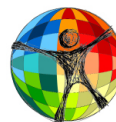


Deconstructing Human Trafficking and Victimization: A Reshaping of Canadian Discourses and Policies

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ABSTRACT

Focusing on the experience of non-status migrant trafficked individuals, this paper explores the ways in which the politicized nature of anti-trafficking discourses has important detrimental consequences for trafficked individuals in Canada. The first section sets out the problematic anti-trafficking discourses that have dominated the discussion in Canada, demonstrating how they have served to construct the trafficked person as the paradigmatic victim and justify the adoption of criminal justice- and security-oriented solutions. Secondly, the paper presents an overview of human trafficking in the Canadian context, focusing on the shortcomings of anti-trafficking responses thus far. I subsequently explore the potential and the limitations of non-traditional solutions to human trafficking that have or may be adopted (such as civil litigation and private sector solutions). The final section then outlines the various ways of re-shaping the discourse, calling for a re-imagining of the non-status migrant's identity and place in Canadian society and a re-conceptualization of the human trafficking experience, with the goal of making the Canadian anti-trafficking response a better informed one.

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Introduction¹

Dominant human trafficking discourses have experienced multiple shifts over the years, from being viewed initially as an international problem undergone by Asian and Eastern European women working in the Canadian sex industry to be eventually understood as a matter of sexually exploited Canadian women within Canada. While these two perceptions remain today, there has been an increasing awareness of human trafficking as forced labour, as predominantly experienced by individuals who have migrated to Canada.² As the narrative surrounding human trafficking has evolved, policy shifts have also naturally occurred.

Accepting the Foucauldian premise that discourses are neither neutral nor impartial as a starting-point,³ this paper explores the ways in which the politicized nature of anti-trafficking discourses has important detrimental consequences for trafficked individuals in Canada. In recent years, there has been greater attention paid to the role played by such discourses in shaping anti-trafficking policies and responses to reflect an overwhelming focus on criminal justice and immigration control.⁴ In the first

¹ This paper was inspired from my work as a legal intern at *Avocats sans frontières Canada/Lawyers Without Borders Canada* in Québec City in the summer of 2017, where I had the opportunity to explore problematic discourses surrounding the Duvalier regime in Haiti. The internship additionally allowed me to grapple with the limits of international criminal law mechanisms in addressing human rights violations and broader social justice concerns.

² Ricard-Guay, Alexandra & Jill Hanley. "Frontline Responses to Human Trafficking in Canada: Coordinating Services for Victims" (2014) *Comité d'action contre la traite humaine interne et internationale (CATHII)*, online: <http://www.cathii.org/sites/www.cathii.org/files/CATHII_english.pdf> at 133.

³ According to Foucault: "We should admit rather that power produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations". See Foucault, Michel. *Discipline and Punish: The Birth of a Prison* (New York: Vintage Books, 1991) at 27.

⁴ The extent to which human rights were ever or are a focus of anti-trafficking efforts today is questionable. Anne Gallagher explains that "[w]hile human rights concerns may have provided some impetus (or cover) for collective

section, I will present the problematic anti-trafficking discourses that dominate the discussion in Canada, which help to construct the trafficked person as the paradigmatic victim and justify the adoption of criminal justice- and security-oriented solutions. The second section will subsequently start with an overview of human trafficking in the Canadian context, followed by a closer look at its responses to human trafficking. The shortcomings of such approaches are briefly examined. In the third section, I explore the potential and the limitations of non-traditional solutions to human trafficking that have or may be adopted (notably civil litigation and private sector solutions). The last section of the paper presents ways of re-shaping the discourse with the goal of re-conceptualizing the trafficked individual and the human trafficking experience to better inform and guide the Canadian anti-trafficking response to both. Given the particularly serious repercussions current anti-trafficking responses have had on non-status migrants and the relatively minimal attention paid to the form of trafficking to which they are most vulnerable, this paper will focus on the experience of migrant trafficked individuals. This paper will ultimately call for a reimagining of the non-status migrant's identity and place in Canadian society.

Part I: Constructing Human Trafficking and the Trafficking Victim

As Janie Chuang puts it, “[d]iscourse is a way of exercising power”.⁵ More simply, as seen in the context of human trafficking,

action, it is the sovereignty/security issues surrounding trafficking and migrant smuggling which are the true driving force behind such efforts”. See Gallagher, Anne. “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis” (2001) 23:4 Human Rights Quarterly 975, online: <<http://www.jstor.org/stable/4489368>> at 976. Similarly, Julia Davidson writes: “Despite all the cant about [trafficking in human beings] as a human rights violation, states have defined it as first and foremost a security and criminal justice issue, and even international organisations that emphasize the need to protect the human rights of [victims of trafficking] often lay equal stress on the threat trafficking poses to the central power”. See Davidson, Julia. “De-canting ‘Trafficking in Human Beings’, Re-centring the State” (2016) 51:1 *The International Spectator: Italian Journal of International Affairs* 58, online: <<https://doi.org/10.1080/03932729.2016.1121685>> at 68.

⁵ Chuang, Janie. “Rescuing Trafficking from Ideological Capture: Prostitution Reform Anti-Trafficking Law and Policy” (2010) 158:6 University of

discourse often is power. It “produces reality; it produces domains of objects and rituals of truth”.⁶ Since the “ways we think and talk about a subject influence and reflect the ways we act in relation to that subject”,⁷ discourses can shape policies. To better understand the Canadian response to human trafficking (and to ultimately be able to address the shortcomings of that response), it is useful to explore the dominant discourses and recurring themes featured in the anti-trafficking debate.

For Julie Kaye, power is the “unequal context in which the narrative of human trafficking is constructed by some and, by discursively framing the issue, its ability to shape the response”.⁸ Adopting a postcolonial and anticolonial perspective, she posits that representations of trafficked persons in mainstream initiatives and discourses in the anti-trafficking movement replicate and perpetuate the inequalities and power imbalances that allow trafficking to occur.⁹ Those principally involved in shaping the Canadian response to human trafficking (from the immigration, justice, government, and policy sectors) represent trafficked persons in problematic ways. Such portrayals support an overly simplistic understanding of the phenomenon of human trafficking – one that calls (often exclusively) for the traditional criminal justice-based responses. However, one can question the effectiveness and adequacy of such approaches in either preventing human trafficking and/or protecting those subject to it. This is partly because they fail to address the root causes that render some vulnerable to human trafficking, incapable as they are of “transforming structural and material forms of violence and inequality”.¹⁰ This is also because the criminal justice- and security-

Pennsylvania Law Review 1655, online:

<<http://www.jstor.org/stable/25682362>> at 1694.

⁶ Foucault, *supra* note 3 at 194.

⁷ Karlberg, Michael. “The Power of Discourse and the Discourse of Power: Pursuing Peace Through Discourse Intervention” (2004) 10:1 International Journal of Peace Studies 1, online:

<http://www.gmu.edu/programs/icar/ijps/vol10_1/Karlberg_101IJPS.pdf> at 1.

⁸ Kaye, Julie. *Responding to Human Trafficking: Dispossession, Colonial Violence, and Resistance Among Indigenous and Racialized Women* (Toronto: University of Toronto Press, 2018) at 33.

⁹ Kaye, *supra* note 8 at 13.

¹⁰ *Ibid.* 14.

centred anti-trafficking and related policies can reinforce such structural inequalities and cause new harms.¹¹ In this way, the way we understand and assign meaning to human trafficking (and those trafficked) matters. Where discourses rest on stereotypical, misinformed, politicized, and simplistic conceptions of the human trafficking experience and the individuals involved, the policies adopted in response to human trafficking can be ineffective, counter-productive, and serve to further undermine the dignity, security, and rights of those trafficked.

What is human trafficking?

Trafficking can be better “understood [...] as a process and part of a continuum of exploitation in which it is often difficult to know where to draw the line designating severe forms of exploitation as trafficking”.¹² According to Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations (UN) Convention against Transnational Organized Crime (“Palermo Protocol”), human trafficking refers to the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.¹³

Human trafficking has been committed where the three constituent elements of the act (such as the transfer of persons), the means (such as the threat or use of force or abuse of power),

¹¹ Kaye, *supra* note 8 at 7; De Shalit, Ann & Emily van der Meulen. “Critical Perspectives on Canadian Anti-Trafficking Discourse and Policy” (2015) 37:2 *Atlantis* 2, online:

<http://journals.msvu.ca/index.php/atlantis/article/view/5336/pdf_43> at 4.

¹² Ricard-Guay & Hanley, *supra* note 2 at 12.

¹³ United Nations General Assembly. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Crime. G.A. Res. 55/25, Annex II, U.N. GAOR, 55th Sess., UN Doc. A/55/393 (15 November 2000), online:

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>> at Article 3(a).

and the purpose (of exploitation) are present.¹⁴ Canada has, in its domestic legislation, adopted a similar definition, though it differs from its UN counterpart in covering more than cross-border trafficking. This will be further detailed in Part II of this paper.

Problematic Conceptualizations of Human Trafficking

According to Ann De Shalit and Emily van der Meulen, “current conceptualizations of human trafficking are based on largely unsubstantiated claims, much international conjecture, and wildly divergent estimates as to its actual existence”.¹⁵ A few of the dominant conceptualizations prevalent in Canada, many of which can similarly be identified internationally, will be explored in this section. As various scholars have pointed out, such constructions are not neutral in their effects, but have led to the enhanced securitization, criminalization, insecurity, and vulnerability to violations and abuses of those trafficked and those vulnerable to trafficking.¹⁶

Conflation Between Migrant Smuggling and Human Trafficking

Human trafficking is most commonly confused with or conflated with migrant smuggling, a phenomenon with clear links to the former, but fundamentally different at its core. Both the overemphasis of a legal distinction between human trafficking and migrant smuggling and, simultaneously, the conflation between both phenomena can have negative policy implications. While the legal distinction may be artificial in certain real-life scenarios,¹⁷ using both terms interchangeably is inaccurate and confusing because important distinctions do exist between the two. Being identified as having been trafficked generally affords one more rights and protections under both international and Canadian law than being viewed as a smuggled migrant.¹⁸ Often only the first is

¹⁴ Gallagher. “Human Rights and the New UN Protocols”, *supra* note 4 at 986-987.

¹⁵ De Shalit & van der Meulen, *supra* note 11 at 2.

¹⁶ *Ibid* at 2-3.

¹⁷ Carling, Jorgen et al. “Beyond Definitions: Global Migration and the Smuggling-Trafficking Nexus” (2015) *Regional Mixed Migration Secretariat (RMMS)*, online: http://www.regionalmms.org/images/DiscussionPapers/Beyond_Definitions.pdf at 4.

¹⁸ Carling, *supra* note 17 at 4.

recognized as a victim worthy of protection and support, while the latter is subject to greater criminalization.¹⁹ It is therefore often in the interest of a state to label migrants as smuggled rather than trafficked in an effort to minimize the responsibilities it would be called upon by the international community to take on.²⁰

On the other hand, governments can sometimes choose to do the opposite and view smuggling as human trafficking, even though only the former requires exploitation, a lack of consent, and sometimes border-crossing (when applying the international definition).²¹ As Aidan McQuade writes (in reference to the European piecemeal response to the Mediterranean migrant crisis), “[t]he conflation of smuggling and trafficking conveniently obfuscates the issue and buys political breathing space. [...] When faced with such horror, it is easier to make grand statements blaming migrant deaths on evil traffickers than to seek the causes and identify proper responses”.²² Beyond being inaccurate, such a conflation therefore rather conveniently “allows officials to paint a complex problem [whether it be human trafficking or migrant smuggling] as one of simple criminality and security, and of good versus evil”.²³ Simple criminality and security, of course, automatically calls for an obvious response: the swooping in of police forces and prosecutors (and other members of the repressive arm of the state) to take their place as the heroes and rescuers.

Confusing the two phenomena also helps justify the adoption of immigration enforcement policies as anti-trafficking measures. Yvon Dandurand describes how such a conflation

¹⁹ Carling, *supra* note 17 at 4.

²⁰ *Ibid* at 5; Gallagher. “Human Rights and the New UN Protocols”, *supra* note 4 at 1000.

²¹ Carling, *supra* note 17 at 5; McQuade, Aidan. “Migrant Crisis: Smuggling or Trafficking? Politicians Don’t Seem to Know” (2015) *The Guardian*, online: <<https://www.theguardian.com/global-development/2015/apr/22/migrant-crisis-smuggling-trafficking-politicians-dont-seem-to-know>>.

²² McQuade, *supra* note 21.

²³ Wan, James. “Review: Migrant, Refugee, Smuggler, Saviour – by Peter Tinti and Tuesday Reitano” (2016), *African Arguments*, online: <<http://africanarguments.org/2016/10/18/review-migrant-refugee-smuggler-saviour/>>.

“triggers conflicting roles of criminal and border police”,²⁴ problematic particularly because the laws governing both “have developed in isolation, [and] inconsistencies exist that result in inadequate protection of human trafficking victims”.²⁵ Unfortunately, rather than preventing human trafficking, border enforcement can make it a more likely reality for irregular (or undocumented) migrants. By reducing the opportunities for migration through official channels, border control may leave already-marginalized migrants with even fewer options and increasingly vulnerable to exploitation while traveling to, and while in, Canada.

Consequently, the “[t]reatment of migrants is [...] increasingly dichotomous: either a noncitizen qualifies as a trafficking victim, in which case she can avail herself of human rights protections [...], or the noncitizen is a smuggled migrant, who is subject to detention, prosecution, criminal punishment, and removal”.²⁶ Where the exploitation appears to be less severe, as is often the case with more normalized “everyday forms of labor exploitation”,²⁷ there is greater room for the state to identify such individuals as smuggled, unexploited, and consenting migrants without access to the protections afforded to trafficked victims (at least in theory).

More than Sex Trafficking

There is additionally the flawed conflation between the various forms of human trafficking—including sex, labour, and organ trafficking—in research, discourse, and policy.²⁸ The continuing over-emphasis on sex trafficking, and the subsuming of other forms of human trafficking, ignores the fact that important

²⁴ Dandurand, Yvon. “Human Trafficking and Police Governance” (2017) *Police Practice and Research* 322, online: <http://dx.doi.org/10.1080/15614263.2017.1291599> at 331.

²⁵ Dandurand, *supra* note 24 at 331.

²⁶ Chacón, Jennifer M. “Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement” (2010) 158:6 *University of Pennsylvania Law Review* 1609, online: <http://www.jstor.org/stable/25682361> at 1635.

²⁷ Chacón. “Tensions and Trade-Offs”, *supra* note 26 at 1635.

²⁸ Dandurand, *supra* note 24 at 323; Note that more than one type of human trafficking, such as forced labour and sexual exploitation, can be present at the same time. See Ricard-Guay & Hanley, *supra* note 2 at 33.

distinctions exist between them all.²⁹ The differing patterns, signs of exploitation, and challenges from one type of trafficking to the next calls for a rejection of a one-size-fits-all approach by policymakers, investigators, prosecutors, and service providers.³⁰ For example, with labour trafficking, it becomes especially useful to “consider the role that immigration status and the immigration process may play in enhancing [...] [migrants’] vulnerability”.³¹ In addition, when recognizing labour trafficking’s relative invisibility vis-à-vis sex trafficking as a major challenge, actors can realize that labour trafficking is “best addressed through preventative measures that tackle victimization before it occurs”.³² Conceptualizing human trafficking as primarily sex trafficking can also divert important resources away from less recognizable forms of exploitation.³³ In the case of forced labour, for example, it can perpetuate the normalization of exploitative labour conditions, far removed as they are from the human trafficking as sex trafficking image impressed in the Canadian public consciousness.³⁴

It is important to also recall that sex trafficking does not cover all instances of prostitution, and being a sex worker does not necessarily make one a victim of trafficking.³⁵ Such a conflation between human trafficking and sex work not only has negative repercussions for victims of labour and other forms of trafficking, but also sex workers, who may experience a heightened vulnerability and denial of their rights.³⁶ Treating all sex workers as trafficked can also have the problematic cultural effect of “perpetuating stereotypes of women and girls as powerless victims in society, unable to control their bodies in the

²⁹ Dandurand, *supra* note 24 at 323.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.* at 324.

³³ Ricard-Guay & Hanley, *supra* note 2 at 39.

³⁴ Marchionni, Doreen M. “International Human Trafficking: An Agenda-Building Analysis of the US and British Press” (2012) 74:2 International Communication Gazette 145, online:
<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.825.5694&rep=rep1&type=pdf>> at 155.

³⁵ Dandurand, *supra* note 24 at 328.

³⁶ *Ibid.*

most private way without state help”.³⁷ This problematic construction of victimization is explored in the next section.

Problematic Victimization

Dominant anti-trafficking discourses, as reflected in the media, in the training of law enforcement, official statements, and the Canadian public consciousness, focus on the individual. It is the victim, more specifically, who figures prominently in any discussion of human trafficking. This, in and of itself, is not necessarily problematic. Increasingly recognizing those trafficked as victims, rather than criminals, is almost certainly a positive development in any state’s response to human trafficking. There is also value in remembering the individual and the harm undergone by that one individual, easily obscured as they can be by the sheer magnitude of the problem and often neglected in any human rights project.³⁸

However, focusing near exclusively on the individual – and more specifically, on the individual as a victim – has serious implications when it comes to combating human trafficking and responding to the needs of those trafficked. According to Suchland, “the global apparatus to combat human trafficking has failed to address the problem as a symptom of complex economic and social dynamics precisely because the focus has been on defining and deciphering the proper individual victim”.³⁹ Once identified as having been trafficked, an individual becomes, first and foremost, a victim. According to Makau Mutua’s savages-victims-saviors (SVS) metaphor, “a human being whose ‘dignity and worth’ have been violated by the savage is the victim. The victim figure is a powerless, helpless innocent whose naturalist attributes have been negated by the primitive and offensive

³⁷ Marchionni, *supra* note 34 at 155-156.

³⁸ Barbora Bukovska, for example, criticizes human rights advocates for “disregard[ing] the wishes, opinions, or particular needs of the victims considered, and [...] [sacrificing] the interest of actual victims for the goal that the particular organization was pursuing”. See Bukovska, Barbora. “Perpetrating Good: Unintended Consequences of International Human Rights Advocacy” (2008) 5:9 Intl JHR 7 at 14.

³⁹ Suchland, Jennifer. *Economies of Violence: Transnational Feminism, Postcolonialism, and the Politics of Sex Trafficking* (Durham: Duke University Press: 2015) at 5.

actions of the state".⁴⁰ When one replaces the state with the individual trafficker, or the network of traffickers, as the paradigmatic savage, the metaphor effectively captures the anti-trafficking experience as presented in the dominant Canadian narrative.⁴¹

The Victim and the Saviour

Who is the victim in the human trafficking story? "[V]ictims are typically portrayed as minors and females, 'reflecting prevailing assumptions regarding ideal victimhood, where some individuals are viewed as more "legitimate" and worthy of assistance than others'".⁴² For many, it is the young, innocent, female, and often foreign victim of sex trafficking who quickly comes to mind. She is presumed to be waiting for rescue by the saviour that is the state (and its actors) and/or civil society.⁴³ State complicity in perpetuating an environment of precariousness that renders such victims vulnerable to trafficking through its immigration and criminal policies simply fades into the background.⁴⁴ It should be noted that although most prosecutions featured Canadian victims, the Canadian public still views human trafficking as a predominantly international problem affecting non-Canadians, whether in other countries or in Canada.⁴⁵ Such individuals are perhaps more easily viewed as "ignorant, tradition bound, poor, and infantilized, [and] resembling minors in need of guidance".⁴⁶

⁴⁰ Mutua, Makau. "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42:1 Harv Intl LJ 201, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1525547> at 203.

⁴¹ Note that in the case of other (non-Canadian) states, the savage may indeed be the state in this narrative. Julie Kaye writes: "While anti-trafficking advocacy is quick to condemn state complicity in countries over *there*, there is little contextual understanding of the role Canada plays in shaping and reproducing the conditions in which trafficking experiences and anti-trafficking responses are negotiated". See Kaye, *supra* note 8 at 4 [emphasis in original].

⁴² Dandurand, *supra* note 24 at 330.

⁴³ Vance, Carole S. "States of Contradiction: Twelve Ways to Do Nothing about Trafficking While Pretending To" (2011) 78:3 Social Research 933, online: <<http://www.jstor.org/stable/23347022>> at 938-939.

⁴⁴ Vance, *supra* note 43 at 939.

⁴⁵ Ricard-Guay & Hanley, *supra* note 2 at 38.

⁴⁶ Chuang. "Rescuing Trafficking", *supra* note 5 at 1700.

Sex workers and migrants are not naturally victims, neither inherently weaker or more susceptible to exploitation and control, nor objects to be rescued or waiting for empowerment. Instead, many migrants and female sex workers are rendered especially vulnerable to the exploitation and control that constitute human trafficking as a result of a combination of socio-economic factors; the lack of realizable protections afforded to them in the law; social, racial, and immigration status-based inequalities; and more. Such constructions of victimization are not only problematic in their inaccuracy, however, but also in their potential to justify misguided and ineffective policies. Kaye explains how “[b]y presenting people as ‘unable to speak for themselves and waiting to be saved’ anti-trafficking representations reproduce cycles of dehumanization and objectification. In turn, such dehumanization reinforces stigma and criminalization”.⁴⁷ This then helps to justify criminal justice and security-centred responses (as explored further below).⁴⁸

The Savage

Dominant anti-trafficking discourses focus not only on the individual victim, but also on the individual evil trafficker.⁴⁹ Jennifer Chacón notes that the particularly “‘bad actors’ that are scrutinized tend to be other noncitizens involved in supplying certain markets with trafficked persons rather than the population that consumes the goods and services that these trafficking victims provide”.⁵⁰ Such traffickers are often racialized, such that Makau’s observation that “savages and victims are generally non-white and non-Western, while the saviors are white”⁵¹ in the human rights narrative is an apt one. Importantly, the perpetrators are also *non-state* actors, further helping to distance the state from the role of savage and doing away with any need for an examination of its part in facilitating human trafficking.⁵²

Shifting Identities along the Victim/Criminal Spectrum

⁴⁷ Kaye, *supra* note 8 at 9.

⁴⁸ *Ibid* at 9.

⁴⁹ Chacón. “Tensions and Trade-Offs”, *supra* note 26 at 1628.

⁵⁰ *Ibid* at 1628.

⁵¹ Mutua, *supra* note 40 at 207.

⁵² Vance, *supra* note 43 at 942.

The line between victim and criminal is a fluid one. Indeed, to claim to have been trafficked is to be treated with suspicion, particularly if one does not align with the image of victim as identified in the dominant discourse. Hence, the “body of the abject victim, deserving compassion and care, quickly transforms into the body of a dangerous criminal”.⁵³ Only the saviour remains constant throughout all of this. As Suchman writes, the “identity of the rescue-saviour remains firmly intact [...], while racist structures persist: women go missing, are murdered, and are disappeared through targeted violence, then criminalized, disciplined, and silenced by their self-purported saviours”.⁵⁴

The Practical Implications of this Construction of Victimization

Portraying both trafficked individuals and traffickers in these simplistic ways is problematic in various ways. As Jennifer M. Chacón explains, “presenting trafficking as a product of certain nefarious noncitizens reinforces problematic notions of the noncitizen as inherently more criminally inclined than her citizen counterparts”,⁵⁵ a problem seemingly easily addressed through restrictionist immigration policies that keep traffickers out of the country. Portraying traffickers as savage or evil foreigners has another negative effect, rendering “it more difficult to conceive of ordinary citizens and corporations as perpetrators of trafficking”.⁵⁶

Most importantly, the strategies adopted in response to the reductive narrative about individual victims and rescuers are reactionary and ultimately ineffective – whether the goal is to prevent human trafficking, punish the perpetrators, or protect those trafficked.⁵⁷ They fail to address the structural factors that facilitate human trafficking.⁵⁸ Carole Vance is particularly critical of states who invoke “bogus human rights rhetoric”⁵⁹ (relating, for

⁵³ Vance, *supra* note 43 at 937.

⁵⁴ Suchland, *supra* note 39 at 5.

⁵⁵ Chacón. “Tensions and Trade-Offs”, *supra* note 26 at 1632.

⁵⁶ *Ibid* at 1632.

⁵⁷ Chuang, Janie. “Exploitation Creep and the Unmaking of Human Trafficking Law” (2014) 108:4 American Journal of International Law 609, online: <<http://www.jstor.org/stable/10.5305/amerjintlaw.108.4.0609>> at 612.

⁵⁸ Vance, *supra* note 43 at 938.

⁵⁹ *Ibid* at 942.

example to gender inequality or poverty), as they pretend to respond to human trafficking, while effectively rendering “most victims invisible”.⁶⁰

The construction of victimization also makes it easier to reduce human trafficking to sex trafficking, to the exclusion of other forms of trafficking such as labour trafficking. Labour trafficking fits less easily within the SVS paradigm, therefore challenging the principal narrative Canadians tell themselves about human trafficking. As Alexandra Ricard-Guay and Jill Hanley explain, the perpetrators here are “often Canadian citizens and are employers who are likely to be engaged in a range of legitimate, socially-endorsed business activities, alongside the exploitation of vulnerable individuals”.⁶¹ As such, they are less likely to be viewed as evil traffickers (or savages), and can better evade detection, criminal charges, and prosecution than their non-status counterparts. Those exploited in such cases are also less likely to be viewed as the perfect victims necessitated by the SVS metaphor. Although they are typically racialized and non-Canadians, many are recognized to have chosen voluntarily to come to Canada for economic reasons, demonstrating an agency and initiative inconsistent with the image of the helpless victim. One is even less compelled to view such individuals as victims worthy of protection under the law or access to social and health services, with the “tendency to assume that the nanny and male farm worker are illegal migrants”.⁶² There may be less of a concern about migrants crossing borders illegally in Canada when compared to its southern neighbour. However, the tendency to associate illegality with low-wage migrants exists equally among Canadians, whether such illegality comes in the form of finding ways to jump the so-called immigration queue, to overstay their work permit, or otherwise abuse Canadian generosity. Finally, “[t]he ‘good guy’ role of law enforcement agents and prosecutors in the legal system is also complicated through their dual and contradictory commitments both to human

⁶⁰ Vance, *supra* note 43 at 942.

⁶¹ Beatson, Jesse & Jill Hanley. “The Exploitation of Foreign Workers in Our Own Backyards” (2015) *Committee of Action against Human Trafficking National and International (CATHI)*, online: <http://www.cathii.org/sites/www.cathii.org/files/The%20Exploitation%20of%20Foreign%20Workers%20Report.pdf> at 3.

⁶² Chuang. “Rescuing Trafficking”, *supra* note 5 at 1698.

rights protection and immigration control”,⁶³ in a way that is less of a problem with sex trafficking. As Chuang states, the “simplified version of trafficking is much easier to explain to the general populace than the complex, multilayered narrative concerning the destabilizing effects of globalization and the resulting transnational flow of capital, goods, and people”.⁶⁴

The SVS construction of trafficking can also be problematic because it risks isolating those who are unable to or refuse to self-identify as the victims portrayed in the discourse. A service provider interviewed by scholars Ricard-Guay and Hanley, for example, speaks of how “words like victim, words like human trafficking do not resonate with them. Words like slave are ridiculous, in my opinion, to use... And there’re real implications for people if that’s the language that we’re using to describe this then we’re not reaching those people”.⁶⁵ The effect may be even worse for male trafficked individuals, not only overlooked by service providers and criminal sector actors, but also less likely to recognize themselves as victims of human trafficking given the widely-shared assumption that such victims are female. Indeed, while “exploited women are conceptualized as trafficked, [...] men subjected to the same abuse are more commonly seen as irregular migrants”.⁶⁶ Gender appears to be the principal factor informing victimhood in the human trafficking narrative, over other aspects of identity such as ethnicity, age, race, class, or religion – even though these can just as easily render one vulnerable to trafficking (particularly in the context of labour trafficking.) Anti-trafficking responses are less likely to have the male trafficked individual in mind, leading to services and interventions that may be particularly inadequate (such as female-only shelters).⁶⁷

Challenging Discourses

How we perceive trafficked victims thus has important ramifications regarding the solutions we deem appropriate. As seen above, today’s dominant anti-trafficking discourses “[embed] in the public consciousness a reductive narrative

⁶³ Beatson & Hanley, *supra* note 61 at 3.

⁶⁴ Chuang. “Rescuing Trafficking”, *supra* note 5 at 1698-1699.

⁶⁵ Ricard-Guay & Hanley, *supra* note 2 at 38.

⁶⁶ Chuang. “Rescuing Trafficking”, *supra* note 5 at 1711.

⁶⁷ *Ibid.*

trafficking [...] [that] overlooks, if not discounts, the need for better migration and labor frameworks or socioeconomic policies to counter the negative effects of globalizing trends that drive people to undertake risky migration projects in the first place”.⁶⁸ Rather than solely resorting to criminal justice and human rights approaches, justified through the dominant discourses about human trafficking and the trafficked individual, Canadians should consider how such discourses are inaccurate, simplistic, and help justify dangerous policy implications. We can start questioning such discourses and consider adopting new ones that may be more complex, entail less straightforward solutions, but also reflect the lived experiences of trafficked individuals themselves. Only then can we “adopt and emphasize policies that are guided foremost by a pragmatic, evidence-based approach that grapples with the real-world complexities of human trafficking”.⁶⁹ We can begin to address, in the case of forced labour, “trafficking as a problem rooted in the broader structural issues of poor migration management, ineffective labor protections for poor and unskilled workers, and endemic gender, race, and class discrimination that sustains demand for exploited labor”.⁷⁰

Part II: Overview of the Canadian Response to Human

Trafficking

Canada is a source, transit, and destination country for human trafficking. Ontario, Quebec, Alberta, and British Columbia are the principal human trafficking hubs, while recognizing that “the distribution of charges may in fact reflect the amount of resources put into investigations rather than the actual existence of cases”.⁷¹ Although sex trafficking is the most commonly reported according to the police, this does not necessarily mean it is the most prevalent type of trafficking given

⁶⁸ *Ibid* at 1694.

⁶⁹ *Ibid* at 1659.

⁷⁰ *Ibid* at 1725. See also Mutua, *supra* note 40 at 207 regarding the need for the human rights movement (arguably applicable to human trafficking) to “address deeply lopsided power relations among and within cultures, national economies, states, genders, religions, races and ethnic groups, and other societal cleavages”.⁷⁰

⁷¹ Ricard-Guay & Hanley, *supra* note 2 at 28.

that “sexual exploitation is precisely the focus of state resources and intervention” and other forms of trafficking may simply be more under-reported.⁷²

Human trafficking may initially involve a level of consent (for example, to work in Canada or in the sex industry), accompanied by deceit about the work conditions.⁷³ Traffickers often exert control through confiscating their victims’ identity documents, debt or financial precariousness, or threats of denunciation to family members, immigration officials, and/or to the police.⁷⁴

Legal and Legislative Framework

In accordance with its ratification of the United Nations Palermo Protocol,⁷⁵ Canada introduced several changes to its *Immigration and Refugee Protection Act (IRPA)* in 2001 and its *Criminal Code* in 2005. Such changes render trafficking in persons (TIP) a domestic offence.⁷⁶ Limited to transnational cases, *IRPA* provides for a maximum prison term of life imprisonment and a fine of up to \$1 million for the offence of “knowingly organizing the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion”.⁷⁷ Constraint and coercion can be both psychological and physical.⁷⁸ The *Criminal Code*, on the other hand, applies regardless of whether Canadian borders have been crossed or not. It includes six specific offences prohibiting trafficking in persons (section 279.01), trafficking of minors (section

⁷² Ricard-Guay & Hanley, *supra* note 2 at 28.

⁷³ *Ibid* at 29.

⁷⁴ *Ibid* at 30.

⁷⁵ United Nations General Assembly, *supra* note 13.

⁷⁶ Ricard-Guay & Hanley, *supra* note 2 at 18; Hastie, Bethany & Alison Yule. “Milestone or Missed Opportunity? A Critical Analysis of the Impact of Domotor on the Future of Human Trafficking Cases in Canada” (2014) 19 Appeal 83, online:

<<https://journals.uvic.ca/index.php/appeal/article/view/12886>> at 85.

⁷⁷ *Immigration and Refugee Protection Act*, SC 2001, c 27 at section 118(1).

⁷⁸ Ricard-Guay & Hanley, *supra* note 2 at 30.

279.011),⁷⁹ as well as certain associated acts such as obtaining a material benefit (subsections 279.02(1) and 279.02(2)) and withholding or destroying identity documents (subsections 279.03(1) and 279.03(2)) for the purpose of committing or facilitating trafficking. One commits the primary offence of TIP under the *Criminal Code* where one “recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation”,⁸⁰ placing a clear emphasis on exploitation. There is such exploitation if a person causes “someone to provide or offer work or services out of fear that refusal will endanger one's security or that of a loved one”.⁸¹ Consent cannot exist under such circumstances.⁸² Different factors that the court should consider in determining whether such exploitation is present include “the fact of having used or threatened to use (i) violence, (ii) force or any other form of constraint, or otherwise (iii) having made false declarations or used other fraudulent means”.⁸³ As of 2012, these factors were reflected in the definition of exploitation set out in the *Criminal Code*, with the goal of facilitating the prosecution of trafficking.⁸⁴ It should be noted that movement is not required for this offence because human trafficking is about exploitation, rather than movement.⁸⁵ Where there are aggravating factors such as kidnapping, aggravated assault, aggravated sexual assault or death, the maximum penalty for the primary trafficking in persons offence is life imprisonment, or fourteen years otherwise.⁸⁶

In addition to the human trafficking-specific offences, perpetrators are often charged with charges for other offences

⁷⁹ Note that as of 2010, with the coming into force of Bill C-268, there is a mandatory minimum prison sentence of five years for cases involving minors. See Ricard-Guay & Hanley, *supra* note 2 at 19.

⁸⁰ *Criminal Code*, RSC 1985, c C-46 at section 279.01(1).

⁸¹ Ricard-Guay & Hanley, *supra* note 2 at 18; See *Criminal Code*, *supra* note 80 at section 279.04(1).

⁸² Ricard-Guay & Hanley, *supra* note 2 at 19.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Department of Justice, “Legislation” (2016), online: <http://www.justice.gc.ca/eng/cj-jp/tp/legis-loi.html>.

⁸⁶ *Criminal Code*, *supra* note 80 at section 279.

listed in the *Criminal Code*, such as procurement, abduction, assault, sexual assault, confinement, extortion, threats, as well as offences connected to prostitution and criminal organizations.⁸⁷

In 2006, Canada introduced a Temporary Resident Permit (TRP) for migrant victims of trafficking who are neither permanent residents nor Canadian citizens. This permit “provides temporary regularized immigration status to trafficked persons in Canada with the goal of providing time for reflection and recovery, and immediate assistance with basic needs in the aftermath of exiting a trafficking situation”.⁸⁸ As of 2007, permit-holders can remain for up to 180 days (though the permit is renewable for up to three years), have coverage for healthcare and therapeutic services through the Interim Federal Healthcare Programme (IFHP), and have administrative fees waived when applying for a work permit. This TRP is granted at the discretion of immigration officials.⁸⁹ These officials also determine whether to grant renewal beyond 180 days, based on whether the permit-holder can be positively identified as a trafficked person; “whether it is reasonably safe and possible for the victims to return to and to re-establish a life in the country of origin or last permanent residence”;⁹⁰ “whether the victims are needed, and willing, to assist authorities in an investigation and/or in criminal proceedings of a trafficking offence”;⁹¹ and “any other reason that the officer may judge relevant”.⁹²

The RCMP established the Human Trafficking National Coordination Centre (HTNCC) in 2005, allowing it to liaise and coordinate law enforcement, criminal intelligence, and awareness efforts. This legislative measure is targeted towards prosecution, rather than victim support.⁹³ In addition, in 2012, Canada adopted a National Action Plan to Combat Human Trafficking (“Action Plan”), with the goal of “implementing a global, coordinated, national response to fight human trafficking”.⁹⁴ It

⁸⁷ Ricard-Guay & Hanley, *supra* note 2 at 18.

⁸⁸ Hastie & Yule, *supra* note 76 at 92.

⁸⁹ Ricard-Guay & Hanley, *supra* note 2 at 19.

⁹⁰ Hastie & Yule, *supra* note 76 at 92.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Ricard-Guay & Hanley, *supra* note 2 at 21-22.

⁹⁴ *Ibid.* at 21.

provided for training programmes targeted towards police forces, front-line workers, judges, and prosecutors; awareness campaigns targeted for sectors of the population; regional consultations with frontline workers (to “help orient future government involvement and projects”)⁹⁵; the funding of research projects about forced labour and trafficking of indigenous persons; awareness workshops for provincial labour standard inspectors (to help facilitate the identification of forced labour); the establishment of a specialized investigative unit composed of RCMP, local police, and CBSA actors based in Montreal; and more.⁹⁶

Shortcomings

The Canadian response to human trafficking has been disappointing in its emphasis on security, prosecution, and border control, while obscuring the need for meaningful victim protection and support. Whatever support is available to trafficked individuals is normally provided through non-governmental channels. No national data system currently exists to track the number of victims.⁹⁷

The security-centric efforts have had limited success. Many prosecutors continue to be unwilling to pursue human trafficking charges, preferring to press other related and more easily prosecuted charges.⁹⁸ Where human trafficking charges are pressed, the sentences ordered have been minimal. According to Hastie and Yule writing in 2014, these generally range “from 18 months to seven years, though cases without aggravating factors such as extreme physical violence have tended to attract sentences of three years or less”.⁹⁹ Although the situation has improved since the first successful human trafficking prosecution, which involved a three-year sentence for Imani Nakpangi,¹⁰⁰ the sentences continue to significantly fall short from the maximum provided by law.

⁹⁵ Ricard-Guay & Hanley, *supra* note 2 at 21.

⁹⁶ *Ibid* at 21-22.

⁹⁷ *Ibid* at 17-18.

⁹⁸ *Ibid* at 19.

⁹⁹ Hastie & Yule, *supra* note 76 at 85-86.

¹⁰⁰ *Ibid* at 86.

While the TRP for victims of trafficking is a measure that affords a level of protection to international victims so that they can remain in Canada, it has severe shortcomings. To start, many simply cannot reliably expect to be issued such a permit, such that it is under-used, partly because immigration officials do not grant it easily.¹⁰¹ Beyond the lack of knowledge about the TRP among immigration officers, there is also a lack of clarity regarding the criteria that they will consider in deciding whether to grant a TRP. Some officers may also incorrectly suggest that applicants pursue refugee claims or other alternative avenues to regularize their immigration status, instead of applying for the TRP, even where such options may be inappropriate and almost certainly likely to be unsuccessful.¹⁰² Where a trafficked individual is a witness to a case being prosecuted, there is a greater likelihood of obtaining a TRP, though its issuance is still not guaranteed. Given the limited cases being prosecuted, obtaining a TRP is not a realistic option for many. Even where the TRP is granted, it is a short-term protective measure that does not bar against detention or deportation.¹⁰³

The Action Plan's imbalanced funding distribution among different actors has also been found to be problematic, demonstrating the government's prioritization of border control and security over victim protection. Law enforcement agencies and prevention initiatives (such as awareness campaigns and research projects) receive a disproportionate allocation of financial resources when compared to victim protection and rehabilitation efforts, which receive only a 10% cut of the \$5,000,000 budget. The vagueness of the language used when discussing victim protection, when compared to the specific projects and outcomes mentioned for the purposes of law enforcement, also illustrates governmental priorities.¹⁰⁴ Perhaps more problematically, the arguable overemphasis on the Canada Border Services Agency (CBSA)'s role in the Action Plan has led some to question whether the plan's goal is "to strengthen state tools to control irregular migration or [instead] to protect potential

¹⁰¹ Ricard-Guay & Hanley, *supra* note 2 at 19.

¹⁰² Hastie & Yule, *supra* note 76 at 92.

¹⁰³ *Ibid* at 81-83.

¹⁰⁴ Hastie & Yule, *supra* note 76 at 91.

victims".¹⁰⁵ What Chacón noted in the American context arguably applies in Canada: "As officials have worked to train individuals to recognize trafficking situations, the training internalizes the message that trafficking is perpetrated by foreign criminal organizations and is best solved through aggressive policing at the border".¹⁰⁶ In addition, while the Action Plan has allowed for the greater participation of non-governmental organizations (NGOs), "their role remains consultative [...] [and] [p]riority was instead accorded to strengthening partnership among law enforcement organizations".¹⁰⁷

To bolster the Action Plan, Ricard-Guay and Hanley suggest the establishment of an organizational and institutional structure that will not only clearly set out the responsibilities of different actors and better allow for their coordination, but is also aimed at victim protection. For example, they recommend the adoption of a referral mechanism to ensure victims can receive the appropriate support. Providing sufficient financial resources would also be key.¹⁰⁸

The Limits of Criminal Justice and Immigration Control Approaches

While framed as a matter of human rights, human trafficking continues to primarily be addressed in Canada through a criminal justice approach. The dominant construction of human trafficking "regards it mostly as an organized crime and illegal migration problem, calling for law enforcement and immigration control interventions".¹⁰⁹ Given human trafficking's severity and its inherently harmful nature, its treatment through a criminal law lens is not misplaced or inappropriate, allowing for the prosecution of human traffickers, appropriately subject to the power of the state, as well as the dismantling of criminal networks. However, there are limitations to treating it overwhelmingly as a

¹⁰⁵ Ricard-Guay & Hanley, *supra* note 2 at 23.

¹⁰⁶ Chacón. "Tensions and Trade-Offs", *supra* note 26 at 1630.

¹⁰⁷ Ricard-Guay & Hanley, *supra* note 2 at 21.

¹⁰⁸ *Ibid* at 23.

¹⁰⁹ Dandurand, *supra* note 24 at 330.

criminal justice matter, as has been recognized and explored by many scholars.¹¹⁰

Canada has responded to human trafficking by adopting increasingly restrictive immigration and border control policies.¹¹¹ However, such policies “provide the conditions of vulnerability, desperation, and dependency under which trafficking flourishes.”¹¹² Carole Vance explains how the “emphasis on criminal law makes it difficult for trafficked people to escape the vortex that deems them criminal offenders, even in texts that nod to their new [...] status as crime victims. The ethos of criminality spills over to the trafficked persons, exacerbated by suspicion and resentment toward undocumented migrants and prostitutes”.¹¹³ They may consequently be subject to abusive and coercive treatment by many actors at different stages, whether in detention facilities or shelters, in addition to facing the threat of deportation if they are undocumented migrants. Indeed, many migrants in a situation of forced labour fear reporting such trafficking, knowing they risk detention or deportation if they are in a situation of irregular migration, such as being present in Canada with an expired work permit.¹¹⁴ This remains the case even if they arrived “legally”, with the proper documents in order, and became “illegal” migrants as a result of their traffickers’ control tactics.

In Canada, migrants are often detained in remote locations and made subject to the “potentially and actually violent control of those who hold them”.¹¹⁵ As explained by Julia Davidson, their situation is worse than that of citizens in criminal detention, not benefiting from as many legal guarantees and protections.¹¹⁶ Most ironically, through border control and securitization, states arguably engage in activities resembling human trafficking.¹¹⁷ More specifically, she describes how: “Immigration detainees are [...] moved against their will into a

¹¹⁰ See Dandurand, *supra* note 24; Chacón. “Tensions and Trade-Offs”, *supra* note 26.

¹¹¹ Vance, *supra* note 43 at 935.

¹¹² *Ibid.*

¹¹³ *Ibid* at 936.

¹¹⁴ Ricard-Guay & Hanley, *supra* note 2 at 33.

¹¹⁵ Davidson, *supra* note 4 at 66.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid* at 67.

situation in which they are controlled by means of violence or its threat, and exploited for economic gain [for the many private security companies]. This sounds very much like what is described as [human trafficking] when perpetrated without the sanction of the state".¹¹⁸ Paradoxically, however, such treatment does not change the state's role as saviour in the dominant discourse.¹¹⁹

In addition, while the possibility of criminal prosecution may be an appealing one, it is one that often fails to materialize for a variety of reasons, not least of which because of the difficulty of satisfying the necessary elements of the crime. As stated by Vance, while many "think of criminal law as the most powerful response, the 'big gun,' [...] it is one that is very hard to fire, since proving trafficking requires a tight chain of evidence and intent".¹²⁰ The fearful reluctance of many trafficked individuals to report trafficking and to act as witnesses only compound the problem, rendering human trafficking a particularly difficult crime to prosecute.

The criminal justice and immigration control policies adopted have not only had limited success in punishing and stopping traffickers and minimizing human trafficking, but also increase the marginalization of migrants and the vulnerability of trafficked individuals.¹²¹ Undermining anti-trafficking objectives in this way, such policies need to be re-evaluated and new more contextually-specific approaches adopted.

Part III: Creative Approaches

While criminal justice may be an intrinsically appropriate response to the wrongs and violence inherent to human trafficking, its limitations make it clear that it should not be the only one. Perhaps as a result of the failures of such responses, there has been increasing interest in other, non-traditional approaches to human trafficking. This section of the paper will explore civil litigation (a private law of action) and private sector projects as additional possible responses, exploring both their potential and

¹¹⁸ Davidson, *supra* note 4 at 67.

¹¹⁹ *Ibid.*

¹²⁰ Vance, *supra* note 43 at 936-937.

¹²¹ Dandurand, *supra* note 24 at 330.

limitations in addressing the concerns raised with traditional criminal justice-focused approaches.

Civil Litigation (A Private Right of Action)

Ontario recently passed Bill 96, the *Anti-Human Trafficking Act*,¹²² which created a tort of human trafficking, a new civil cause of action, to allow trafficked individuals to sue their traffickers without proof of damages. It additionally created a new civil restraining order.¹²³ According to the Minister of Community and Social Service, Dr. Helena Jaczek, this bill is “part of the comprehensive approach [Ontario] [is] taking to end human trafficking and support survivors, working across ten government ministries and with external partners in many different sectors”.¹²⁴ The legislation is claimed to “mak[e] it easier for survivors to receive compensation from those who traffic them, [...] helping them to reclaim and rebuild their lives”.¹²⁵

A trafficking-specific private right of action has been available in the American context since 2003, with the Trafficking Victims Protection Reauthorization Act (TVPRA) amendment of the Trafficking Victims Protection Act (TVPA) of 2000.¹²⁶ While criticized for being under-utilized, private trafficking lawsuits have

¹²² Bill 96, *Anti-Human Trafficking Act*, Legislative Assembly of Ontario, 2017, online:
<http://ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4513>.

¹²³ Ontario Bar Association, “Bill 96, the *Anti-Human Trafficking Act*, 2017” (2017), online:
<<https://www.oba.org/CMSPages/GetFile.aspx?guid=2a267052-156f-4a48-bcf6-1ea253a4f2d5>> at 2.

¹²⁴ “Ontario Passes Legislation to Protect Human Trafficking Survivors” (2017), *Ontario Newsroom*, online:
<<https://news.ontario.ca/owd/en/2017/05/ontario-passes-legislation-to-protect-human-trafficking-survivors.html>>.

¹²⁵ “Ontario Passes Legislation to Protect Human Trafficking Survivors”, *supra* note 124.

¹²⁶ Kim, Kathleen and Daniel Werner. *Civil Litigation on Behalf of Victims of Human Trafficking* (Los Angeles: Legal Aid Foundation of Los Angeles, 2005), online:
<<http://www.oas.org/atip/Reports/Civil%20Litigation%20on%20behalf%20of%20TIP%20victims.pdf>> at iv and 20.

garnered support as an alternative tool and supplement to criminal law mechanisms. The main reason is that they are seen to respond to a major limitation of criminal prosecutions, constituting “a source of empowerment for victims who exercise discretion over the direction of their case and can utilize the civil case to express their own narratives”,¹²⁷ as the plaintiff parties rather than the victims/witnesses of the case. Civil actions have been better able to provide trafficked individuals with the financial means to rebuild their lives in the form of monetary damages, even in the absence of parallel criminal cases (which can provide survivors with restitution), partly because of the lower burden of proof involved. Such lawsuits additionally help deter individuals from engaging in trafficking.¹²⁸ Given that civil litigation is survivor-rather than prosecutor-led, a private right of action can “[increase] accountability for wrongdoing and [vindicate] harms left unvindicated by government enforcement agencies”.¹²⁹ The greater control given to survivors, the lower burden of proof, and the greater possibility of financial compensation (when compared to criminal cases) may make civil litigation a critical tool to addressing the wrongs experienced by trafficked individuals and providing them with a measure of relief.¹³⁰

However, civil litigation is not always appropriate and is also subject to important limitations. Beyond requiring major investments in time and money, it may be a source of new trauma and re-victimization for trafficked individuals, particularly in the case of sex trafficking.¹³¹ As Barbora Bukovksa found, “[l]itigation can have a great impact on a particular issue, but without extensive support for victims it can be completely disruptive for the individual. It can very easily happens that the victims are, in a sense, manipulated and abused twice when the focus of the action is not the victim but an ideology alien to

¹²⁷ Kim, Kathleen. “The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers” (2009) 1:8 University of Chicago Legal Forum, online: <<http://chicagounbound.uchicago.edu/uclf/vol2009/iss1/8>> at 292.

¹²⁸ Kim & Werner, *supra* note 126 at 1.

¹²⁹ Kim, *supra* note 127 at 293.

¹³⁰ Kim & Werner, *supra* note 126 at ivs.

¹³¹ “Civil Litigation on Behalf of Trafficking Survivors” (2010), *The Human Trafficking Project*, online: <<http://www.traffickingproject.org/2009/08/civil-litigation-on-behalf-of.html>>.

them”.¹³² This might be the case where lawyers take on cases for strategic litigation purposes, such as to develop the jurisprudence relating to human trafficking, and fail to mitigate the power imbalance that exists between them and their clients.¹³³ To avoid the remedies provided under Bill 96 from being merely symbolic, the Ontario Bar Association has emphasized the need for greater legal aid funding and resources dedicated to trafficked individuals, as well as support for consultation and information sharing among service providers.¹³⁴ Given the role NGOs play in identifying trafficked individuals, greater governmental funding can help to increase the number and the success of private actions filed.¹³⁵ Lawyers can additionally make an effort to engage in what Bukovska describes as rebellious lawyering: “see[ing] themselves as more a part of the communities or groups for whom they work and [...] shar[ing] the special knowledge and expertise they have gained through their education and expertise”. As much as possible, they can move forward with the litigation in a way that ensures the survivor remains at the forefront of the case and retains control over it.¹³⁶

Tort law is also fundamentally different from criminal law and may fail to provide the vindication achieved through finding traffickers criminally responsible. As Catherine Barber states, “the most that tort law can do [is] award financial compensation to victims for wrongful action, wrongdoing or a violation of rights. Tort litigation is not about proving criminal responsibility for an action”.¹³⁷ A successful tort claim simply may not be able to capture the morally wrong nature of human trafficking in the way that a criminal conviction can.

¹³² Bukovska, *supra* note 38 at 13.

¹³³ Bukovska, *supra* note 38 at 13.

¹³⁴ Ontario Bar Association, *supra* note 123 at 3.

¹³⁵ Nam, Jennifer S. “The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims” (2007) 107:7 Columbia Law Journal 1655, online: <<http://www.jstor.org/stable/40041732>> at 1692.

¹³⁶ Bukovska, *supra* note 38 at 16.

¹³⁷ Barber, Catherine Corey. “Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations” (2012) 16:3 The International Journal of Human Rights 411, online: <<http://www.tandfonline.com/doi/abs/10.1080/13642987.2011.566723>> at 420.

The Financial Sector: "Following the Money"

Another response that can complement the traditional criminal justice approach features greater involvement on the part of private sector financial corporations. This approach recognizes that human trafficking, fundamentally, is a business, whose work can be disrupted through "following the money" and targeting the proceeds. The high profits and relative lack of success of criminal prosecutions have made human trafficking a "low-risk, high-reward crime".¹³⁸ Focusing on the proceeds of trafficking is meant to strengthen the capacity of law enforcement players to carry out effective investigations and prosecutions.¹³⁹ Financial investigations, which occur parallel to regular police investigations, might entail "looking at the modelling of financial flows, the collection and analysis of relevant data, finding weak points in the business, and the disruption of financial flows".¹⁴⁰ For example, a public-private partnership between financial institutions, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) and law enforcement offices allow suspicious transactions to be identified, reported, and investigated.¹⁴¹

Focused on aiding law enforcement services in investigation and prosecution, financial sector solutions arguably do not challenge the dominant narrative that calls for a criminal justice approach. However, such solutions can help mitigate some of the failings of the criminal justice response, by strengthening the capacity of those primarily involved in carrying out this response. By helping police or RCMP officers, for example, better understand trafficking patterns and behaviours, financial institutions can help disrupt trafficking networks and render

¹³⁸ Dandurand, *supra* note 24 at 327.

¹³⁹ *Ibid* at 327-328

¹⁴⁰ "Following the Money: Connections Between Human Trafficking and Money Laundering" (2015) UNODC, online: <https://www.unodc.org/unodc/en/human-trafficking/human-trafficking-illicit-financial-flows-workshop.html>.

¹⁴¹ "How the Financial Services Sector Can Help Tackle Human Trafficking" (2017) GrantThornton, online: https://www.grantthornton.global/globalassets/1.-member-firms/global/insights/article-pdfs/2017/how-the-financial-services-sector-can-help-tackle-human-trafficking_grant-thornton.pdf.

trafficking activities more costly and less tempting.¹⁴² Involving private sector corporate actors also generally supports multisectoral cooperation in anti-trafficking work, moving away from the near exclusive focus on police, immigration, and NGO actors to involve actors with much-needed expertise. This may have the negative effect of further distancing corporations from the role of “savage”, making it harder to conceive of corporations as responsible for human trafficking,¹⁴³ as explored in Part I. This may be problematic given corporate complicity in facilitating human trafficking.¹⁴⁴

Technology Firms and Data Collection

There is a pressing need for more reliable data from a variety of sources to better inform our understanding of human trafficking and those trafficked, and to ultimately develop more effective anti-trafficking responses. Current data derives largely from criminal intelligence and “completely obscures the existence of [...] [a] vulnerable group: migrants, particularly women, with precarious status”.¹⁴⁵ This is not to say that other actors lack data; instead, with actors from government, NGOs, academic, or law enforcement failing to share their data, the situation is one of multiple existing data silos making it hard to depict an accurate

¹⁴² “How the Financial Services Sector Can Help Tackle Human Trafficking”, *supra* note 141.

¹⁴³ But see Lee, Dave. “Sex Trafficking Bill Gets Tech Firms’ Backing” (2017) BBC News, online: <<http://www.bbc.com/news/technology-41868143>>, regarding a bill that would hold corporations liable in certain cases for trafficking activities.

¹⁴⁴ Given space constraints, this paper cannot explore this line of thought further, but a good overview of corporate complicity and liability for human trafficking can be found here: Institute for Human Rights and Business. “Corporate Liability for Forced Labour and Human Trafficking” (2016), online: <https://www.ihrb.org/uploads/reports/IHRB%2C_Corporate_Liability_for_Forced_Labour_and_Human_Trafficking%2C_Oct._2016.pdf>; Jennifer Chacón also explores how “mainstream companies and individuals benefit from trafficked labor, directly and indirectly. An understanding of this complicity could lead to more rational discussions regarding issues of labor and migration”. See Chacón. “Tensions and Trade-Offs”, *supra* note 26 at 1635.

¹⁴⁵ Ricard-Guay & Hanley, *supra* note 2 at 32.

picture of human trafficking.¹⁴⁶ The clandestine, criminalized, and stigmatized nature of trafficking make such data hard to obtain,¹⁴⁷ with individuals often unwilling to report instances of trafficking and trafficked persons hard to identify. The data “only provides a partial portrait of the situation, based on cases reported to the police”,¹⁴⁸ rather than reflecting the reality of the scale or nature of the phenomenon. There is a need for data on not only the identities of those trafficked and their traffickers, but also the patterns of human trafficking and the factors behind successful and failed law enforcement, prosecution, and service provision strategies.¹⁴⁹

This is where private sector organizations and corporations can once again step in. As Hannah Augur remarks, “[m]any efforts to solve crimes with data is actually coming from outside the law department. From community efforts to non-profits and even full business solutions, it seems the world of data science is actively using their skills for good”.¹⁵⁰ Indeed, organizations like Peace-Work can use analytics to identify patterns in large amounts of data and render such data both accessible and comprehensible to law enforcement groups, service providers, and policymakers so that they can better respond to human trafficking. This data comes from a variety of sources, including the deep web, social media platforms, Google searches, and more.¹⁵¹ Such data analytics allowed organizations to recognize the key role played by emergency room doctors when trained to spot signs of human

¹⁴⁶ Danes, R. “These Noble Nerds Fight Human Trafficking with Data, Blockchain Analytics” (2017) *Silicon Angle*, online: <<https://siliconangle.com/blog/2017/10/02/noble-nerds-fight-human-trafficking-data-blockchain-analytics-splunkconf17-womenintech/>>.

¹⁴⁷ Ricard-Guay & Hanley, *supra* note 2 at 133.

¹⁴⁸ *Ibid* at 25.

¹⁴⁹ Dandurand, *supra* note 24 at 332.

¹⁵⁰ Augur, Hannah. “Data Science Leveraged to Stop Human Trafficking” (2016) *Dataconomy*, online: <<http://dataconomy.com/2016/05/data-science-leveraged-stop-human-trafficking/>>.

¹⁵¹ Shewani, Rajesh. “Big Data and the Fight Against Human Trafficking” (n.d.), *Data Points Blog*, online: <<http://blogs.teradata.com/data-points/big-data-fight-human-trafficking/>>.

trafficking.¹⁵² Data analytics conducted at The Polaris Project¹⁵³ in the United States, on the other hand, identified the retail-like structure of networks of illicit massage businesses, such that tracing business records can help law enforcement officers identify other illicit businesses. This can help “show them that if they want to make cases, they don’t have to rely on the testimony of a victim to get the conviction against the trafficker”.¹⁵⁴ Organizations have also used data to better predict trafficking routes, to help with prevention efforts.¹⁵⁵ Most importantly, data-enabled insights can help shift the narratives told about human trafficking and inform the ways in which Canada chooses to respond.

Different sectors in society can thus respond to human trafficking in different ways – using both legal and extra-legal tools. All of these more creative solutions however still primarily involve a criminal justice-centred approach. They ultimately rely on and elevate the role of law enforcement. For example, data collection and hotlines are often suggested as anti-trafficking tools that can serve to help law enforcement authorities tackle the problem of human trafficking. A more nuanced understanding of the problem of human trafficking, as explored in the first half of this paper, however calls for a consideration of solutions that move beyond the criminal justice framework. This will be explored in the following section.

¹⁵² “Analytics Tackles the Scourge of Human Trafficking: Organizations Band Together to Use Data for Good” (n.d.), SAS, online:

<https://www.sas.com/en_us/insights/articles/analytics/analytics-tackles-human-trafficking.html>.

¹⁵³ “Google Helps Launch Global Human Trafficking Network to Fight Slavery (Video)” (2013) *The Huffington Post*, online:

<http://www.huffingtonpost.ca/entry/google-impact-award-given_n_3101663>.

¹⁵⁴ Woodie, Alex. “How Data Analytics is Helping to Fight Human Trafficking” (2016) *Datanami*, online: <<https://www.datanami.com/2016/10/07/data-analytics-fight-human-trafficking/>>.

¹⁵⁵ “Global Emancipation Network and Splunk Partner” (2017) *Global Emancipation Network*, online: <<http://www.globalemancipation.ngo/gen-splunk-human-trafficking/>>.

Part IV: New Discourses (For New Policies)

Counter-narratives can serve as an important tool to combat human trafficking. After all, discourse not only “reinforces [power], but also undermines and exposes it, renders it fragile and makes it possible to thwart”.¹⁵⁶ Building such counter-narratives begins by recognizing the complexity of human trafficking and its multi-dimensional nature that call for a contextualized understanding based on better data, as well as the words, stories, and narratives told by those trafficked themselves. In challenging the dominant discourse and presenting a counter-narrative “in a way that captures lived experience”,¹⁵⁷ one can seek to shape responses and policies that will better address the systemic and structural barriers identified as causing or allowing for human trafficking. Instead of promoting excessive criminal justice and immigration responses, one can start to recognize the complicity of the state and regular Canadians who view exploitative conditions for racialized migrants as normal. This may call for greater educational efforts to start challenging the “social norms that permit exploitation of vulnerable labor”.¹⁵⁸

Immigration Law and Labour Reforms

From interviews conducted with individuals who were trafficked, Hayli Millar and Tamara O’Doherty concluded that, “extending labour rights to precarious status workers and proactively using other systems of law (such as by-law enforcement) could function more efficiently to prevent labour exploitation rather than a system of criminalization”.¹⁵⁹ Such reforms in both immigration and labour law could include providing easier pathways to a regularized immigration status to

¹⁵⁶ Foucault, Michel. *The History of Sexuality: The Will to Knowledge* (London: Penguin Books, 1990) at 101.

¹⁵⁷ De Shalit & van der Meulen, *supra* note 11 at 3.

¹⁵⁸ Chuang, Janie. “Beyond a Snapshot: Preventing Human Trafficking in the Global Economy” (2006) 13:1 *Indiana Journal of Global Legal Studies* 137, online: <<http://www.jstor.org/stable/10.2979/gls.2006.13.1.137>> at 159.

¹⁵⁹ Millar, Hayli & Tamara O’Doherty. “The Palermo Protocol & Canada: The Evolution and Human Rights Impact of Anti-Trafficking Laws in Canada (2002-2015)” (2015), online: <<https://www.ufv.ca/media/assets/criminology/Palermo-Project-Key-Findings-Report-15-October-2015-with-copyright-2.pdf>> at 65.

migrants and providing stronger guarantees against deportation. This can significantly reduce the risks faced by non-status migrant workers when reporting incidents of labour trafficking and assisting with criminal investigations and prosecutions.¹⁶⁰

While there are limits to the effectiveness of the law in producing social change, legal reform can still play an important role in better protecting those vulnerable to trafficking. Orly Lobel notes how “[m]arginalized groups have used legal reform precisely because they lacked power. Despite limitations, these groups have often successfully secured their interests through legislative and judicial victories.”¹⁶¹ Such legal reforms will not solve human trafficking; there is evidently no panacea and the goal of this paper is not to attempt to identify one. However, they comprise one response that can help address the shortcomings of the criminal justice approach to human trafficking, better reflecting a less simplistic and more informed conceptualization of the phenomenon and of the individuals involved.

*Migrants and Inclusivity: Re-imagining
Citizenship/Belonging and the Right to Vote*

As explored above, the anti-trafficking project has the power to “[shape] existing boundaries of social organization, including discussions of human rights, citizenship, migration, and national security”.¹⁶² Although this has thus far meant a tightening of such boundaries (represented, perhaps, most clearly, through the tightening of national borders), I argue that this debate can also be used to re-examine our conceptions of citizenship, belonging, and the non-status migrant’s role in Canadian society.

Until we start viewing such individuals differently and constructing a different narrative about human trafficking and those who are trafficked – one that acknowledges the racism, classism, sexism, and other socio-economic structural factors that serve as drivers of human trafficking – we will continue to do a

¹⁶⁰ Millar & O’Doherty, *supra* note 159 at 66; Chuang. “Rescuing Trafficking”, *supra* note 5 at 1726.

¹⁶¹ Lobel, Orly. “The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics” (2007) 120:4 Harvard Law Review 9937 at 988.

¹⁶² *Ibid* at 26.

disservice to those trafficked. Awareness campaigns can help by rendering labour trafficking more visible in the public consciousness and by making clear the complicity of all Canadians in supporting the demand for cheap labour. However, any such campaigns led by Canadians and targeted towards the non-trafficked and immigration status-bearing Canadian population will not be enough. This is partly because such an approach arguably continues to perpetuate the saviour-victim model – though having trafficked individuals take a lead role in such campaigns could help address this concern. The more important concern has to do with the reality that the position of non-status migrants cannot hope to be made secure if it is always tied to changing political tides and shifting pro- or anti-migration sentiments.

Instead, there needs to be more concrete ways to ensure the empowerment of non-status migrants. Civil litigation, as explored above, can help change this perception of trafficked individuals, granting them the ability to take control of a case and thus promoting their legal empowerment. However, it is imperative that the term “legal empowerment” be understood more broadly. As Dan Banik explains, “the ‘legal’ aspect ‘extends far beyond the confines of the purely formal legal system’ to that of ‘political empowerment’”.¹⁶³ The ability to bring cases forward in the courts may empower migrants, however such empowerment will be limited until it extends to the political sphere where their voices can be used to directly start shifting the discourse on migrants and human trafficking. One way to do this would be through giving non-status migrants the right to vote, which is currently held only by Canadian citizens, perhaps after a requisite number of years of residence in Canada. Although such a proposal may seem far-fetched, enfranchising foreigners has already occurred in many North American cities.¹⁶⁴ Tying voting

¹⁶³ Banik, Dan “Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication” (2009) 1:1 *Hague Journal on the Rule of Law* 117 at 130.

¹⁶⁴ Haltiwanger, John. “Immigrants Are Getting the Right to Vote in Cities Across America” (2017) *Newsweek*, online: <http://www.newsweek.com/immigrants-are-getting-right-vote-cities-across-america-664467>; Mendleson, Rachel. “Giving Non-Citizens the Right to Vote in City Elections: Your Questions Answered” (2013), *Toronto Star*, online:

rights to citizenship is a contestable notion, and arguably should re-examined, particularly given the limbo of permanent temporariness (returning year after year to Canada as temporary migrants) in which low-wage migrants increasingly find themselves in Canada.¹⁶⁵ Voting rights would help trafficked persons directly challenge their representation in the dominant discourse about human trafficking as victims “unable to speak for themselves and waiting to be saved”¹⁶⁶ as identified in the beginning of this paper.

Conclusion

As explored in this paper, how we – whether individually, as a society, or a global community – conceive of human trafficking has important ramifications. It influences how we view the trafficked individuals and where they lie along the victim/criminal (legal/illegal) spectrum. It then determines “whether a victim is recognized as in need of protection [...] or, alternatively, ought to be repatriated home for breaching immigration rules”.¹⁶⁷ This consequently informs the way in which we believe the trafficked individuals should be treated – whether primarily through protective measures or through increasing criminalization.¹⁶⁸ How we, as a society, view human trafficking and those involved will determine how we respond to it whether through “criminal justice, border controls, labor regulation, victim protection or tackling root causes, or a combination of two or more of these”.¹⁶⁹ Recognizing the problems with the current

https://www.thestar.com/news/city_hall/2013/06/12/giving_noncitizens_the_right_to_vote_in_city_elections_your_questions_answered.html>.

¹⁶⁵ Hari, Amrita. “Temporariness, Rights, and Citizenship: The Latest Chapter in Canada’s Exclusionary Migration and Refugee History” (2014) 30:2 *Refuge* 35, online:

<https://refuge.journals.yorku.ca/index.php/refuge/article/view/39617>> at 36.

¹⁶⁶ Kaye, *supra* note 8 at 9.

¹⁶⁷ Edwards, Alice. “Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor” (2007) 36:1 *Denver Journal of International Law and Policy* 9, online: <http://www.law.du.edu/documents/djilp/36No1/Traffic-Human-Beings-Intersection-Criminal-Justice-Human-Rights-AsylumMigration-Labor-Alice-Edwards.pdf>> at 52.

¹⁶⁸ Edwards, *supra* note 167 at 52.

¹⁶⁹ *Ibid.*

dominant discourses on human trafficking and those trafficked is the first important step; challenging them with new discourses is the next. It is only then that meaningful, survivor-informed, and effective solutions can hope to be reached.

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