FROM SEX PANIC TO EXTREME EXPLOITATION: REVISITING THE LAW AND GOVERNANCE OF HUMAN TRAFFICKING

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"TRAFFICKING" THE SCOURGE OF OUR TIMES: AN INTRODUCTION

> With that information and with that capital, we then together eliminate slavery for all time everywhere. One person living in slavery anywhere in the world makes us poorer . . . one slave is one slave too many.
>
> Andrew Forrest, Chairman & Founder, Walk Free Foundation

> Last night we talked until midnight about our situation. We were talking about you. It is about time that the Ministry of Labor came here to help us. Because this is slavery you know? Working in such a desert.
>
> Workers found by Brazilian labor inspector, Para cattle farm, International Labour Organization

> [in female voice] I was promised a better life . . . [male voice] far away from my home [child's voice] I used to have a family [male voice] now I must pay for my family's debts [female] I sleep with many men every-day . . . they make me kill for a war [male voice] work many long hours [different voices] trapped, beaten, scared, locked in the dark [male voice] with no way out [child's voice] I want to go home I want my [different voices] freedom freedom freedom
>
> Emma Thompson, actress, Public Service Announcement, UN Global Initiative to Fight Human Trafficking

> [loudly sobbing] My niece! My niece! Why did you leave us? Your two daughters are crying. What shall I tell your daughters? Why did you leave me alone?
>
> Relative on receiving the coffin of Lila Aacharya, a Nepali migrant domestic worker from Lebanon in The Cost of Living, documentary by Anti-Slavery International and International Trade Union Confederation

All four videos above claim to address the same pressing problem, namely, of human trafficking. However, as evident even from the quotes above, the conceptual tropes these various interventions deploy to understand the problem, possible solutions, the agency of those trafficked and even the terms they use to describe the problem could not be more different. The Walk Free Foundation video (2015) is set to an upbeat tune and features current and ex-heads of state, Bill Clinton, Tony Blair and a range of celebrities and claims that every one of us is an expert on modern slavery (with 8.5 million of us currently fighting to end it) and that we can help end the slavery of 32 million modern slaves (at the time of the video; but now 45.8) as even one slave, according to Andrew Forrest, the CEO of the Foundation is "one slave too many." Emma Thompson (2008) in a dire recording meanwhile, contorts her face and voice to imitate in different largely Eastern European accents the voices of several male and female trafficked victims. While the Anti-Slavery International's documentary (2011) is a painful reminder of those extremely exploited migrant domestic workers who do not survive, the public service announcement from the International Labour Organization (ILO) (2007) paints a starkly contrasting picture of Brazilian workers held against their will in the Amazonian forests but who are aware of their rights and are indeed anticipating intervention by the Labor Ministry, thus reflecting the agency of some of the most precarious workers in the world economy.

Of course, anti-slavery groups remind us that we hardly need to look to faraway places like Brazil or Lebanon; literally everything that we consume on a day-to-day basis is tainted by "slave" labor. These include basic commodities like tea, sugar (Richardson 2016), coffee (Anti-Slavery International 2009), prawns (Hodal, Kelly, Lawrence 2014), chicken, eggs, onions, mushrooms (LeBaron 2016: 33), "slave chocolate" from Cote D'Ivoire and cotton from Uzbekistan (Anti-Slavery International 2016). Exploitation is also rife in wartime captivity in Nigeria, bonded labor in Pakistan, fishing boats in Thailand (Quirk 2016: 18), households employing overseas migrant domestic workers (Sloan 2015), Qatari construction sites with Nepali workers, the brick kiln industry in India, Brazilian garment factories emplying Bolivian workers (Lerche 2016: 76), in Unilever's supply chain in Vietnam and in Kenyan flower and green bean cultivation (Wilshaw 2016: 78). This – anti-slavery groups claim – is "modern slavery" brought home.

Drafters of the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) (UN 2000a) supplementing the UN Convention against Transnational Organized Crime 2000 (UN Convention) (UN 2000b) could not have imagined the above interpretations of trafficking in their wildest dreams when they sat down in the late 1990s to negotiate the Trafficking Protocol. Although international law had historically targeted the "traffic" in women and children across borders particularly for prostitution, in the 1990s, this traditional concern converged with several developed states' interests in stemming illegal international labor migration to create a criminal law regime against "trafficking." Consequently, under the Trafficking Protocol and the Protocol on Migrant Smuggling (UN 2000c) which supplemented the UN Convention, participating states promised to criminally sanction anyone assisting another to migrate illegally (migrant smuggling) as well as recruiting, harboring or transporting a person through means of coercion, force and deception for purposes of exploitation (trafficking). Under the Trafficking Protocol, the trafficked person cannot be criminally punished in the receiving country for being trafficked, may be able to obtain a visa to stay there, but is most likely to be repatriated. Negotiated within two years "at lightning speed on the UN clock" (Lloyd and Simmons 2015: 423), the Trafficking Protocol was adopted in 2000, came into force in 2003 and has been exceptionally well ratified by 170 countries to date. This volume offers an in-depth look at the development of anti-trafficking law since.

Although presented and often discussed as a problem of epic proportions requiring urgent attention, the prevalence of trafficking is notoriously difficult to verify. As this volume will amply demonstrate, this is not surprising given the highly malleable scope of the very concept of trafficking. Estimates vary wildly from 1.3 million people (Danailova-Trainor & Laczko 2010: 57) to 45.8 million as estimated by the Walk Free Foundation (Kelly 2016).[1] Indeed, Savona and Stefanizzi observe that available information on trafficking is "fragmentary, heterogeneous, difficult to acquire, uncorrelated and often out-dated" (Savona & Stefanizzi 2007). Underlying these highly varied estimates of the problem of trafficking, however, is the acknowledgment, even by the United Nations Office on Drugs and Crime (UNODC), the only UN entity focusing on the criminal justice aspects of trafficking, that the data on the extent of the problem is woefully inadequate (UNODC

2014: 16). The UNODC attributes this inadequacy to the lack of international standardization of definitions along the lines of the Trafficking Protocol, the failure of even countries with similar legal systems to count the same things and countries' failures to include domestic crimes amounting to trafficking within their data.

This wide variance can also be attributed to the fact that trafficking as an issue has been over-determined by many competing discursive frames and ideologies promoted by the epistemic communities that have developed around them for the past two decades. These discursive frames include sex work, migration, smuggling, human rights, security, crime control, criminal justice, forced labor, slavery, border control, and increasingly, extreme exploitation especially forced labor and modern slavery (Lee 2007: 2; Choi-Fitzpatrick 2016: 6). As I will demonstrate, these discursive frames are mirrored in the paradigmatic theoretical approaches to the problem of trafficking and the choice of law used to counter it, highlighting the significance of the frame (Clifford 2015) through which the problem is sought to be understood. Having underlined the significance of the framing device for defining this social problem, I clarify at the very outset the approach that animates this volume.

Like all other major headline-grabbing issues of global import, a critical analysis of trafficking too is best understood from varied disciplinary vantage points and this is what the current volume seeks to do. This volume brings together a range of contributions from disciplines as diverse as law, sociology, anthropology and public health; from scholars based in academic institutions and international organizations such as the ILO to activists who have often shaped the field of anti-trafficking law and policy in quite significant ways. As the pages of this volume will show, we can at times appear to have varied preoccupations, political intuitions and skills that we deploy in parsing through the complex anti-trafficking landscape. So while we do not sing in one voice, we hum a similar tune – a tune of protest against the increasingly shrill dramatization of what constitutes "trafficking" immortalized in the minds of the lay public by the image of a young, white woman duped into sex slavery in a foreign country where she is repeatedly raped and brutalized. Where anti-trafficking discourse is replete with "a range of simplistic and misleading images, dubious 'statistics', and self-serving narratives" (Quirk and O'Connell Davidson 2016: 11), we view the moral charge of these images and the regulatory correlative that they justify, namely, the use of police power to crack down on evil criminals while sending

victims back home as deeply problematic. We view revisionist accounts of such "slavery" in other sectors whether it is bonded labor in India's brick-kilns or child labor in Africa's cocoa farms and the resultant policy proposals with healthy doses of skepticism.

We instead shine light on the complexity of trafficking by marshalling insights from varied disciplines and standpoints to offer the full range of discursive, social scientific and legal-doctrinal critique. We are keen to show how states piously condemn trafficking and modern slavery while using the cognate legal categories of "migrant"/"refugee"/"temporary" workers and "undocumented" workers to undermine people's freedom of mobility which adversely affects the very rights of those most vulnerable to trafficking. The influx of migrants into the EU has brought home a humanitarian crisis that is exacerbated by strong border control policies. But we do not stop there. We also highlight how victims of trafficking perceive force and coercion and how they exercise their agency, with a view to rendering visible the legal levers necessary to enhance their bargaining power. In other words, we map the mess, pause over the paradoxes and unearth what lies in the background, all in an effort to suggest pathways and methodologies for future research and action.

My introduction will begin by detailing my theoretical approach, one that is transnational and socio-legal, to unpack the various discourses (legal and sociological) that surround anti-trafficking law and policy today. I analyze anti-trafficking law as a "transnational legal order" or "TLO," weaving in contributions of authors from Part I of the volume who elaborate on the history of international law predating this TLO and its development over the past seventeen years – replete with boundary issues, diagnostic mismatches and ideological differences – and offer their prognosis for its institutionalization going forward. Each of the subsequent parts of the book highlight the multi-dimensionality of trafficking through a transnational, socio-legal lens. Part II of the book offers a legal realist critique of anti-trafficking law. Part III elaborates on the importance of non-state actors like corporations and public health advocates as well as alternate modes of governance through the use of indicators, in mapping the now familiar shift in regulation from "government" (state-based, nationally defined regulation) to "governance" (through myriad forms of self-regulation) (Zumbansen 2012: 335). Part IV continues in this vein by considering the role of a large international organization, namely, the ILO in generating data on trafficking and driving the negotiation in 2014 of a protocol on forced labor. Part

V pushes forth the inter-disciplinary aspirations of transnational legal scholarship by shedding light on temporary workers' programs in general, and specifically on the political economy of a specific labor sector, namely, domestic work before examining the political and strategic value of using anti-trafficking discourse for furthering the rights of domestic workers. I then conclude by reflecting on a future research agenda on trafficking – one that seeks to facilitate the "right to locomotion" as O'Connell Davidson calls it and realizes the redistributive potential of the law.

A TRANSNATIONAL SOCIO-LEGAL APPROACH TO TRAFFICKING

A chronic challenge for anti-trafficking activists is the sheer ineffectiveness of anti-trafficking law. Despite the spectacular figures of modern slaves already mentioned, only 44,758 trafficked persons around the world have been identified (Chuang, Plant this volume) resulting in 5776 convictions (Chuang 2014: 642). Conviction rates have remained "stubbornly low" since 2003 (Kangaspunta 2015: 86); 41 percent of countries have not had any convictions or recorded less than ten convictions between 2010 and 2012 (Ibid.). The yawning gap between the intellectual energy and material resources expended on trafficking and the meager outcomes fundamentally problematize our continuing urgent prioritization of this issue. However, this is not simply a problem of the gap between the "law in the books" and "law in action." Although the weak enforcement of anti-trafficking criminal law is a serious matter, there is much more at stake. The very terms of the political debate, the incorporation of the Trafficking Protocol into domestic law, the interpretations of the various aspects of the definition of trafficking, the jurisdiction and suitability of institutional machineries to deal with trafficking, the nature of anti-trafficking discourse and the affective economies that accompany these are all up for grabs.

Yet the apparent governance chaos in the world of anti-trafficking policies is not unique. Instead, twenty-five years since the lifting of controls on the circulation of goods, services, capital and labor, lawyers are still grappling with the implications of globalization for regulation. Trafficking is only one of many issues that have emerged at a distinctly epochal moment of globalization to confound the regulatory efforts of states. Almost all of the predicaments that we face in the context of

trafficking, namely, the lack of normative coherence on the question of precisely what trafficking is, the range of regulatory frameworks (whether criminal, labor, immigration, international) that can be brought to bear on it, the ineffectiveness of cross-border criminal law, the rise of indicators as a technique of governance and the multitude of actors involved in creating legal and social norms through formal state law and "soft law" at the international, regional, domestic and local levels around trafficking are hardly unique. If anything, similar regulatory predicaments affect issues (to name only a few) as diverse as the rule of law, internet governance, environmental protection, crime, terrorism, access to medical treatment, human rights, corporate bankruptcy law, commercial arbitration, climate change, plant genetic resources, food safety and food quality standardization regimes, double taxation and secured transactions (Zumbansen 2012: 312–313; Halliday and Shaffer 2015: 8). Theorizing the regulatory complexities posed by the issue of trafficking resituates it as part and parcel of the processes of globalization more generally rather than as an exception or impediment to what globalization seeks to achieve. Trafficking as a regulatory issue is in need of precisely this form of de-centering.

UNDERSTANDING TRANSNATIONAL LAW AND TRANSNATIONAL LEGAL ORDERS (TLOs)

Synthesizing some of the insights of transnational legal studies, a fast-growing field of scholarship that theorizes the peculiar predicaments of contemporary law in a globalized world helps contextualize and clarify developments in our thinking about anti-trafficking law. Scholars here have productively drawn on the notion of "transnational law" coined by Philip Jessup in 1956 to describe "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories" (Jessup 1956: 2). An approach that is "transnational" would therefore make sense of a complex, diverse regulatory universe arising in the context of globalization that is not contained within traditional international law or the universally geographical reach of the "global" (Halliday and Shaffer 2015). It would not prioritize national law (cf Darian-Smith forthcoming) nor think of itself as post-national and would adequately recognize the crucial role that nation states continue to play in shaping globalized economic and legal

processes. A transnational legal approach therefore "places processes of local, national, international, and transnational public and private lawmaking and practice in dynamic tension within a single analytic frame" (Halliday and Shaffer 2015: 3). A "transnational legal order" or TLO in turn is a "collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions" (Ibid.: 5). The term "order" connotes some regularity of behavioral orientation, communication and action while a "legal" order "involves international or transnational legal organizations or networks, [which] *directly or indirectly* engage multiple national and local legal institutions, and assumes a recognizable legal form" (Ibid.: 11; italics mine).

The legal form includes both norms enacted by the state through formal law but also those developed by networks, which are directed toward enactment or recognition and enforcement within nation-states (Ibid.: 12). Thus a TLO encompasses both hard law as well as soft law norms such as codes of conduct and diagnostic and prescriptive indicators. Scholars like Zumbansen go further to prioritize transnational legal pluralism as "an – inherently interdisciplinary – inquiry into the nature of legal regulation of problems" (Zumbansen 2010: 55–56), which becomes "an attempt to bridge the experience of legal pluralism in the nation-state with that of the emerging transnational space" (Zumbansen 2012: 312).

TLOs are also understood to be dynamic and in flux such that they "can rise or fall in rapid bursts or in long drawn-out, incremental cycles. They may entail trial and error or big bang-like events" (Halliday and Shaffer 2015: 32). Transnational law is also recursive so that "the production and implementation of transnational legal norms among international, transnational, national, and local lawmakers and law practitioners dynamically and recursively affect each other" (Ibid.: 38). Further, TLOs may become institutionalized over time with a convergence of legal norms and practices so as to guide actors over what norms apply to given situations (Ibid.: 42). This can reflect concordance (or alternatively discordance) at varied levels – the transnational, national and local. Institutionalization is also reflected in the alignment of a given TLO with the issue at hand. One could thus imagine competing TLOs, which may regulate the very same issue to varying extents in which case, it becomes possible to delineate these interactions in terms of (i) correspondence, (ii) partition

(especially where the legal scope and geographical scope do not converge), (iii) misalignment/non-alignment and finally (iv) antagonistic competition between them (Ibid.: 47–49). Shaffer and Halliday illustrate correspondence between a TLO and the underlying issue through the example of double taxation, while the TLO on intellectual property rights on the other hand, may well be misaligned with and even compete with the TLO on access to drugs.

While the idea of the TLO presumes to some extent the uniqueness of regulatory patterns that lawyers encounter in a distinctly globalized world, a concurrent strain of transnational legal theorizing underscores continuities in regulatory dilemmas and assumes that law's coordinates were failing *well before* the advent of globalization (Zumbansen 2015: 8) with the prior erosion of dearly held distinctions such as public/private, state/non-state, law/non-law (Ibid.: 7). Various aspects of the "hubris, fragility, violence, and vulnerability that underlies the idea and experience of law" (Zumbansen 2012: 323), as this volume will show, are equally applicable to anti-trafficking law. Consequently, Zumbansen urges us to understand "transnational law primarily as a methodological approach and less as a distinctly demarcated legal field" (Ibid.: 307; italics in original), an approach that animates this volume's study of the trafficking TLO.

THE TRAFFICKING PROTOCOL, TRANSNATIONAL CRIMINAL LAW AND THE TRAFFICKING TLO

In this section, I use a transnational legal lens to examine the emergence and continued development of the trafficking TLO. Over the past two decades, trafficking has been discussed predominantly in the key of international law. Under international criminal law, itself a relatively new field emerging in the 1990s (Cryer et al. 2010: 3), individuals are held criminally responsible by a supra-national court for crimes such as genocide and crimes against humanity and the violation of *jus cogens* norms. The Trafficking Protocol is however better understood as an instance of "transnational criminal law" or "the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-border effects" (Boister 2003: 955). In other words, the core component of transnational criminal law is a crime suppression treaty, whether agreed bilaterally, regionally or through a large UN-backed multilateral convention

directed at suppressing conduct that is subsequently criminalized through domestic law. Boister describes this as the "horizontal" component of transnational criminal law. Following this, "[t]he vertical component in transnational criminal law involves domestic criminalisation of the specified conduct of individuals and the enactment of allied procedures and provisions for cooperation in regard to those individuals by the states parties to the particular suppression convention" (Boister 2015: 19). In prioritizing international law and its influence on national law, anti-trafficking scholars often miss what Boister calls the "conformal" nature of transnational criminal law, namely, its horizontal and vertical dimensions, and specifically the domestic legal translation of the Trafficking Protocol. Transnational criminal law thus offers by default a "transnational" frame that encompasses an understanding of both international and national laws. It is this conformal nature of transnational criminal law that explains patterns of settlement and institutionalization of the Trafficking Protocol.

Some scholars observe that anti-trafficking law has percolated to the local level (Lloyd and Simmons 2015: 414) and its reach is deep and extensive (Ibid.: 416). Certainly, the number of states that criminalized sex and labor trafficking in domestic laws increased from 10 percent in 2000 to about 73 percent in 2013 (Ibid.: 436) to 90 percent in 2014 (UNODC 2014). In addition to the high rates of ratification of the Trafficking Protocol, several more treaties explicitly and indirectly refer to trafficking, especially given its expansive understanding in terms of forced labor and modern slavery, as do non-treaties and soft law codes of conduct (Lloyd and Simmons 2015: 414). As this volume amply demonstrates, this implicates other sets of laws including labor law, contract law, immigration law, corporate law and financial and regulatory law that interact with anti-trafficking criminal law. Viewed through the legal pluralist, multi-scalar lens of transnational legal studies, the stunning legal architecture spawned by the Trafficking Protocol constitutes a TLO. Despite the existence of the trafficking TLO for the past seventeen years however, the low rates of conviction for trafficking-related offences indicate its poor institutionalization. This can be attributed to several factors including the indeterminacy of the concept of trafficking and the malleability of its definition in Art. 3 of the Trafficking Protocol and the lack of alignment and concordance within the TLO, all of which lead to the poor settlement of norms whether in legal, institutional or sociological terms. It is to Art. 3 that I next turn.