrating people—‘illegal’ or ‘temporary foreign worker’ being two of the largest—are the greatest threats to their liberty. Being categorised as ‘illegal’ or ‘temporary’ is what entraps a growing number (and proportion) of migrating people into substandard work while severely limiting their rights and mobility. In short, national immigration policies legislate the conditions that make some people ‘cheap’ or ‘disposable.’ Quite simply put: without national immigration policies, there would no ‘migrants’ to subordinate, scapegoat and abuse.

We learn none of these real-life dangers and exploitations from the ever-multiplying accounts of ‘human trafficking’ and ‘modern-day slavery.’ I’ve long been curious about why that is. I suspect it has something to do with how anti-trafficking campaigns cast nation-states as the ‘rescuers’ of ‘victims of trafficking’ instead of showing nation-states to be the *source* of much of their woes. For those people whose mobility is seriously imperilled by immigration and border controls; who have resorted to paying someone to help them across increasingly militarised borders; who are forced to work for poverty wages in substandard conditions; who are evermore frequently detained and deported; and for those who care about the people who have drowned at sea or died of thirst in deserts while attempting to reach somewhere else, the idea that the nation-state is a friend to ‘migrants’ is, well, *galling*.

Anti-trafficking policies do a great disservice to migrating people, especially the most vulnerable. By diverting our attention away from the practices of nation-states and employers, they channel our energies to support a law-and-order agenda of ‘getting tough’ with ‘traffickers.’ In this way, anti-trafficking measures are *ideological*: they render the plethora of immigration and border controls as unproblematic and place them outside of the bounds of politics. The reasons why it is increasingly difficult and dangerous for people to move safely or live securely in new places are brushed aside while nation states rush to criminalise ‘traffickers’ and (largely) deport ‘victims of trafficking.’

To have a useful discussion about ‘trafficking’ and ‘modern-day slavery,’ we need to take seriously how national and international governance regimes and legislation shape the experiences of people trying to exit, move across, or live and work in various nationalised societies. The [United Nations estimates](#) there were 232 million international migrants in 2013, 57 million more than there were in 2000. Today, much (but not all) of human migration is shaped by enormous *spatial* disparities in prosperity, peace, and power. In contrast to the “great age of mass migration” of the late nineteenth and early twentieth centuries, when migration was mainly out of Europe, most cross-border migrants today originate from the ‘poor world.’ This is not a surprise given that one’s nationality is a key factor in predicting global income disparity. Branko Milanovic demonstrates in his 2005 book *Worlds Apart: Measuring International and Global Inequality* that citizens of ‘rich world’ nation-states enjoy an enormous “citizenship premium”. For example, he writes that a citizen of the United States with “the average income of the bottom US decile is better off than 2/3 of world population”.

How have nation-states, especially in the ‘rich world,’ responded to this growth in international migration and global disparities? Not by helping people move or by making their migration routes safe but by implementing more restrictive and punitive immigration controls than ever. However, this has not stopped people from moving and, arguably,



Families at Friendship Park, alongside the United States-Mexico border in San Diego-Tijuana. BBC World Service/Flickr. Creative Commons.

this is not the states' goal. While more and more people are moving, they have access to less and less rights and entitlements. For example, in the United States, the largest category of 'migrants'—by a ratio of about 15:1—are those denied state permission to either enter or stay in the country. In Canada, the largest group of 'migrants' are categorised as 'temporary foreign workers' who are not free to choose either their employer, occupation, or geographical residence.

Thus, far from eliminating or even severely restricting the *movement* of people, what neoliberal reformulations of immigration and refugee policy have done is to prevent the vast majority of migrating people from making claims on the state (in terms of social services) or on employers (in terms of minimum wages and standards of work). That is how a 'cheap' and 'disposable' labour force is created. *This* is the real story of international migration in the age of neo-liberalism (late 1960s onward): the creation of a legally subordinated group of people cast as 'migrants'.

It is precisely in this same period that the narratives of ‘modern-day slavery’ and ‘victims of trafficking’ have arisen. This is not a coincidence. Just when nation-states have made it next to impossible to legally live and work in their territories as rights-bearing persons, anti-trafficking measures have been adopted into national laws. Tales of ‘trafficking’ (or ‘smuggling’), which have led to calls for heightened state intervention at the border and more punitive measures for traffickers and/or smugglers, do the crucial work of legitimising further *controls* on global human mobility, all in the name of ‘helping’ victims of trafficking. By ideologically filtering their efforts through the politics of rescue, anti-trafficking campaigns provide a crucial veneer of humanitarianism to the exploitative and repressive practices of states and employers. It is because of their ideological character that anti-trafficking campaigns articulate so well with official anti-migrant agendas.

In particular, anti-trafficking measures fail to acknowledge that in the face of ever-more restrictive immigration and border controls, it is virtually *impossible* today for many people to move without the assistance of people ready and able to help them in one way or another. They might need forged papers (visas, passports, etc.) for travel. They might need help in navigating clandestine migration routes. They might need help in gaining paid employment. It is true that many, but certainly not all, migrants experience coercion and even abuse during their journeys. They may also experience some form of deception if the jobs, wages, or working conditions they expected do not materialise. Does this mean that they are ‘victims of trafficking’ as some NGOs, many national governments, and the United Nations would have us believe?

They are not. Instead, most people who migrate, especially those cast as ‘illegals’ or ‘temporary foreign workers,’ are victims of the daily, banal operation of global capitalist labour markets that are governed by nation-states. These practices make migration a survival strategy. People are further victimised by border control practices and the ide-

ologies of racism, sexism, and nationalism that render *unspectacular* their everyday experiences of oppression and exploitation, which are rarely considered worthy of our attention. By vilifying the ‘trafficker’, anti-trafficking crusaders further *depoliticise* state immigration policies, border controls, and the capitalist market.

To address the needs and desires of people who move—and to acknowledge extant global disparities in power, wealth, and peace—we need to *re-politicise* nation-states and their immigration and border controls. This requires that we jettison the framework of anti-trafficking and its supporting legislation. Only a very small number of migrants have received temporary legal status as a result of being positioned as victims of trafficking. For the vast majority of people migrating, however, the focus on ‘traffickers’ has made people’s clandestine journeys *more* expensive and *more* dangerous, as avoiding detection and arrest has become increasingly difficult. Instead of objectifying people who migrate as ‘trafficked victims,’ we need to re-centre how state immigration and border controls have forced them into dangerous migration routes. We also need to be aware of how the intersection of criminal law and immigration law creates the conditions for the exploitation of people who need to earn a living and form new homes across borders. Doing so leads to the recognition that only by mobilising to end practices of displacement, while simultaneously ensuring that people are able to move according to their own self-determined, wilful needs and desires, will we be able to contest globally operative practices of exploitation and abuse. We need to eliminate all immigration controls and eradicate those sets of social relations organised through global capitalism and the equally global system of nation-states.

The European Union's approach to migrants: humanitarian rhetoric, inhumane treatment

The European Commission is working on its 'comprehensive migration agenda' while migrants continue to die at sea. Its tenants should be self-evident, yet some proposals for it are deeply troubling.

Judith Sunderland and Bill Frelick

The European Union's misplaced response to increased flows of migrants and asylum seekers, including the failure to rescue boats in distress and pushbacks at land borders, is risking lives. At a time of severe humanitarian crises around the world, there are alarming signs that the EU is doubling down on externalising its border management and asylum responsibilities.

Over 220,000 migrants and asylum seekers reached the EU by sea in 2014, four times as many as in 2013. The Mediterranean is the world's deadliest migration route. Over 3,200 died in 2014.

The problematic EU response largely focuses on border enforcement and preventing departure from North Africa and elsewhere, rather than on improving search and rescue and creating safe and legal channels into the EU. Italy ended its massive humanitarian naval operation Mare Nostrum in November 2014, with the EU border agency Frontex launching the much more limited Triton operation. Despite increased funding for Frontex, it lacks the resources or, most important, the appropriate mandate to ensure robust search and rescue operations throughout the Mediterranean.

The number of irregular boat migrants recorded between November 2014 (when Mare Nostrum ended) and March 2015 was almost double that of the same period a year earlier. The numbers show that rescue operations are not a magnet for migrants, as [UK Immigration Minis-](#)

ter James Brokenshire and UK Foreign Office minister Lady Anelay, among others, have argued. Instead, the increase has shown that people will continue to attempt the journey even in the absence of any certainty of rescue.

Migrants and asylum seekers also try to reach the EU over land, encountering fences, pushbacks, and ill-treatment. Bulgaria and Greece have bolstered their guard forces and built fences along their borders with Turkey, causing many, including people fleeing Syria, to attempt the more dangerous route across the Aegean Sea.

Spain has fortified the borders of its enclaves in North Africa—Ceuta and Melilla—with a law formalising the unlawful practice of summarily returning people caught on the fences, even though they are already in Spanish territory. Many are injured, including through excessive use of force by Spanish border guards, and face ill-treatment by Moroccan security forces when sent back. Along the Balkan route—the third main irregular route into the EU—migrants and asylum seekers also experience police abuse, denial of access to asylum procedures in Serbia and Macedonia, and pushbacks from Macedonia to Greece.

The EC's upcoming comprehensive migration agenda

Migration and asylum issues are high on the EU agenda, and feature prominently in public debate across the region. The European Commission is to present a “comprehensive migration agenda” in May. Some of the ideas floating around are deeply troubling.

There is real cause for concern that the EU will implement abusive policies cloaked in humanitarian garb. Italy's recent ‘[Non Paper](#) on Possible Involvement of Third Countries in Maritime Surveillance and Search and Rescue’ is a case in point. The brief document, submitted to EU interior ministers in mid-March 2015, proposes EU technical and financial assistance to countries like Tunisia and Egypt so they can “prevent the departure of migrants from the southern shores of the



A rubber boat carrying around 50 migrants and refugees arrives from Bodrum in Turkey to the Greek island of Kos in the early hours of the morning. Christopher Jahn/IFRC. Flickr/Creative Commons.

Mediterranean” in order “to save the greatest possible number of lives”. The catch is that those prevented from departing or interdicted in the territorial waters of North African states would be taken “to their own ports” far from the EU and its well-developed asylum system. This plan would certainly limit arrivals, but would not necessarily provide a safety net for those seeking humane treatment and sanctuary.

Italy is pushing another potentially problematic proposal: setting up refugee processing centres in third countries (candidates apparently include Egypt, Sudan, and Niger). Refugee resettlement programmes run under the auspices of the UN High Commissioner for Refugees (UNHCR) have historically provided durable solutions to hundreds of thousands of refugees trapped in dead-end camps. But an EU-run, off-shore processing system similar to past and present offshore processing by the United States and Australia—which keep interdicted asylum seekers and recognised refugees in protracted limbo in isolated, dismal holding centres—would be a serious cause for concern.

Would reception conditions for asylum seekers be comparable to Europe's? Could their safety be assured while their claims were being processed? How long would they have to wait? If the processing involved deporting people screened out to their countries of origin, would these centres operate more like immigration detention than a camp/shelter model? Would the existence of such centres make it more likely that boat migrants would be interdicted and returned there? Would irregularly arriving asylum seekers in the EU interior also be transferred there to have their claims processed?

Both these proposals raise questions about the real motives of EU and Italian policymakers: do their actions stem from humanitarian concern, or from a cynical desire to limit the number of refugees, asylum seekers, and other migrants arriving on their shores?

Doublespeak

If EU member states were genuinely interested in sharing the burden with front-line states like Lebanon, Turkey, and Jordan, they would have responded generously to UNHCR's [appeal](#) in December for 130,000 Syrian resettlement places. [As of 12 March 2015](#), only Germany (30,000) and Sweden (2,700) had made credible pledges; the other 26 states combined had pledged 5,438.

Another staple of EU rhetoric these days is the need to stop traffickers and smugglers, when the primary objective is really stopping their passengers. EU officials, including Migration Commissioner Dimitris Avramopoulos, conflate traffickers with smugglers in their self-serving argument that preventing departures and dismantling criminal networks is a "humanitarian mission" to save lives. But many migrants and asylum seekers turn to smugglers because they have no other options. There is legitimate reason to prosecute criminals, including those who prey upon migrants, but the focus on stopping the smugglers is consciously myopic, one-dimensional, and an inadequate response to the problem.

Tackling root causes through development aid in countries of origin is a central plank of the EU's response. Though laudable, this is unlikely to save lives today. It is also disingenuous because it seeks to portray those attempting to reach the EU as economic migrants, when over one-fifth of those who arrived by sea last year came from Eritrea—a repressive, closed country—while many others came from Mali, Nigeria, and failed states where human rights are routinely abused. According to UNHCR, 37,000 Eritrean asylum seekers reached the EU in the first ten months of 2014—triple the number from the previous year. The EU is reportedly planning a multi-million euro development package to Eritrea in hopes of stemming the flow. The danger is that these kinds of programmes will justify preventing departures as well as forced returns, ignoring the human rights abuses driving people from their homes.

The foundations of an EU migration policy should be self-evident: saving lives at sea, treating migrants decently, giving asylum seekers access to fair procedures and respecting the obligation under international law not to send people back to places where they face threats to their lives or freedoms. Properly managed, and with a fair distribution among EU member states, the numbers of migrants and asylum seekers should not be cause for alarm. Instead of shirking and diverting responsibilities, the EU should overhaul its current 'Dublin' approach to EU responsibility sharing, which puts an unfair burden on states on the EU's external borders. It should furthermore establish a more efficient system for processing asylum claims of irregular arrivals, increase the paltry number of refugees it resettles, grant more humanitarian visas, and ease restrictions on family reunification.

But the first imperative is to save lives. The EU's failure to invest the necessary resources and effort for Mediterranean-wide search and rescue is inexcusable and should be rectified immediately.

Filipina entertainers and South Korean anti-trafficking laws

Seoul continues to strengthen its anti-trafficking frameworks, but neither migrant wives nor migrant workers find the language of ‘trafficking’ helpful in addressing their concerns.

Sealing Cheng

The perspectives of criminal justice and human rights offer distinct conceptual and policy frameworks for understanding and addressing trafficking, its causes, and its possible solutions. At the risk of oversimplification, I will briefly outline their differences before discussing my research on ‘trafficked women’ in South Korea. This shows how the language of human rights has served as the “soft glove” for the “punishing fist” of the criminal justice system in anti-trafficking measures, and how most migrant workers and migrant wives avidly avoid the trafficking framework in their fight for better protection of their rights.

A criminal justice framework understands human trafficking as a problem caused by ‘bad guys’ who abuse the labour of innocent people. The criminals need to be stopped, and the state is obliged to mobilise the full strength of the law enforcement apparatus to punish the criminals. The victims need to be rescued and reintegrated into either their home or host country. If sufficient resources are invested in police, border control, and information campaigns about the dangers of falling victim to the crime, and if heavy enough penalties are imposed, then human trafficking can be controlled if not erased. Abusive and violent employers and recruiters preying on the dreams and labour of poor people are therefore the main cause of trafficking, while the state intervenes to halt such abuse and restore order. As the problem of human trafficking grows, the state needs to expand its regulatory and punitive powers accordingly. This perspective focuses on the visible violence perpetrated by clearly identifiable agents (the traffickers and

their auxiliaries) on the victims. Trafficking is therefore a disruption of the normal order of things.

The human rights approach draws on international agreements and national legal provisions to go beyond the direct violations of human rights by traffickers in order to examine trafficking as a failure of states to protect and to fulfil the full spectrum of human rights—for migrants or otherwise. Human trafficking is thereby seen as rooted in global and national inequalities, regulatory regimes that make unsafe migration necessary, and the lack of adequate protections for migrants and labourers. Trafficking is thus considered a product of the current global political economic order, and the state bears partial responsibility for the range of human rights violations included within its definition.

A human rights-based approach furthermore identifies victims of trafficking as rights bearers rather than targets of state action. As such, they have the right to be involved in decisions that directly affect them. For example, it does not render human rights protection conditional upon the victims' cooperation with law enforcement to facilitate prosecution. Ideally, a human rights-based approach seeks to identify and empower populations who are vulnerable to human trafficking, and to prevent them from engaging in unsafe migration by strengthening their capacities for claiming rights: as workers, migrants, immigrants, and citizens, for example. This is, however, what a human rights approach ideally should aspire to achieve rather than how it is practiced on the ground. Different stakeholders, including the state, deploy the language of human rights for their own interests and concerns, resulting often in contradictory sets of claims and practices that may undermine the human rights of the target population.

Filipina entertainers...

As an anthropologist, my research traces how states deploy global anti-trafficking discourses in different contexts, and what these anti-trafficking efforts mean to the migrants and workers who experi-

ence abuse first-hand. One key problem is the conflation of human trafficking with trafficking into forced prostitution, popularly known as ‘sex trafficking’. This view also presumes women’s sexual victimhood and negates the possibility of sex as work. A second problem is the privileging of a criminal justice approach over a human rights-based approach, undermining the rights and capacities of migrant men and women as well as sex workers as a result.

In 1998, I began ethnographic research on Filipina entertainers in US Military camptowns in South Korea. Catering to a US military clientele in the clubs, these migrant women filled the gap left by Korean women who found better prospects outside of the camptowns. Over the next two years of my research, Korean and international NGOs came to identify these women entertainers as ‘victims of international trafficking’. Central to these women’s definition as victims of trafficking was the performance of sexual labour by some of these women—sometimes but not always under coercive circumstances. Their intimate relationships with their customers and employers, their fear of the police and immigration, and their desire for better working conditions find no place in the ‘trafficking’ narratives that highlight their powerlessness, sometimes referring to them as ‘sex slaves’.

As alarms about the trafficking of Filipinas into forced prostitution caught international attention, both the Philippines and South Korea tightened control on travel and visas for ‘entertainers’. It became more difficult for the Filipinas to leave home for these jobs. In the following years, some of the women who had returned to the Philippines and wanted to work again in South Korea had to resort to more dangerous paths and less familiar destinations, placing themselves in more precarious situations.

...and South Korean anti-trafficking law

The year 2000 marked a turning point on both international and local fronts with a surge of anti-trafficking efforts, including the passage of

the United Nations Protocol on trafficking and the US Trafficking Victims Protection Act. The US government also identified prostitution as a prevalent form of human trafficking and began to promote this view through the State Department.

In 2004, South Korea replaced the old 'Prevention of Prostitution Act' with the 'Act on the Punishment of Procuring Prostitution and Associated Acts' (Punishment Act) and the 'Act on the Prevention of Prostitution and Protection of Victims Thereof' (Protection Act). These laws led South Korea to be recognised by the US government in the [2005 TIP report](#) as a country with 'best international practices' in combating trafficking—even though they were targeted only at prostitution. The expansion of resources for policing far exceeded that of welfare provisions (including livelihood support, welfare services, and vocational training for victims of prostitution). For example, in 2004, three new branches of the National Police Agency were created and 20,000 additional police officers were recruited for the crackdown on prostitution and for locating missing children. [Five times the amount of money was spent on policing](#) than on welfare provision for “prostituted women”.

The new laws were launched with high-profile crackdowns and arrests of clients, brothel-owners, and sex workers. The laws continued to criminalise women who do not qualify as victims, such as independent sex workers. The heavier penalties of the new laws made sex workers reluctant to report abusive clients, while lives for the many who continued to work in prostitution became more difficult and precarious. Since 2004, seasonal and annual police raids take place as a demonstration of the government's will to enforce the new laws.

How do the laws address the needs of foreign women forced into prostitution? Article 13 of the Punishment Act, titled 'Special Provisions for Foreign Women,' stipulates that those who file reports or are being investigated as 'victims of trafficking into forced prostitution' would be

temporarily exempted from deportation in order to file suits and claim damages. In effect, this turns foreign women into instruments of law enforcement without due protection of their means of livelihood. Even though the [2009 TIP report](#) suggested that these victims are allowed employment, documents from the immigration department as well as local service-providers have indicated otherwise. Only a handful of foreign women have ever sought help in government shelters.

Do other migrants in South Korea fight for their inclusion in these anti-trafficking efforts? No. Neither migrant wives nor migrant workers find the language of ‘trafficking’ helpful in addressing their concerns. Female marriage migrants (migrant wives) have become a significant presence due to South Korea’s demographic crisis in the new millennium. [By 2006](#), 11.9 percent of all marriages were international marriages, and close to 70 percent of them were marriages between Korean men and foreign women. The cultural and social isolation of these migrants, as well as their dependence on their Korean spouses for resident status, have made them vulnerable to a range of human rights violations.

However, activists from within the international marriage community protested against the use of ‘trafficking’ as a blanket term that erases their agency, instead demanding the protection of their rights as migrants and as individuals under the phrase “migrant women’s human rights”. Migrant workers have been organising to fight against the employment permit system that limits their right to change jobs and denies their right to challenge abusive working conditions. An [IOM report](#) detailed how migrant workers, who made up 70 percent of the agricultural sector, are excluded from the Labour Standards Act and have no channels of redress for the physical and sexual violence they experience. Migrant workers are much more concerned about fighting for rights than about their inclusion in the trafficking discourse.

To sum up, the exclusive focus of the South Korean anti-trafficking

laws on criminalising prostitution fails to protect the rights of sex workers and renders irrelevant the human rights abuses of migrant workers. In addition, migrant wives and migrant workers resist or are otherwise uninterested in anti-trafficking initiatives, as they emphasise victimhood and criminalisation rather than the advancement of their rights. These observations make it necessary for activists and policy-makers to reconsider two major issues. First, is emphasising criminalisation and prosecution the best strategy for preventing the abuse of vulnerable populations? Secondly, what lessons could be learned from the resistance of migrant wives and migrant workers in South Korea to the anti-trafficking discourse, who instead favour institutional reforms to solidify and expand their rights?

This points to the urgent need to re-evaluate the current anti-trafficking paradigm that is fundamentally focused on fighting crimes and not protecting rights: the UN Protocol against trafficking is an optional protocol under the Convention on Transnational Organised Crime, and various national legislations are designed to punish the ‘bad guys’ rather than to protect the rights of workers and migrants. Anti-trafficking measures have aided in the aggrandisement of state powers and have done little to empower vulnerable populations. The experiences of sex workers, migrant wives, and migrant workers in South Korea are by no means unique and have echoes across national borders. If the protection of human rights is the goal, then we need to look beyond ‘human trafficking’ as a paradigm of intervention.



Section three

The state, the law, and gross
labour exploitation

From brothel to sweatshop? Questions on labour trafficking in Cambodia

Garment manufacturers in Cambodia benefit when anti-trafficking programmes portray clothing manufacturing as the only viable and, crucially, moral labour opportunity available.

Anne Elizabeth Moore

I wandered into my first anti-trafficking NGO in Cambodia last winter in the same manner in which I had entered journalism some years earlier: I was curious and it was there. Then suddenly I found myself agreeing to a surprisingly long list of stipulations in order to be granted entry to the facility as a member of the press. Chief among them was that I not photograph or ask questions of clients, which set off my independent media alarm: the interesting story is always the one you're told doesn't exist.

My concerns were, and remain, twofold: that the wall between clients and the press positions the organisational version of these women's life stories as irreproachable. As an American who travelled to Cambodia regularly, I had often seen how English-speaking officials frequently misrepresented Khmer women's stories, whether out of language differences, Western presumption, or genuine empathy. My other concern was more personal: being unable to photograph or ask detailed questions meant I was banned from doing a good job as a reporter, whose primary job is relaying the stories of others.

These concerns faded as I entered the main facility, replaced by larger, all encompassing one. What I saw before me was *not* the roomful of Cambodian women picking up the life skills necessary to rebuild post-trafficking that I had expected to see. What I saw before me was a garment factory, albeit a small one, full stop.

This was familiar terrain. Of the previous seven years writing about women's issues in Cambodia, six of them had been devoted to looking at the national garment industry, its ties to the US, and its total dominance over the economic life of women in the country. The industry is the third largest in Cambodia, but directly supports the second-largest: agriculture. Women from the provinces are sent off to work in the factories with the express purpose of supporting family farms. That the factories pay only a percentage of a living wage neither stops the nearly half-million workers from enduring long hours, unsafe conditions, and difficult labour, nor prevents them from sending sometimes three-quarters of their monthly wages back home. Some 70 percent of their output is bound for the US market, creating a strong, interwoven economic bond between the two nations that remains largely hidden.

For many women, the only viable alternative to factory life is in Cambodia's tourist sector, the country's biggest industry. Running a hotel, food cart, or restaurant are some of the only economic options for women in a country with deeply entrenched gender norms (however slowly they may be changing). The sex trade presents another alternative, however in Cambodia this is geared more for the domestic market than for foreign clientele, despite what you might read in the press.

In 2008, under pressure from the US, Cambodia passed the Human Trafficking Law. The vague language of this law essentially criminalised forced labour and sexual exploitation, and cast sex workers as victims. Organisations in the field had already been under siege prior to this, as American funding for HIV/AIDS programmes and other projects was frequently withheld due to their support of sex workers and sex workers' rights. By 2008, few organisations remained to interpret the new legislation.

Standing in the Phnom Penh-based NGO among the 300+ clients busily assembling garments and other textiles, I wondered how many would self-identify as trafficking victims, although I had been pro-

hibited from asking them. I wondered how many had worked in the factories, too, yet I could not ask this either. I specifically wondered how many clients the organisation served that had left the factories to do sex work—not a terribly common career move, although I’d met several women by then who had made it—only to discover that exit hinged on re-entering the industry in which they’d seen no future. I could certainly not ask this, although even in the factories I’d seen garment workers more excited about their jobs. It might have been the pay, which was even worse than the going rate in the garment industry. Factories offered a monthly minimum wage at the time that was approximately 53 percent of a living wage, while the NGO paid workers only a fraction of this for the same labour.

Who benefits from a system in which women are placed in low-paying, high-risk jobs? Certainly not the NGO’s clients. Whether former at-will sex workers or trafficking victims, being coerced into ‘reputable’ work that makes its profit from devalued, underpaid women’s labour is not a step up. It can’t be the NGO, either, the staff of which must be aware that their clients have needs completely unmet by the so-called brothel-to-sweatshop pipeline—an inaccurate but convenient phrase.

The primary winners are, of course, garment factories and their apparel-brand clients. Both benefit from a system that presents their low-paying employment opportunities in unsafe conditions as the only viable, legal, and *moral* jobs available.

If their degree of involvement in anti-trafficking initiatives is any indication, the garment industry benefits a lot from the current paradigm. Many clothing companies provide Cambodian anti-trafficking NGOs with financial and material support. Somaly Mam’s own AFESIP, for example, has its own retail outlet in Phnom Penh. Janet Rivett-Carnac—Gap’s VP of Global Sourcing—sat on the The Somaly Mam Foundation’s board when it was still in operation. Agape International Missions (AIM), featured recently on CNN reports about the

scourge of sex trafficking in Cambodia, boasts Ken Peterson, the CEO of clothing retailer Apricot Lane, as a board member. Ram Gidoomal, on the board of International Justice Mission, runs the fair-trade apparel company and development charity Traidcraft, while Curtis Lind, of Columbia Sportswear Company, sits on the board of Shared Hope International.

There's more. Nicholas Kristof and Sheryl WuDunn, creators of the book and film *Half the Sky*, were former close associates of Somaly Mam and lead propagandists of the American Rescue Industry. They are funded by the Nike Foundation, the former president of *Time's* Style & Entertainment Group Fran Hauser—now an investor in an ethical fashion startup—and IKEA. The last of these doesn't produce garments, of course, just the products in which we store them.

And this is just Cambodia, where the government stands so strongly opposed to workers' rights that [police have shot protestors demanding higher wages](#). How are state economic interests supported by anti-trafficking initiatives where the connections between the two are less evident? To what degree do these initiatives cater to the needs of the state over the needs of the clients they purport to serve?

These are questions we cannot answer. Yet.

The Protocol of 2014 is a new standard to combat modern slavery, but will states make it real?

Anti-trafficking measures to date have been unsuccessful as they do not address structural labour governance failures. A new global treaty was adopted in 2014 that aims to do exactly that.

Zuzanna Muskat-Gorka and Jeroen Beirnaert

Governments began to react to the increased power of organised crime and the growth of illegal trafficking, including in human beings, during the 1990s. This drive culminated in 2000 with the passage of [the Palermo Convention](#) to combat organised crime and its Protocol to combat human trafficking. Since then, the fight against human trafficking and modern slavery has received political attention and [millions](#) have been poured into different anti-trafficking initiatives around the world. National penal laws have been adopted and [national referral mechanisms](#) have been set up. Judges, special police units, and border guards were trained to identify victims, while international cooperation and coordination improved through new intergovernmental platforms such as Frontex and Eurojust. Nevertheless, there is no indication that the level of ‘modern-day slaves’ in the world has decreased due to these developments. On the contrary, recent estimates suggest that the number has been rising. One can only conclude that, by and large, government responses have been ineffective.

Strong laws, weak protections

At least part of the explanation can be found in the broader socio-economic and political context of recent decades. While state interventions to combat trafficking have been strengthened in the criminal justice sphere, labour markets have been persistently deregulated and employment protections weakened. Nothing has been done to stop informal employment from growing in the uncontrolled shadows of the global economy. At the same time, excessive use of temporary and



A migrant worker harvests dates. Apex Images-ILO/Flickr. Creative Commons.

guest worker schemes, self-employment and indirect employment constructions through intermediaries and complex subcontracting have made work more precarious.

In addition, governments negotiate bilateral agreements in order to promote employment abroad, hoping that the ensuing remittances will stimulate development. Most bilateral agreements relating to migrant labour, however, are negotiated with a complete lack of transparency. More often than not they fail to protect migrant workers' rights while undermining labour protection systems. In the rare cases where origin country governments include some protection measures for their migrant workforce in the negotiations, such as the Philippines, the subsequent implementation of these protections is rarely monitored.

In Europe, the EU's [Directive of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer](#) allows companies to employ third-country nationals under the conditions of the origin countries, in effect

legalising discrimination of migrant workers. Strong protections in EU law regarding the freedom to provide services de facto promote the use of temporary agency work, transnational posting of workers and 'self-employed service providers', and are all too often abused to exploit migrant workers.

The lack of coherence in labour migration governance, combined with the deregulated global labour market, create an environment in which unscrupulous businesses can pursue profit at the expense of vulnerable, often migrant workers. In addition, the clear preference for criminal justice responses to human trafficking result in those affected being treated as victims of crime rather than as workers deprived of their fundamental rights.

A paradigm shift in government responses is therefore urgent. There is a need to address what makes workers vulnerable. Rather than instituting reactive measures to rescue victims, preventive measures should focus on equal treatment, income insecurity, living wages, real collective bargaining power, fair recruitment and employment protection.

Fight exploitation to combat trafficking

Since 2012, the international trade union movement has been [campaigning for the adoption of a new global treaty at the International Labour Organisation \(ILO\)](#) to put more emphasis on prevention, worker protection, and effective compensation in the case of abuse.

As a result, a [new ILO Protocol](#) was almost unanimously adopted last June to complement the 1930 [Forced Labour Convention](#) (n°29). The protocol addresses some of the issues mentioned and requires states to: extend coverage of law to protect all workers; strengthen labour inspection; better protect against fraudulent recruitment or placement; increase international cooperation; ensure access to remedy and effective compensation; and involve labour courts, labour administration, trade unions and employers' organisations in anti-trafficking action.

The protocol is one of the first examples to transpose the [UN Guiding Principles on Business and Human Rights](#) into a legally binding requirement. While the text suffered from tough negotiations with business, it explicitly outlines that businesses have the responsibility to “identify, prevent, mitigate and account for how they address the risks of forced or compulsory labour in their operations or in products, services or operations to which they may be directly linked”.

The protocol has broad coverage and a lot of potential, but it is up to governments to make it real. States should regulate the conduct of businesses along corporate supply chains, address extraterritorial corporate abuses and ensure victims have an effective right to remedy.

It is up to governments to seize this unique opportunity to start addressing modern slavery without repeating the mistakes of the past. It is a classic example of a collective action dilemma, but governments around the world need to ensure that the new treaty becomes a strong regulatory instrument. If applied to all countries it will help level the multilateral playing field, protecting the workers and political leaders of (mostly) democratic countries against corporate power.

Governments can now do one of two things. They can continue the race to the bottom, outdoing each other in stripping away workers’ protections as they compete for foreign investment. Alternatively, they can agree to end ‘modern-day slavery’ and promote, ratify, and implement the Forced Labour Protocol as the real new global standard.

Gotcha! the 'bait and switch and bait again' of US anti-trafficking policy

American understandings of trafficking concentrate on so-called 'sex trafficking', however existing laws address many forms of exploitation. Too little is known about the effects of such laws on all workers.

Alice M. Miller

The US's current anti-trafficking policy, which produces a tangle of finite good and possibly infinite harmful effects, is the product of a very modern twist on the classic *'bait and switch'* game of law-making. The 'bait' of sexual harm—stories of 'sex slaves' produced by some advocates and propagated with alacrity by the media and accepted by some US law makers—has permitted a constantly changing 'switch', an incoherent spectrum of immigration and criminal law enforcement operating without much critical oversight, let alone public understanding. Laws and practices ostensibly targeting trafficking can either benefit or negatively affect a wide range of domestic and border-crossing workers in vastly different labour sectors, ranging from door-to-door magazine sales, to domestic work, sex work, agricultural work, and construction.

It is my contention that we—including progressive critics of the (American) Trafficking Victims Protection Act or TVPA—know too little about the impacts of state and NGO practices carried out under the 'switch'. All of us, critics and proponents alike, are still talking too much about the 'bait': the sex side of anti-trafficking work. Despite the now multi-pronged reach of the TVPA, the public understanding, the press and the vast majority of research and scholarship remains stubbornly focused on the sexual aspects of the practices covered by the crime of 'trafficking'. When the 'switch' occurs—the actual application of the TVPA to non-sexual labour in the US—it goes relatively unnoticed and un-critiqued.

US press reports on a recent ‘victory’ under the TVPA makes this continued enthrallment with the sex side of trafficking clear. In February 2015, five Indian welders and pipefitters employed by Signal International in the US through the H-2B visa programme [were awarded](#) \$14 million in compensatory and punitive damages as victims of ‘labour trafficking’—i.e., through the application of the US anti-trafficking law. They had been promised but denied green cards, held in sub-standard living conditions, and inhibited in their movement, among other harms. Over 200 more workers are part of a follow up action, claiming to be similarly situated. A national coalition of groups—including the Southern Poverty Law Center, the ACLU, the Asian American Legal Defense Fund, and the Louisiana Justice Institute—carried out this campaign and litigation. These groups have made an assessment that the TVPA has some potential to benefit this set of exploited workers.

But the headlines, [such as those of *The New York Times*](#), trumpeted not that they were ‘trafficking victims’ but that they were exploited *guest workers*—a characterisation that readily plays into an equally vexed but different, racially charged immigration policy. This media mis-characterisation of the victims occurred even though spokespersons for the workers were careful to remind journalists that ‘human trafficking’ can take many forms, and press materials stressed this fact. Nonetheless, the media followed the general advocacy template of treating exploited (male) workers as migrant labours while reserving the term ‘trafficking’ for (female) ‘sex trafficking victims’.

Over the last decade, there have been dozens of accounts of prosecutions using the TVPA that mis-characterise the affected victims as ‘smuggled’ or solely as victimised migrant worker cases. In general, the only cases using trafficking in the headlines are those of ‘sex trafficking,’ with a smattering of domestic worker cases attracting the term. Interestingly, the line of cases called into view after the [2014 high-profile arrest of an Indian diplomat](#) were called ‘trafficking’ in their text but headlined as other forms of mis-treatment of domestic workers.

The public understanding of ‘trafficking’ as a contemporary crime remains over-determined to see it as a gendered/sexed crime in part because rhetorically and symbolically, it is the direct inheritor of the mantle of ‘white slavery’. The persistent casting of all trafficking in line with the narratives of ‘white slavery’—[tales of girls and women tricked into prostitution in the late nineteenth early twentieth century](#)—forecloses public engagement with anti-trafficking law as relevant to other kinds of workers. Many sex worker advocates warned in the late 1990s, as these laws were being adopted, that the crime of trafficking could never be extracted from tales of prostitution and horror, regardless of what the content of the law says. But what are scholars and advocates doing to counter this preoccupation with sex?

Therein lies the rub. Despite the serious concern among some labour advocates regarding the usefulness of the anti-trafficking framework overall, precious little of this garners the publicity it needs to affect the discourse. As Nandita Sharma, Sealing Cheng, and Judy Fudge all argue in this volume, anti-trafficking initiatives are always subject to countervailing state interests and ad hoc, politically driven enforcement because they are based in criminal law rather than labour rights. They are not organically organised to generate better working conditions as demanded by workers. An increasing number of advocates and scholars are now debating whether and how to mitigate the dangers of this, slices of which are reflected in [the published work of Janie Ch- uang](#) and [Jennifer M Chacon](#). The [Freedom Network](#) is endeavoring to synthesise and publicise recent work on civil litigation, for example regarding the recovery of back wages for trafficked persons over and above the high profile stories of sexualised victims. But I would hazard a guess that few Americans know about this work, even as all my US students know about the ‘trafficking of women for prostitution’.

When Congress initially passed the TVPA in 2000, it was as part of an awkward right-left compromise between broader human rights and narrower anti-prostitution policies. Both groups of policies operated

in an over-heated atmosphere redolent of stories of Eastern European and South East Asian ‘sex slaves’ being bought and sold in the US. Despite the limited data on the actual needs of exploited workers in all the sectors covered by the TVPA—such as agricultural, factory, or domestic work—Congress re-authorised and revised the act in 2003, 2005, 2008, and 2013. Each time they tweaked the content of the crime of trafficking and its remedies so that it both concretised the range of crimes beyond forced movement into sexual commerce AND remained tethered to sex. It also remained a criminal prosecution statute but added civil remedies. As the work of anthropologist Alicia Peters and law professor Dina Haynes has shown, the dominant narrative and the ideal trafficked victim remains the ‘innocent/duped sex slave.’ At the same time, the dominant understanding of the law in the media and in the public remains prosecution and not wage redress.

In the shadow of this sex/crime narrative, revisions of the TVPA have altered the priorities for prosecution as well as the programmes for its prevention and amelioration. Notably, on the side of ‘tethered to sex’, the most recent revisions redoubled the TVPA’s powers to reach under 18s. The new category of innocent victim is the under 18-year-old harmed through sexual commerce in the US. Globally, the TVPA is expanding its focus on kids, and sexual harm has also expanded its reach to child sexual exploitation through the ‘Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT)’ Act of 2003.

While many revisions continued the focus on sexual harm, there have been some interesting shifts in the actual law of the TVPA vis-a-vis other forms of labour. In 2008, for example, the TVPA reconciled its definition for the crime, removing the higher threshold for the use of force in the crime of labour trafficking vs. sex trafficking. If the TVPA has found use for other non-sexual forms of labour trafficking now, scholars are in a good position to understand the effects of that change—if we wanted to pay attention to the actual scope of

the ‘switch’. But scholarship and research haven’t fully kept up with the changing scope of the TVPA.

Under these circumstances, I think it is fair to say that the progressive critiques by academics on the sexuality side of the problem have *become* part of the problem—scholarship on ‘trafficking’ remains remarkably lop-sided. The academy approached the issues of the anti-trafficking framework—rightly I think—with a strong critique of the ‘bait’ side. A strong cadre of critical race/feminist and post colonial scholar/advocates—myself included—sought to take apart the way that racialised and sexualised melodramatic tales of sexual violation were presented as facts of migration and labour (as *melomentaries*, to use Carole Vance’s term). Our entry points were often concerns about the conflation of all sex work with ‘trafficking’; the use of rescue and raids to disrupt the sex sector regardless of evidence of actual harm, the colonialist assumptions about ‘brown women’ being unable to show agentic movement, etc.

But we have not moved substantially from the ‘bait’ side. This has happened in part, I suspect, because the academic institutional apparatus of sexuality, queer studies, and feminism with which we approached our initial critique has now trapped us. Critiques of the anti-trafficking framework resonate in gender studies classes, not in migration and labor studies programmes. Many of us are now stuck to the bait of criticising sex trafficking. Sadly, it is a knotty problem that continues to produce bad effects in practice as well as in the academy. The press seems to cover fights within feminism over sex work and prostitution law as much as it covers what they are fighting about: their attention to these struggles seems a bit like the superior attitudes of watching ‘girl fights’.

Our own theories about the power dynamics in and around sexuality tell us that ‘sex is sticky’. We need a way out that will respect both the continuing bad effects of the ‘sex panic’ but also fully engage with

how sex diverts attention away from exploited workers outside the sex sector and fails to help folks in the sex sector. To do this we need grounded, longitudinal, and snap shot research on many different labour sectors that asks whether or not the TVPA is a useful tool for workers of all types. The numbers of people engaged in this side of study are smaller than the numbers buzzing around sexual hysteria (both generating it and critiquing it).

Moreover, more than increasing numbers, we need to think hard about the range of different scholars and advocates who need to be in the room. In 1998, Barbara Limanowska, a feminist activist from Poland, told me that most of what needed to be known about the migration patterns of women from Eastern Europe could be gleaned from currency fluctuations, yet she had never been to an anti-trafficking conference that included micro and macro-economists, or fiscal policy analysts.

This is changing. It now appears that researchers of migration and scholars of informal labour and labour rights are increasingly in the room during international conferences on trafficking. We need more support for their presence in our debates on anti-trafficking policies here in the US. It would be important to organise more of those conferences alongside the critical race feminist scholars and advocates. It won't be easy, in part because the funding for this kind of cross-disciplinary, theoretically rich and empirical research at the intersection of borders, labour and sex is not obvious in the US, nor is the route to shifting public understandings. But without the theory and research, we have no chance against the mis-use of anti-trafficking law. Sadly though, we must keep reckoning with the fact that we cannot keep contributing to the frisson of fights over 'white savours', raid and rescue, and 'girl fights within feminism' that has made the sex-framed anti-trafficking work so attractive as the bait.

Centring the state in our critiques of trafficking

Prevailing accounts of a division between sex work and 'trafficking' obscure the routine fact of economic exploitation and its basis in law. We must centre immigration law as part of more ambitious political enquiry.

Katie Cruz

The relationship between 'trafficking' and prostitution is far from clear. The definitions found in international law (the 2000 UN Trafficking Protocol) and UK law (the Sexual Offences Act 2003) are broad enough to encompass the radical feminist view that prostitution *is* trafficking. However, the more dominant approach is narrower. According to this view, migrating or being smuggled to a destination to work in the sex industry is different to 'sex trafficking', and the exploitation and unfreedom experienced by 'sex slaves' is different to that facing sex workers. Coerced movement that includes violence or its threat, plus severe economic exploitation, draw the line between unfree and free sex work. While it is acknowledged that making these distinctions is 'tricky', I am told that it remains crucial to do so. As research conducted by Julia O'Connell Davidson and others indicate, this is also the approach of those tasked with enforcing anti-trafficking law in the UK.

Others are more critical of anti-trafficking law and policy but nevertheless affirm it. Largely in response to radical feminism, those supportive of sex workers' rights insist there is a distinction to be made between 'victims' and 'non-victims'. [Nick Mai argues](#) that 87 percent of the migrant sex workers in his 2009 study were free workers, and that a similar ratio exists in the sex industry in general. Based on interviewee responses, Mai argues that only 13 percent experienced sexual and economic exploitation, in conditions that ranged from no consent through to relatively consensual arrangements. With due respect for Mai's desire to challenge the pull of radical feminist orthodoxy, the conclusion that 87 percent of migrant sex workers are 'free' is as obfus-

cating as the suggestion that 100 percent of prostitutes are victims of male sexual violence.

Binary thinking, coercive realities

The ‘acts’ listed in the UN Trafficking Protocol include movement, transportation, and recruitment. It is therefore not the ‘act’ of trafficking that allows a distinction to be made between trafficking and smuggling. Rather, the ‘means’ and ‘purpose’ of the movement, recruitment, etc. should draw the line. In short, for a sex worker to be viewed as trafficked rather than smuggled, it must be proven that s/he did not choose to move or be recruited, but was induced with force, deception, or the abuse of vulnerability. It must *also* be proven that s/he has been exploited, is working in unfree conditions, and that his/her treatment is connected to those who facilitated her travel. This means that those who would employ the idea of ‘trafficking’ must not only decide what constitutes force in both the transit and labour stages. They must also accept that the distinctions they make will delineate victims deserving of (paltry) protection from non-victims undeserving of protection (who will be deported or removed if they do not have legal status).

Any person facing labour compulsion (the compulsion to accept a wage to subsist) can be described as *coerced* by the alternative, or to have freely *chosen* the lesser evil. Some ‘forced choices’ will be far harsher than others, but as [Robert Steinfeld argues](#), “there are no logical grounds for saying that the performance of labour in one case is coerced and in the other it is voluntary.” In fact, how society draws the line between free and unfree (sex) work depends on *what kind of coercive pressures are regarded as legitimate or illegitimate*. Many argue that trafficking law and policy should, on the one hand, address extreme forms of forced, physical movement. On the other, it should cover labour extracted under the threat of severe physical and psychological violence, or the deprivation of wages. But surely a much wider array of pressures—including economic compulsion, appalling wages, and state-based violence or its threat—are also unacceptable.

Borders and immigration law

It is well documented that 'trafficking' emerged as part of a concern with illegal migration and organised crime. This is why governments prioritise border control and the creation of criminal laws when tackling 'it'. Although attention has been drawn to how border controls *facilitate* trafficking (and the exploitation of migrant workers in general), the hegemonic view is that *borders are a vital source of humanitarian protection for trafficked victims (and migrant workers)*. The development of international human rights protections provides another example of the prioritisation of border control. International protections are increasingly being drawn upon to extend protection to migrant workers, who are often unprotected by national labour laws. However, Article 4 of the European Convention of Human Rights, which prohibits slavery, servitude and forced labour, is being interpreted as putting a 'positive obligation' upon member states to strengthen borders.

We need to shift our focus from trafficking to immigration law, which, as a structural coercive pressure, regulates categories of entrant, impacts upon relations with 'managers', and affects treatment in the workplace. It also governs access to public funds, as well as the removal and deportation of migrants who fail to economically integrate or whose presence is found to be non-conductive. In short, these restrictions *limit* the alternatives available to both illegal *and* legal migrant sex workers, and thereby *increase* the risk and extent of exploitative working conditions, and both violent and economic compulsion.

Immigration law puts many sex workers migrating from *outside* the European Economic Area (EEA) in a highly precarious position. At the same time, workers from *inside* the EEA find their labour market options limited to 'low skilled', nominally self-employed, poorly protected sectors, such as sex work. Only recently have the restrictions been lifted on A8 and A2 nationals, but they will remain imposed on Croatian nationals for the next seven years. And *any* EEA national that is unable to prove that s/he is 'economically active' (which could

include, for example, not registering as self-employed, or being homeless) in the UK can be removed, according to the 2006 EEA Immigration Regulations. Between 2006 and 2012, 1565 removals were recorded, largely of 'inactive' Romanian nationals. As part of a Freedom of Information request I asked what percentage of those served with notice or removed were involved in prostitution. This was rejected on the basis that it would be too costly to gather the information.

Bringing the state back in

'Trafficking' relies on binaries that do not exist in reality, and is bound up with border control and criminalisation. Even if it could be wrested from this agenda, the concept of trafficking covers too broad a range of experiences to be useful for mapping and responding to the forms of exploitation and unfreedom faced by migrant sex workers.

We need ask: what 'forced choices' are acceptable and unacceptable in sex work? This can only be answered by asking many other structural and political questions. What constitutes exploitative and alienating sex work? How do we understand the economic compulsion faced by sex workers under contemporary capitalist social relations, and what is the role of debt? What is the extent of physical and psychological compulsion in the workplace? How do patriarchy and racism intersect with economic compulsion and violence? How does immigration law (re)produce these conditions? What protective role may labour law, or social security and welfare protections play, bearing in mind their historical weakness and current austerity measures? Might campaigns for no borders and a universal basic income be more useful than campaigns against 'trafficking'? As we begin to answer these questions it will undoubtedly become clear that (migrant) sex workers are subject to many of the same troubling processes and relations. Differences will be in *degree* rather than *kind*. Far from being a neutral ally, the state will appear as a culpable force. Our political responses will necessitate that collectively self-organised sex workers, who are already challenging these conditions, take centre stage.

Law's mediations: the shifting definitions of trafficking

As trafficking becomes increasingly conflated with slavery and forced labor, there is less and less agreement amongst international organisations on the precise definitional boundaries of these terms.

Prabha Kotiswaran

Until very recently the term trafficking typically conjured up for us the image of a young girl forced to perform sex work in a caged brothel in some gritty red-light area in a third world country like Cambodia or India. Today the increasingly visible concern around modern slavery and forced labour has shined the spotlight on the extremely exploitative conditions experienced by men and women in the agricultural, clothing, and construction sectors (to name only a few). Little wonder then that the International Labor Organisation (ILO) estimates that there are approximately 21 million forced labourers in the world today. So what are law-makers doing to address this complex, trans-border problem of human trafficking?

Almost 15 years ago, states negotiated a set of international legal instruments called the Palermo Protocols. Specifically, there are three Palermo protocols that supplement the 2000 UN Convention against Transnational Organised Crimes. These deal with human trafficking, migrant smuggling, and trafficking in firearms. The [Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children](#) was negotiated in 2000. It came into force in 2003 and has been ratified by around 159 countries. As we approach the fifteenth anniversary of the negotiation of the protocol, one might ask how it has fared so far. In the initial years after its adoption (2003 to 2009), states operationalised the protocol into domestic law to do two things: target sex workers whether they were working voluntarily or by force, and police borders to prevent migrants, undocumented workers, and

asylum seekers from crossing into their countries. The human rights of these groups were severely compromised during this time. These enforcement efforts were driven largely by the policies of the Bush administration in the US, as well by the requirements of a US law, the Victims of Trafficking and Violence Protection Act (VTVPA), which conditioned foreign aid on compliance with its anti-trafficking standards. Every June, the US State Department issues a Trafficking in Persons (TIP) Report ranking countries according to their anti-trafficking efforts. Countries in Tier 3 lose non-humanitarian, non-trade foreign assistance. This definitional and operational bias however began to shift in 2009, making way for increased attention to trafficking in a range of labour sectors other than sex work.

The definition of trafficking in the Palermo Protocol itself is quite broad. Article 3, which provides this definition, includes three elements:

1. an action element, meaning the recruitment, transportation, transfer, harbouring or receipt of persons;
2. a means element, referring to the threat or use of force or other forms of coercion, including: abduction, fraud, deception, the abuse of power or vulnerability, or the giving and receiving of payments or benefits to achieve the consent of a person having control over another person;
3. a purpose element for the purpose of exploitation. Exploitation includes, 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.

None of the legal concepts listed in Article 3 are in fact defined in the Palermo Protocol itself. Certain terms such as ‘forced labour’, ‘slavery’,

‘practices similar to slavery’ and ‘servitude’ are defined under international law but the others are not defined under international or domestic laws. As a result, one could stretch these concepts across a continuum of social possibilities.

Indeed, states adopt definitions of trafficking in their domestic criminal law that suit their particular social and political contexts. For example, in the Netherlands, undocumented Chinese migrants, working for less than half the Dutch minimum wage, are considered exploited and ultimately trafficked. In Switzerland, on the other hand, all migrant sex workers are considered vulnerable to trafficking even if they have entered this form of work voluntarily. Even the UN Office on Drugs and Crime, which is the guardian of the protocol, has recently admitted its lack of data on the phenomenon of trafficking, the magnitude of the problem, and the uneven nature of domestic law reform undertaken to align states’ obligations with the protocol.

Thus, although non-lawyers may expect there to be a clear-cut legal definition of trafficking, the legal scenario is in fact rather fluid. As the definition of trafficking is stretched, several international players are visibly stepping up their anti-trafficking efforts. The ILO views trafficking as a form of ‘forced labour’. The International Labour Conference in June 2014 adopted a protocol and recommendation to supplement the Forced Labor Convention of 1930, which strengthen the rights of migrant workers and address the structural socio-economic conditions that often lead to their being trafficked. Meanwhile philanthropists like Andrew Forrest, the Australian mining magnate and founder of the Walk Free Foundation, has contributed millions of dollars to counter what he calls ‘modern forms of slavery’. This organisation issues a Global Slavery Index, which ranks countries around the world in terms of the magnitude of their slavery problem. Governments also find this idea of modern slavery appealing, as shown by the passage of the UK Modern Slavery Act in 2015.

As trafficking becomes increasingly conflated with slavery and forced labour, there is less and less agreement amongst international organisations on the precise definitional boundaries of these terms. This further muddies the waters regarding which regulatory agencies are responsible for dealing with these issues. Definitional conundrums are exacerbated by the fact that the Palermo Protocol assumes that states will put into place a criminal law machinery to address trafficking, but the shifts in the definition of trafficking suggest that a broader range of legal techniques (such as labour law, corporate law, immigration law) is necessary to address the problem of trafficking.

The fact that the law does not definitively draw bright-line boundaries around trafficking may appear disconcerting and seem to undermine the fight against trafficking. Yet the malleability of anti-trafficking law also provides an opening for reconceptualising the spectrum of exploitative labour conditions that are endemic to contemporary globalised economies. More significantly, it reminds us that law is hardly adequate for addressing what are fundamentally complex socio-economic problems of transnational import. On the contrary, the law often *reflects* intensely political struggles over the meaning of contested social problems. To conclude, the law is significant to the anti-trafficking movement yet a measured appreciation of its strengths and drawbacks is essential in crafting a realistic strategy to combat trafficking.

Contributors

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The articles in this volume outline and critically interrogate the role of the state, national legislation and international conventions in shaping the understanding and construction of those conditions deemed to constitute modern forms of slavery. Our contributors further highlight the role of the state and national legislation in creating or allowing the varying forms of insecurities that necessitate entry into various precarious engagements. It is evident from these that the state plays a hugely significant role in the modern slavery discourse. It can be either a force for good or bad. Those who wish to see human rights and social justice realised at much higher level than that found in abolitionist discourse must recognise and be willing to engage politically with the state sponsored system of injustice.

“BTS is a beacon for civil society organisations, and for anyone working to end extreme exploitation. It shines a spotlight not only on individual bad apple exploiters, but on the much more important structural root causes of this exploitation. There is nothing else like BTS out there; it makes raising awareness, organising, and challenging complacent governments easier.”

—*Helga Konrad, former OSCE Special Representative for the Fight Against Trafficking in Persons*

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