

**STREAM READINGS**

**LAW AND INEQUALITY:  
DEBT AND LABOR**



**IGLP SCHOLARS WORKSHOP | BANGKOK, THAILAND | JANUARY 6 - 10, 2019**



## Law and Inequality: Debt and Labor

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### Description

This Stream investigates legal reform strategies geared towards inducing economic growth and social welfare. We will explore the role of law in economic and social theories of development, the global and intellectual context that channels the range of development reform, and recent shifts in development theory and state practice as they impact labor and the working environment.

# TABLE OF CONTENTS

## Law and Inequality: Debt and Labor

Source	Pages
Robin McDowell, Margie Mason, and Martha Mendoza, "Slaves May Have Caught the Fish You Bought", Associated Press, March 25th, 2015.	1-5
Margie Mason, "Fishing Slaves No More, but Freedom Brings New Struggles", Associated Press, July 12th, 2017.	5-8
Martha Mendoza, "Obama Bans US Imports of Slave-Produced Goods", Associated Press, February 25th, 2016.	8-9
Annie Kelly, "Thai Seafood: Are the Prawns on Your Plate Still Fished by Slaves?", The Guardian, January 23rd, 2018.	9-10
Ministry of Foreign Affairs of the Kingdom of Thailand, "Combating Forced Labor and Trafficking in Persons & Enhancing Supply Chain Transparency in the Fishery Sector: Thailand's Progress, January 2015–March 2016" (excerpt, p. 9).	11
Ministry of Foreign Affairs of the Kingdom of Thailand, "Press Release: Thailand's Comments on Report on Labour Situation in Fishing Industry of Human Rights Watch", January 25th, 2018.	11-12
J.J. Rose, "Thailand's Slave Fishermen: What's Needed to Solve the Crisis?", Al Jazeera, September 13th, 2018.	12-13
Kerry Rittich, 'Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking', in Prabha Kotiswaran (ed.), Revisiting the Law and Governance of Trafficking: Forced Labor and Modern Slavery, Cambridge University Press, 2017, pp. 238-270 (excerpts, pp. 238-252).	14-21
Karen Engle, "Anti-Impunity and the Turn to Criminal Law in Human Rights", Cornell Law Review, Vol. 100, No. 5, 2015, pp. 1069-1128 (excerpts, pp. 1070-1079, 1119-1127).	22-24
Karl Klare, "Critical Legal Theory in a Nutshell", (Draft shared by the author).	25-27
Janet Halley, "Anti-Trafficking and the New Indenture", in Prabha Kotiswaran (ed.), Revisiting the Law and Governance of Trafficking: Forced Labor and Modern Slavery, Cambridge University Press, 2017, pp. 179-211 (excerpts, pp. 186-186).	28-29

## AP INVESTIGATION: SLAVES MAY HAVE CAUGHT THE FISH YOU BOUGHT

By Robin McDowell, Margie Mason,  
and Martha Mendoza (Associated Press)  
March 25, 2015

*Esther Husan contributed to this report from Benjina, Indonesia. Mason reported from Samut Sakhon, Thailand; Mendoza reported from Boston, Mass.*

BENJINA, Indonesia — The Burmese slaves sat on the floor and stared through the rusty bars of their locked cage, hidden on a tiny tropical island thousands of miles from home.

Just a few yards away, other workers loaded cargo ships with slave-caught seafood that clouds the supply networks of major supermarkets, restaurants and even pet stores in the United States.

But the eight imprisoned men were considered flight risks — laborers who might dare run away. They lived on a few bites of rice and curry a day in a space barely big enough to lie down, stuck until the next trawler forces them back to sea.

“All I did was tell my captain I couldn’t take it anymore, that I wanted to go home,” said Kyaw Naing, his dark eyes pleading into an Associated Press video camera sneaked in by a sympathetic worker. “The next time we docked,” he said nervously out of earshot of a nearby guard, “I was locked up.”

Here, in the Indonesian island village of Benjina and the surrounding waters, hundreds of trapped men represent one of the most desperate links criss-crossing between companies and countries in the seafood industry. This intricate web of connections separates the fish we eat from the men who catch it, and obscures a brutal truth: Your seafood may come from slaves.

The men the AP interviewed on Benjina were mostly from Myanmar, also known as Burma, one of the poorest countries in the world. They were brought to Indonesia through Thailand and forced to fish. Their catch was then shipped back to Thailand, where it entered the global stream of commerce.

By this time, it is nearly impossible to tell where a specific fish caught by a slave ends up. However, entire supply chains are muddled, and money is trickling down the line to companies that benefit from slave labor.

The major corporations contacted would not speak on the record but issued statements that strongly condemned labor abuses. All said they were taking steps to prevent forced labor, such as working with human rights groups to hold subcontractors accountable.

Several independent seafood distributors who did comment described the costly and exhaustive steps taken to ensure their supplies are clean. They said the discovery of slaves underscores how hard it is to monitor what goes on halfway around the world.

Santa Monica Seafood, a large independent importer that sells to restaurants, markets and direct from its store, has been a leader in improving international fisheries, and sends buyers around the world to inspect vendors.

“The supply chain is quite cloudy, especially when it comes from offshore,” said Logan Kock, vice president for responsible sourcing, who acknowledged that the industry recognizes and is working to address the problem. “Is it possible a little of this stuff is leaking through? Yeah, it is possible. We are all aware of it.”

The slaves interviewed by the AP had no idea where the fish they caught was headed. They knew only that it was so valuable, they were not allowed to eat it.

They said the captains on their fishing boats forced them to drink unclean water and work 20- to 22-hour shifts with no days off. Almost all said they were kicked, whipped with toxic stingray tails or otherwise beaten if they complained or tried to rest. They were paid little or nothing, as they hauled in heavy nets with squid, shrimp, snapper, grouper and other fish.

Some shouted for help over the deck of their trawler in the port to reporters, as bright fluorescent lights silhouetted their faces in the darkness.

“I want to go home. We all do,” one man called out in Burmese, a cry repeated by others. The AP is not using the names of some men for their safety. “Our parents haven’t heard from us for a long time. I’m sure they think we are dead.”

Another glanced fearfully over his shoulder toward the captain’s quarters, and then yelled: “It’s torture. When we get beaten, we can’t do anything back. ... I think our lives are in the hands of the Lord of Death.”

In the worst cases, numerous men reported maimings or even deaths on their boats.

“If Americans and Europeans are eating this fish, they should remember us,” said Hlaing Min, 30, a runaway slave from Benjina. “There must be a mountain of bones under the sea. ... The bones of the people could be an island, it’s that many.”

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For Burmese slaves, Benjina is the end of the world.

Roughly 3,500 people live in the town that straddles two small islands separated by a five-minute boat ride. Part of the Maluku chain, formerly known as the Spice Islands, the area is about 400 miles north of Australia....

Benjina is impossible to reach by boat for several months of the year, when monsoon rains churn the Arafura Sea. It is further cut off by a lack of Internet access. Before a cell tower was finally installed last month, villagers would climb nearby hills each evening in the hope of finding a signal strong enough to send a text. An old landing strip has not been used in years.

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On the dock in Benjina, former slaves unload boats for food and pocket money. Many are men who were abandoned by their captains — sometimes five, 10 or even 20 years ago — and remain stranded.

In the deeply forested island interiors, new runaways forage for food and collect rainwater, living in constant fear of being found by hired slave catchers.

And just off a beach covered in sharp coral, a graveyard swallowed by the jungle entombs dozens of fishermen. They are buried under fake Thai names given to them when they were tricked or sold onto their ships, forever covering up evidence of their captors’ abuse, their friends say.

“I always thought if there was an entrance there had to be an exit,” said Tun Lin Maung, a slave abandoned on Benjina, as other men nodded or looked at the ground. “Now I know that’s not true.”

The Arafura Sea provides some of the world’s richest and most diverse fishing grounds, teeming with mackerel, tuna, squid and many other species.

Although it is Indonesian territory, it draws many illegal fishing fleets, including from Thailand. The trade that results affects the United States and other countries.

The U.S. counts Thailand as one of its top seafood suppliers, and buys about 20 percent of the country’s \$7 billion annual exports in the industry. Last year, the State Department blacklisted Thailand for failing to meet minimum standards in fighting human trafficking, placing the country in the ranks of North Korea, Syria and Iran. However, there were no additional sanctions.

Thailand’s seafood industry is largely run off the backs of migrant laborers, said Kendra Krieder, a State Department analyst who focuses on supply chains. The treatment of some of these workers falls under the U.S. government’s definition of slavery, which includes forcing people to keep working even if they once signed up for the jobs, or trafficking them into situations where they are exploited.

“In the most extreme cases, you’re talking about someone kidnapped or tricked into working on a boat, physically beaten, chained,” Krieder said. “These situations would be called modern slavery by any measure.”

The Thai government says it is cleaning up the problem. On the bustling floor of North America’s largest seafood show in Boston earlier this month, an official for the Department of Fisheries laid out a plan to address labor abuse, including new laws that mandate wages, sick leave and shifts of no more than 14 hours. However, Kamonpan Awaivanont stopped short when presented details about the men in Benjina.

“This is still happening now?” he asked. He paused. “We are trying to solve it. This is ongoing.”

The Thai government also promises a new national registry of illegal migrant workers, including more than 100,000 flooding the seafood industry. However, policing has now become even harder because decades of illegal fishing have depleted stocks close to home, pushing the boats farther and deeper into foreign waters.

The Indonesian government has called a temporary ban on most fishing, aiming to clear out foreign poachers who take billions of dollars of seafood from the country’s waters. As a result, more than 50 boats are now docked in Benjina, leaving up to 1,000 more slaves stranded onshore and waiting to see what will happen next.

Indonesian officials are trying to enforce laws that ban cargo ships from picking up fish from boats at sea. This practice forces men to stay on the water for months or sometimes years at a time, essentially creating floating prisons.

Susi Pudjiastuti, the new Fisheries Minister, said she has heard of different fishing companies putting men in cells. She added that she believes the trawlers on Benjina may really have Thai owners, despite the Indonesian paperwork, reflecting a common practice of faking or duplicating licenses. She said she is deeply disturbed about the abuse on Benjina and other islands.

“I’m very sad. I lose my eating appetite. I lose my sleep,” she said. “They are building up an empire on slavery, on stealing, on fish(ing) out, on massive environmental destruction for a plate of seafood.”

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The story of slavery in the Thai seafood industry started decades ago with the same push-and-pull that shapes economic immigration worldwide — the hope of escaping grinding poverty to find a better life somewhere else.

In recent years, as the export business has expanded, it has become more difficult to convince young Burmese or Cambodian migrants and impoverished Thais — all of whom were found on Benjina — to accept the dangerous jobs. Agents have become more desperate and ruthless, recruiting children and the disabled, lying about wages and even drugging and kidnapping migrants, according to a former broker who spoke on condition of anonymity to avoid retribution.

The broker said agents then sell the slaves, usually to Thai captains of fishing boats or the companies that own them. Each slave typically costs around \$1,000, according to Patima Tungpuhayakul, manager of the Thai-based nonprofit Labor Rights Promotion Network Foundation. The men are later told they have to work off the “debt” with wages that don’t come for months or years, or at all.

“The employers are probably more worried about the fish than the workers’ lives,” she said. “They get a lot of money from this type of business.”

Illegal Thai boats are falsely registered to fish in Indonesia through graft, sometimes with the help of government authorities. Praporn Ekouru, a Thai former member of Parliament, admitted to the AP that he had bribed Indonesian officials to go into their waters, and complained that the Indonesian government’s crackdown is hurting business.

“In the past, we sent Thai boats to fish in Indonesian waters by changing their flags,” said Praporn, who is also chairman of the Songkhla Fisheries

Association in southern Thailand. “We had to pay bribes of millions of baht per year, or about 200,000 baht (\$6,100) per month. ... The officials are not receiving money anymore because this order came from the government.”

Illegal workers are given false documents, because Thai boats cannot hire undocumented crew. One of the slaves in Benjina, Maung Soe, said he was given a fake seafarer book belonging to a Thai national, accepted in Indonesia as an informal travel permit. He rushed back to his boat to dig up a crinkled copy.

“That’s not my name, not my signature,” he said angrily, pointing at the worn piece of paper. “The only thing on here that is real is my photograph.”

Soe said he had agreed to work on a fishing boat only if it stayed in Thai waters, because he had heard Indonesia was a place from which workers never came back.

“They tricked me,” he said. “They lied to me. ... They created fake papers and put me on the boat, and now here I am in Indonesia.”

The slaves said the level of abuse on the fishing boats depends on individual captains and assistants. Aung Naing Win, who left a wife and two children behind in Myanmar two years ago, said some fishermen were so depressed that they simply threw themselves into the water. Win, 40, said his most painful task was working without proper clothing in the ship’s giant freezer, where temperatures drop to 39 degrees below zero. “It was so cold, our hands were burning,” he said. “No one really cared if anyone died.”

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The shipment the AP tracked from the port of Benjina carried fish from smaller trawlers; AP journalists talked to slaves on more than a dozen of them.

A crane hoisted the seafood onto a refrigerated cargo ship called the Silver Sea Line, with an immense hold as big as 50 semi-trucks. At this point, by United Nations and U.S. standards, every fish in that hold is considered associated with slavery.

The ship belongs to the Silver Sea Reefer Co., which is registered in Thailand and has at least nine refrigerated cargo boats. The company said it is not involved with the fishermen.

“We only carry the shipment and we are hired in general by clients,” said owner Panya Luangsomborn. “We’re separated from the fishing boats.”

The AP followed the Silver Sea Line by satellite over 15 days to Samut Sakhon. When it arrived, workers on the dock packed the seafood over four nights onto more than 150 trucks, which then delivered their loads around the city.

One truck bore the name and bird logo of Kingfisher Holdings Ltd., which supplies frozen and canned seafood around the world. Another truck went to Mahachai Marine Foods Co., a cold storage business that also supplies to Kingfisher and other exporters, according to Kawin Ngermanek, whose family runs it.

“Yes, yes, yes,” said Kawin, who also serves as spokesman for the Thai Overseas Fisheries Association. “Kingfisher buys several types of products.”

When asked about abusive labor practices, Kingfisher did not answer repeated requests for comment. Mahachai manager Narongdet Prasertsri responded, “I have no idea about it at all.”

Every month, Kingfisher and its subsidiary KF Foods Ltd. sends about 100 metric tons of seafood from Thailand to America, according to U.S. Customs Bills of Lading. These shipments have gone to Santa Monica Seafood, Stavis Seafoods — located on Boston’s historic Fish Pier — and other distributors.

Richard Stavis, whose grandfather started the dealership in 1929, shook his head when told about the slaves whose catch may end up at businesses he buys from. He said his company visits processors and fisheries, requires notarized certification of legal practices and uses third-party audits.

“The truth is, these are the kind of things that keep you up at night,” he said. “That’s the sort of thing I want to stop. ... There are companies like ours that care and are working as hard as they can.”

Wholesalers like Stavis sell packages of fish, branded and unbranded, that can end up on supermarket shelves with a private label or house brand. Stavis’ customers also include Sysco, the largest food distributor in the U.S.; there is no clear way to know which particular fish was sold to them.

Sysco declined an interview, but the company’s code of conduct says it “will not knowingly work with any supplier that uses forced, bonded, indentured or slave labor.”

Gavin Gibbons, a spokesman for National Fisheries Institute, which represents about 75 percent of the U.S. seafood industry, said the reports of

abuse were “disturbing” and “disheartening.” “But these type of things flourish in the shadows,” he said.

A similar pattern repeats itself with other shipments and other companies, as the supply chain splinters off in many directions in Samut Sakhon. It is in this Thai port that slave-caught seafood starts to lose its history.

The AP followed another truck to Niwat Co., which sells to Thai Union Manufacturing Co., according to part owner Prasert Luangsomboon. Weeks later, when confronted about forced labor in their supply chain, Niwat referred several requests for comment to Luangsomboon, who could not be reached for further comment.

Thai Union Manufacturing is a subsidiary of Thai Union Frozen Products PCL., the country’s largest seafood corporation, with \$3.5 billion in annual sales. This parent company, known simply as Thai Union, owns Chicken of the Sea and is buying Bumble Bee, although the AP did not observe any tuna fisheries. In September, it became the country’s first business to be certified by Dow Jones for sustainable practices, after meeting environmental and social reviews.

Thai Union said it condemns human rights violations, but multiple stakeholders must be part of the solution. “We all have to admit that it is difficult to ensure the Thai seafood industry’s supply chain is 100 percent clean,” CEO Thiraphong Chansiri said in an emailed statement.

Thai Union ships thousands of cans of cat food to the U.S., including household brands like Fancy Feast, Meow Mix and Iams. These end up on shelves of major grocery chains, such as Kroger, Safeway and Albertsons, as well as pet stores; again, however, it’s impossible to tell if a particular can of cat food might have slave-caught fish.

Thai Union says its direct clients include Wal-Mart, which declined an interview but said in an email statement: “We care about the men and women in our supply chain, and we are concerned about the ethical recruitment of workers.”

Wal-Mart described its work with several non-profits to end forced labor in Thailand, including Project Issara, and referred the AP to Lisa Rende Taylor, its director. She noted that slave-caught seafood can slip into supply chains undetected at several points, such as when it is traded between boats or mingles with clean fish at processing plants. She also confirmed that seafood

sold at the Talay Thai market — to where the AP followed several trucks — can enter international supply chains.

“Transactions throughout Thai seafood supply chains are often not well-documented, making it difficult to estimate exactly how much seafood available on supermarket shelves around the world is tainted by human trafficking and forced labor,” she said.

Poj Aramwattanamont, president of an industry group that represents Thai Union, Kingfisher and others, said Thais are not “jungle people” and know that human trafficking is wrong. However, he acknowledged that Thai companies cannot always track down the origins of their fish.

“We don’t know where the fish come from when we buy from Indonesia,” said Poj of the Thai Frozen Foods Association. “We have no record. We don’t know if that fish is good or bad.”

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The seafood the slaves on Benjina catch may travel around the world, but their own lives often end right here, in this island village.

A crude cemetery holds more than 60 graves strangled by tall grasses and jungle vines, where small wooden markers are neatly labelled, some with the falsified names of slaves and boats. Only their friends remember where they were laid to rest.

In the past, former slave Hla Physo said, supervisors on ships simply tossed bodies into the sea to be devoured by sharks. But after authorities and companies started demanding that every man be accounted for on the roster upon return, captains began stowing corpses alongside the fish in ship freezers until they arrived back in Benjina, the slaves said.

Lifting his knees as he stepped over the thick brush, Physo searched for two grave markers overrun by weeds — friends he helped bury.

It’s been five years since he himself escaped the sea and struggled to survive on the island. Every night, his mind drifts back to his mother in Myanmar. He knows she must be getting old now, and he desperately wants to return to her. Standing among so many anonymous tombs stacked on top of each other, hopelessness overwhelms him.

“I’m starting to feel like I will be in Indonesia forever,” he said, wiping a tear away. “I remember thinking when I was digging, the only thing that awaits us here is death.”

## **FISHING SLAVES NO MORE, BUT FREEDOM BRINGS NEW STRUGGLES**

By Margie Mason (Associated Press)

July 12, 2017

On the day they were freed from slavery, the fishermen hugged, high-fived and sprinted through a stinging rain to line up so they wouldn’t be left behind. But even as they learned they were going home, some wept at the thought of returning empty-handed and becoming one more mouth to feed.

Two years have passed since an Associated Press investigation spurred that dramatic rescue, leading to the release of more than 2,000 men trapped on remote Indonesian islands. The euphoria they first felt during reunions with relatives has long faded. Occasional stories of happiness and opportunity have surfaced, but the men’s fight to start over has largely been narrated by shame and struggle.

Some of them are lucky to find odd jobs paying pennies an hour in cramped slums and rural villages in Myanmar, Cambodia, Thailand and Laos. Others must travel far from home for back-breaking labor.

Some suffer night terrors and trauma from the years or even decades of physical and mental abuse they endured on boats run by Thai captains. Others have fought their demons with drugs and alcohol.

At least one Cambodian tried to hang himself. Another Thai fisherman went back to work on a different boat at home, only to have his arm ripped off by a net. He says he was offered about \$3 and a few packets of instant noodles as compensation.

The men left their impoverished homes years ago full of hope and headed to neighboring Thailand, promising to send money back from good-paying jobs. Instead, they were tricked, sold or even kidnapped and put onto boats that became floating prisons.

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“What happened in Benjina has opened everybody’s eyes,” says Indonesian fishing minister Susi Pudjiastuti, who oversaw the rescue and is pushing for improved human rights at sea globally.

Despite all the suffering following their homecomings, there are stories of inspiration.

Some of the men borrowed money, enrolled in trade school or found decent work, saving what little they could. Others are opening small businesses, or have married and started families.

A few have gone to court to challenge their former captains, receiving a small portion of the pay they were owed. In rare instances, some even helped send their traffickers to jail.

Many say time has helped soften the pain, but most remain angry about the money and years lost to Benjina. Still, they are thankful to be home, living as free men.

They are slaves no more.

#### *SICK AND UNEMPLOYED*

MON STATE, Myanmar — Myint Naing sits outside the flimsy thatch shack he shares with five other family members. He stares silently at a computer alongside his mother and sister, watching flickering images of their extraordinary reunion two years ago.

The memories are still raw of Myint collapsing into his wailing mother's arms on the same dusty road just feet away from where they sit now in southern Myanmar. That day was tinged with both joy and sorrow for all the time lost — ending 22 years of separation after Myint was taken to Indonesia and nearly beaten to death by a captain who refused to let him go home.

His mother blots her eyes and briefly looks away from the screen. Myint's younger sister sees herself embracing her brother and screaming, "We don't need money! We just need family!"

She never realized just how much those words would be tested every day in the harsh reality of poverty.

Myint, now 42, desperately wants to work, but he's simply not able. He tried doing construction and other manual labor, but the muscles on the right side of his body were weakened by a stroke-like attack in Indonesia. He can't even steady a smartphone with one hand long enough to take a selfie.

He dreams of opening a little snack shop to contribute to the family's income, but there is no money to start it.

"Half of my body is suffering, and it's very challenging for me to get a job anywhere," he says, as his nieces dance around him on a rickety porch. "I don't really know how to keep going like this."

He's also stressed. He and his sister moved out of their mother's house soon after he returned, partially because Myint didn't get along with his new stepfather, who is about his age.

His sister, Mawli Than, and her husband together earn less than \$5.50 a day to feed three children and three adults. But she has kept her promise to love and care for him no matter what.

She wishes she could afford to get Myint the long-term medical care he needs. Her voice cracks when she talks about not being able to give him a proper ceremony before he left to study as a Buddhist novice, a custom that every devout Burmese male tries to fulfill.

"I feel really sad and guilty that I wasn't able to do that," she says, sobbing, as he listens quietly in the doorway. "My brother is like a father to me."

Myint's freshly shaved head reveals two large scars he received during his years in Indonesia. One is from a motorbike helmet, the other from an iron rod — both blows from angry fishing captains.

He eventually escaped his captors and lived in the jungle for years, farming vegetables with help from sympathetic local families.

He insists life is better now that he is home. But his mind often drifts to the past. If his former Thai captains would just pay him what he's owed for all the time he worked on the boats, he could buy his own house and help his sister instead of making her life harder.

"I'm very angry at them. I can't even find words," he says. "If I ever saw them again, I might kill them."

#### *HAPPY ON LAND*

PREK TATIENG, Cambodia — A gas-powered pump grows on Sriev Kry's back as he walks barefoot, spraying a stream of pesticide on pink lotus blossoms that will soon be ready for harvest.

The work is hard and unforgiving. He doesn't wear a mask or other protective gear, and there aren't any trees in the surrounding rice paddy to shield him from the blistering sun. But this is Cambodian soil, and it belongs to him. It's a freedom he says he never really understood until being trafficked and enslaved in Benjina.

The wiry rice farmer never wanted to be a fisherman because the ocean's rolling waves had always sent him running to the side of the boat to vomit. So when a cousin asked if he was interested in leaving his rural Cambodian village to find higher-paying work in Thailand, he refused until he was promised a factory job or something else on land.

Unlike most migrant workers who cross the border illegally, Sriev Kry and two of his cousins waited to receive passports before leaving in 2014.

They were immediately taken to a boat and ordered to get on board after receiving \$880 advances. They were told they wouldn't be at sea long. But it was all a lie.

Just as their trawler reached the Malaysian border, Sriev Kry says he woke up to learn a Burmese fisherman was missing. They didn't stop to search for him, and no calls were made for help. Instead, Sriev Kry says the Thai owner told the workers that "life on the boat doesn't matter. No one cares about missing people."

He says the men then watched as the crew member's passport was tossed into the sea, destroying the only record of his existence.

"The other workers just saw that life is very cheap," Sriev Kry recalls. "It is cheaper than the bodies of dogs."

He tried not to cause problems and worked nonstop on the boat, sorting mountains of fish. He saw other crew beaten or scalded by water tossed on them when they were too sick to work.

"It's like a slave's life. It's even worse than a slave. Slaves can sometimes complain or challenge the owner," he says. "If we refused, if we complained, the Thai owner always asked: 'You want to live? You want to have a life? Or do you want to die?'"

Sriev Kry was only able to contact his wife a few times from Benjina. He told her he wasn't sure he'd ever make it back home to the emerald green rice paddies and lotus fields they tended together.

Two of their four children were studying in the capital, Phnom Penh, with one already in university. The baby was just a year old, and the family was struggling to survive because Sriev Kry never sent the money he was promised. But his wife, Khan Srin, encouraged him to hold on. To focus on staying alive.

When he was finally rescued, Sriev Kry was done being silent: He volunteered to testify against his captain. He saw it as his duty to speak out to

prevent others from facing the same fate. He is still waiting for his day in court.

Today, at 44, he earns about \$10 a day farming the field that rings a one-room shack perched on stilts overlooking the few acres of land he owns. He sleeps here sometimes, away from his nearby village, to stand watch over his crops. He also sells mangoes from his beat-up motorbike just across the border in Vietnam and harvests catfish from a lake — the only fishing he says he will ever do again.

It's not much, but it's enough to pay his debts and feed his family. His captain in Benjina swore more earnings would be sent, but Sriev Kry says nothing ever came.

He remains angry and is still haunted by the image of the dead crewman's passport being thrown into the sea. But he's happy to be home and vows he'll never leave his family again.

"I was just rescued from hell," he says, shaking his head. "Why would I go back to hell again?"

#### *STILL A FISHERMAN*

YANGON, Myanmar — Physo Kyaw's father wept when he heard his son was returning to Thailand to board another fishing boat. But there was nothing he could do.

After the 31-year-old was rescued from Benjina, he worked a few months on the gritty outskirts of Yangon driving a bus and a motorbike taxi, but the money wasn't good and his bike soon was stolen.

Several of Physo's friends from Benjina already had gone back to Thailand to find better-paying work, and they encouraged him to get a passport and join them on another fishing boat. They had heard good stories about the company, and they all had legal working documents this time. They were convinced their papers would protect them from exploitation.

Physo left Myanmar without telling his father. He went to the same port town where he was initially trafficked and got on a trawler with 13 other Burmese men.

After being beaten and spending more than two years on Benjina with no pay, he was scared of being trafficked again but decided to take a chance.

As he prepared to leave, he met other fishermen who had just docked — they had been at sea for three years without touching land.

“I don’t think it’s fair, but it’s my choice to go,” Physo says. “My father is the only financial provider here for the moment so at least if I go to Thailand, I can bring some money back.”

Phyo didn’t know where his boat was going or how long he would be gone. He also had no idea if he was fishing legally or poaching, a common but dangerous practice that can land an entire crew in a foreign jail.

The days were still long but, this time, he got a few more hours of sleep — four or five a night — and he wasn’t beaten.

After six months at sea, the trawler returned to Thailand. Physo should have made nearly \$1,600 for the trip, but was left with just \$350 after deductions for fees, food and supplies.

He could have earned nearly double that amount driving the motorbike taxi back home. Still, he’s thinking about going out to sea again with another group of Benjina guys.

His father, an electrical engineer, can only shake his head with disappointment.

“As parents, you are always worried about your children,” Aye Kyaw, 67, says inside the family’s small, sweltering apartment.

But Physo just shrugs. Fishing is what he knows.

“If I can get a better job here, I won’t go,” he says. “But if I don’t have anything, I will go on a fishing boat.”

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*Information for this story came from interviews with nearly 15 former fishermen in Cambodia, Myanmar and Thailand along with nonprofits in Cambodia and Thailand. Associated Press writers Esther Htisan in Yangon, Myanmar, and Sopheng Cheang in Phnom Penh, Cambodia contributed to this report.*

## **OBAMA BANS US IMPORTS OF SLAVE-PRODUCED GOODS**

By Martha Mendoza (Associated Press)

Feb. 25, 2016

Federal officials are preparing to enforce an 86-year-old ban on importing goods made by children or slaves under new provisions of a law signed by President Barack Obama.

“This law slams shut an unconscionable and archaic loophole that forced America to accept products made by children or slave labor,” said Sen. Ron Wyden, an Oregon Democrat who worked on the legislation.

The Tariff Act of 1930, which gave Customs and Border Protection the authority to seize shipments where forced labor was suspected and block further imports, was last used in 2000, and has been used only 39 times all together largely because of two words: “consumptive demand” — if there was not sufficient supply to meet domestic demand, imports were allowed regardless of how they were produced.

The Trade Facilitation and Trade Enforcement Act signed by Obama on Wednesday eliminated that language, allowing stiffer enforcement. U.S. Customs and Border Protection Commissioner Gil Kerlikowske and agency leaders are planning a briefing Friday to explain how they’ll be implementing the new law.

“If the U.S. government works to really keep out goods made with forced labor, this change will have a profound ripple effect on supply chains worldwide,” said David Abramowitz, who advocated for the change as vice president for Humanity United.

To start an investigation, Customs needs to receive a petition from anyone — a business, an agency, even a non-citizen — showing “reasonably but not conclusively” that imports were made at least in part with forced labor.

A of more than 350 goods produced by child labor or forced labor provides a detailed breakdown that human rights groups plan to use as they petition the government to take action. These include peanuts from Turkey, gold from Ghana, carpets from India and fish and shrimp from Thailand.

But advocate Neha Misra at the Solidarity Center, another nonprofit that worked for the legal change, said petitions are hard to file and proving a case is complicated.

Nonetheless, she was encouraged. "Before U.S. law said that we would tolerate forced labor if we really wanted a product for domestic consumption. Now, we are saying that we will not tolerate forced labor for any reason. This is a major step forward," Misra said.

Last year found Thai companies ship seafood to the U.S. that was caught and processed by trapped and enslaved workers. As a result of the reports, more than 2,000 trapped fishermen have been rescued, more than a dozen alleged traffickers arrested and millions of dollars' worth of seafood and vessels seized.

Last April, the AP also identified and highlighted the legal loophole that allowed continued imports of slave-caught seafood. A month later, Obama promised to repeal the consumptive demand exception and ensured "swift, strong and effective enforcement."

...

## **THAI SEAFOOD: ARE THE PRAWNS ON YOUR PLATE STILL FISHED BY SLAVES?**

*Report finds trafficking persists on Thai fishing boats, as campaigners challenge supermarkets to guarantee products are free of rights abuses*

By Annie Kelly (The Guardian)

January 23, 2018

Thailand's billion-dollar seafood export industry remains infested with human rights abuses despite government pledges to stamp out slavery in its fishing industry, according to research by Human Rights Watch.

Four years after [damning revelations of chattel slavery](#) aboard Thai fishing boats linked to seafood exported and sold by major retailers around the world, a report says that rights violations in one of Thailand's major export industries continue unabated, including forced labour and widespread human trafficking.

For the report HRW conducted interviews with 248 current and former Burmese and Cambodian fishermen as well as Thai officials, boat owners, local activists and United Nations agency staff over a two-year period in all of Thailand's major fishing ports.

It documented how migrant fishermen from south-east Asia continue to be routinely trafficked on to fishing boats, prevented from leaving or changing employers, and are often not paid for their work or paid less than the minimum wage.

"What the report found was that although this military government has taken more positive steps forward than the last, the reforms that have been put in place are still largely cosmetic," said Brad Adams, director of Human Rights Watch in Asia.

"Forced labour is routine. The workers we interviewed described being trafficked on to ships, trapped in jobs they couldn't leave, physical abuse, lack of food, long hours and awful working conditions. The worst thing for many of them was not being paid – the psychological harm and final indignity was the hardest to bear."

Steve Trent, chief executive of the [Environmental Justice Foundation \(EJF\)](#), who has been working with the Thai government on its reforms, said the focus should also be on ensuring that those selling seafood to consumers take responsibility for ensuring supply chains are free from rights abuses.

“There is no shadow of a doubt that widespread and very serious labour violations are continuing throughout the industry,” said Trent. “Buyers and retailers have failed comprehensively to play their part in finding a real solution.”

He said the creation of the [Sustainable Seafood Taskforce](#) had failed to live up to its promises: the industry body, made up of supermarkets, buyers and retailers sourcing seafood from Thailand, was set up in 2015 to bring transparency and accountability to their supply chains.

“Never in my career have I seen a process more focused on talking in hotel rooms in Bangkok rather than actually committing to using their influence to create real change,” he said.

“I challenge any of the retailers selling Thai seafood to consumers to guarantee that products from Thailand are free from human rights abuses and illegal fishing. They have arguably more power than anyone else and they are failing to use it.”

The Sustainable Seafood Taskforce did not respond to a request for comment.

A [major investigation by the Guardian in 2014](#) exposed brutal cases of slavery aboard Thai fishing boats feeding trash fish – inedible or infant species of fish to be ground into fishmeal – into the supply chain of prawns sold by supermarkets in the UK, Europe and United States.

In 2015 the European Union [imposed a “yellow card” on Thailand](#) under its illegal, unreported and unregulated (IUU) fishing framework, threatening to ban Thai fisheries imports if the government failed to clean up its fishing industry, including labour rights violations.

The Thai government responded with a broad programme of reforms including new laws to regulate and improve working conditions, documentation and wages for migrant fishermen. A “port-in, port-out” (Pipo) system was also created to require boats to report for inspections, as well as limiting time at sea to 30 days.

However, HRW said that although some progress had been made, the persistence of trafficking and forced labour on fishing boats illustrated that many of the reforms were cosmetic.

The report said that the labour inspection regime was largely a “theatrical exercise for international consumption” and that in 2015 Thailand failed to find a single case of forced labour in inspections of 474,334 fishing crew.

The group is now urging the European Union to continue using the IUU framework to keep the pressure on the Thai government to address trafficking and slavery at sea.

“Although we understand that the IUU is designed to focus on fishing stocks and environmental issues, we’re really concerned that a move to address human rights concerns outside the IUU framework means that we will lose the only real effective tool that the EU had to address trafficking and forced labour in the Thai seafood industry,” said Adams.

Luisa Ragher, deputy of the delegation of the European Union in Thailand, said that the EU is committed to working alongside the Thai government to tackle labour rights violations.

“The government of Thailand has given high priority to this and put significant effort into addressing these problems. There are still shortcomings but progress has been made and we are confident of their commitment to improving things,” she said. “We are working intensively at opening up a broader discussion on labour rights that extends past fishing into other sectors.

**COMBATING FORCED LABOR AND TRAFFICKING IN PERSONS  
& ENHANCING SUPPLY CHAIN TRANSPARENCY IN THE  
FISHERY SECTOR: THAILAND'S PROGRESS**  
*January 2015–March 2016*

Ministry of Foreign Affairs of the Kingdom of Thailand



**CASE 1: AMBON/BENJINA CASE  
LABOR TRAFFICKING AND FORCED  
LABOR ON FISHING VESSELS**

Thai authorities began their mission late 2014 to rescue sea laborers; some of which were stranded in Ambon, Benjina and nearby islands, while others were forced to work on fishing vessels.

**KEY FACTS ON SEA LABOURERS**

- The Thai Government has sent 4 missions to survey and rescue victims of trafficking and stranded crew members. As of March 2016, **1,476 laborers** were repatriated back to Thailand.
- For nationals of other countries who were victimized on ships jointly owned by Thais and Indonesians and others, Thailand is working with the **ICM**, which agreed to handle the repatriation of those nationals to their home countries.
- After victim screening, **57 were identified as victims of trafficking**. **296 laborers** received compensation of **583,334 USD** from their employers.
- The Ministry of Labour assisted **150 laborers** in claiming compensation of **352,778 USD** from their employers.

**ACTIONS TAKEN**

- Key agencies include **Royal Thai Police**, **DSI** and **Office of the Attorney General** (for crimes committed outside Thailand)
- Total number of cases investigated: **24 cases** with **30 arrests**
  - Royal Thai Police investigated **20 cases**; 5 cases involving one family of boat owners are currently under the consideration of the Anti-Human Trafficking Division, Criminal Court;
  - For the rest 15 cases, the Royal Thai Police submitted opinions to prosecute all the cases.
- DSI investigated **4 cases**; 2 cases are under the consideration of the Anti-Human Trafficking Division, Criminal Court; 2 cases are under the consideration of the prosecutors.
- In one of DSI cases, the Court sentenced a broker to **19 years** and **6 months imprisonment** for deception and detention of victims.

**PARTNERSHIP & COOPERATION**

- **Australia-Asia Program to Combat Trafficking in Persons (AAPPIP)** provides technical and financial support for law enforcement agencies from Thailand, Indonesia, Myanmar and Cambodia. Information on law enforcement were exchanged in the previous 3 meetings and 4<sup>th</sup> meeting will be held in Myanmar.
- Thailand and Indonesia are working closely to set up a **Working Group on Fisheries Cooperation**.
- Thai authorities have been active in prevention efforts as well as in assisting victims to reintegrate into the society.
  - **Siela Mats** has been active in prevention efforts as well as in assisting victims to reintegrate into the society.
  - **Labor Rights Promotion Network (LRPN)** has been working closely with the government on the rescue mission and providing intelligence necessary for the successful prosecutions.

**PRESS RELEASE: THAILAND'S COMMENTS ON REPORT  
ON LABOUR SITUATION IN FISHING INDUSTRY  
OF HUMAN RIGHTS WATCH**

Ministry of Foreign Affairs of the Kingdom of Thailand  
Jan 25, 2018

1. During the last two years, the Royal Thai Government has determined and put a great effort into solving labour problems in the fishing industry. The Government has implemented various legal reforms, policies, and strengthened law enforcement on labour protection as well as engaged closely with the private sector, non-governmental organizations and neighbouring countries. As a result, there has been significant improvement in the labour situation in the fishing industry in many areas.

2. One of the positive steps that Thailand has taken that has led to significant change in the labour situation in the fishing industry is the implementation of the Royal Ordinance on Fisheries B.E. 2558 (2015). The Royal Ordinance has imposed severe punishments and higher fines, and together with the execution of the labour laws, have led to the deterrence and elimination of labour trafficking and illegal workers on fishing vessels. During the last two years, there have been more than 4,240 cases of fishery-related crimes and labour law violations brought forward before the criminal court, out of which, 85 cases were prosecuted for human trafficking crimes. Over 50 defendants found guilty were jailed with the maximum sentence of 14 years and fined with the maximum of 2.5 million Thai Bahts (67,500 Euros) as well as got their vessels confiscated.

3. With regards to the prevention of forced labour, numerous new measures have been introduced. For instance, the issuance of special Seabooks for over 70,600 seamen to date; the stipulation that the work contracts must have two copies drawn up - one of which must be given to the worker; the requirement for employers to pay their fishery workers monthly via bank transfer – so far nearly 5,000 workers have been paid through this channel; the stipulation that withholding the identification documents of workers is a punishable offence under the Prevention and Suppression of

Human Trafficking Act; the issuance of new legislation governing recruitment agencies to prohibit debt bondages and the licensing of over 100 recruitment agencies; the revision of the existing regulation regarding to the right to change employers especially in the fishing sector – as of 2017, over 100,000 workers had successfully changed their employers ...

4. On the issue of awareness raising among workers about their rights, the Royal Thai Government has established three Post-arrival and Reintegration Centres along the border to ensure migrant workers, including those in the fishery sector, receive adequate information about their rights. The Centres also conduct preliminary screening for potential cases of human trafficking and verification of employment contracts. ...

5. On the complaint channels, the Royal Thai Government partners with various non-governmental organizations (NGOs) in establishing Migrant Worker Assistance Centers in 10 provinces. In 2017, a total of 57,498 migrant workers were provided with assistance by the Centers, quadruple the number of migrant workers assisted in 2016. Four hotlines available in Thailand's neighboring countries' languages have been established to serve as a channel for complaints. ... In 2017, the hotlines received a total number of more than 130,000 calls, including reports on human trafficking cases that led to over 60 cases of prosecution.

6. Concerning labour inspections, comprehensive inspections have been carried out, covering areas such as ports, seafood processing establishments and onboard fishing vessels. ... The number of labour inspectors and interpreters has increased to over 1,500 officers. ... In 2017, 32 PPO centers and 19 Forward Inspection Points conducted inspection and one-to-one interview of over 53,000 migrant workers, of which around 3,500 migrant workers were found being violated under the labour protection law. 358 seafood processing establishments were inspected, of which 142 establishments were found to have violated the laws, and the Ministry of Labour has already assisted the workers and prosecuted the owners of the establishments. The current Labour Protection Act has been amended with a view to intensifying law enforcement by instructing all labour inspectors nationwide that any offenses associated with labour abused must be brought forward to the criminal court immediately, instead of giving order to the operators to correct their practices. ...

## **THAILAND'S SLAVE FISHERMEN: WHAT'S NEEDED TO SOLVE THE CRISIS?**

*The government favours technological solutions, but workers say collective action is essential to stopping abuse.*

By J.J Rose (Al Jazeera)  
September 13, 2018

Samut Sakhon, Thailand - In 2013, Chairat Ratchapaksi found a job in commercial fishing to support his family. The 40-year-old from Thailand's central Phetchaburi province went to see a boat owner in Samut Song Kram Province, which straddles the Gulf of Thailand, and was hired quickly as a fisherman. From then on, he was at sea more or less continuously for two years, until 2015. He says he was forced to work 24-hour shifts, was not paid and, when he complained, was beaten by his skipper and threatened with being thrown overboard. At the end of his stint, he said he was "dumped on an island and put in jail".

Chairat festered for months in one of the grim holding pens on Benjina, a remote Indonesian fishing island companies reserve for labourers they no longer need. "I didn't know how to escape," says Chairat, who now runs the Thai and Migrant Fishers Union Group (TMFG). "We sent a letter to the Thai ambassador in Indonesia from prison but we got no response. Nothing happened. I thought, 'Who is going to rescue me?' I felt hopeless."

Thailand is the world's third-largest seafood exporter and biggest producer of tinned tuna. Half of the estimated 600,000 men working in the industry are from countries such as Myanmar and Cambodia, according to the United Nations. Along with Thais, they are trafficked and forcibly set to work on commercial fishing boats throughout the region, supplying seafood products to global consumers. ...

Human Rights Watch (HRW) in August called on Thailand to ratify and implement the International Labour Organization's Work in Fishing Convention. ...

According to local NGO, the Labour Rights Protection Network, (LPN) as many as one in 10 commercial fishermen in the region are slave labourers.

Testimonies gathered by LPN confirm that Chairat's experience is not unusual. Like Chairat, fishermen are forced to work for several years at sea, cut off from family and from the rest of the on-land world.

Lek, from Kanchanaburi in Thailand's west, was rescued two years ago from another favourite Indonesian island which serves as a dumping ground, Ambon. He has a photograph of himself on his phone when he was stuck at sea. He hardly set foot on land for a decade as he was enslaved by his bosses.

In the image, he looks young and has long hair. Now, his hairline has fallen back, he has an awkward stance and his eyes are deep-set.

"Now I want to help my fellow fishermen," he says.

...

The Thai government, concerned about international trade agreements in markets such as the EU and the US, which have raised human rights concerns, has worked to end the trafficking and enslavement of local and migrant fishermen in Thailand.

Since 2017, trawler owners have had to ensure, by law, that there is adequate communication technology on every ship and to allow all workers to freely contact their families while on board.

As part of its anti-slavery efforts, the government also banned fishermen under the age of 18 from working and sought an electronic bank transfer system for wages, to verify payment is taking place.

As a reward for its push to stamp out trafficking in the fishing sector, Thailand in June stepped up a notch of the US State Department's Trafficking in Persons Report - it had previously been Tier 3, the lowest possible level.

Set up in 2015 as an initiative of the LPN, the TMFG monitors satellites to track ships that remain at sea for long periods, which is often a sign that they are using slave labour. Ships can stay at sea for years as they transfer their haul to larger boats, which take the produce back to shore.

The monitoring system relies on regular inspections and policing, which are expensive and difficult to maintain.

"The Thai government has not taken the steps necessary to end forced labour and other serious abuses on fishing boats," HRW said in January.

The Thai government responded directly to the report and offered a long list of measures it says it had taken.

...

According to Patima Tunngpuchayakul, LPN director, one of the major logistical obstacles for regulators is the vast and complex supply chain in this sector.

"There are so many participants in this industry," she says. "Many operators across the catching, processing and exporting links in the chain can mean the sector is very difficult to follow."

The Thai Department of Fisheries lists 82 seafood processors approved for export alone. The LPN estimates that there are between 10,000 and 20,000 fishing boats supplying these processors.

Chairat's escape came three years ago. He was spotted by a delegation including Patima and TMFG members who were visiting the island in order to repatriate enslaved fisheries workers.

"We thought there were around 100 ex-slave fishermen there," Patima says. "We found about 1,000."

For his part, Chairat says he was lucky to be found at all. "Some local villagers told the delegation about those of us in jail." Now as chairman of the TMFG, he works to find, register and eventually release and repatriate slave fishermen. The organisation estimates it has found and organised the release of around 4,000 slave fishermen since 2014.

While they work through official channels, the work can be dangerous. It's not uncommon, for instance, for fishing companies to bribe local authorities, leaving the slave rescuers with no effective protection in isolated locations.

Chairat fears he could be killed.

Chairat, Patima and the TMFG team have developed a system whereby slave workers can make calls for help on their mobiles while at sea without being detected. The details of this scheme, Chairat said, must be kept secret.

He now sees the release of slave fishermen as his central aim and is committed to freeing the workers and raising awareness of their plight. A consumer war on the industry, he says, is not the answer. "We don't want to pressure consumers to stop buying seafood," he says. "A boycott affects the fishermen too. The solution is that the workers have to have power. There has to be collective action."

## CHAPTER EIGHT

### REPRESENTING, COUNTING, VALUING: MANAGING DEFINITIONAL UNCERTAINTY IN THE LAW OF TRAFFICKING

Kerry Rittich

#### INTRODUCTION

Debates about the regulation and prohibition of trafficking are beset by definitional controversies (Gallagher, Dottridge, Chuang, this volume). Animating these controversies are the linked certainties that trafficking is a problem and that we must *do* something about that problem. Yet identifying trafficking and describing it in general rather than specific terms remains difficult, and conclusively distinguishing trafficking from related work situations remains a constant challenge.

Two quite different attitudes could be adopted in respect of these conundrums of definition and classification. One – the predominant approach, reflected in international treaties and protocols and the anti-trafficking initiatives of organizations such as the International Labour Organization (ILO) – would be to try to settle the definitions with more precision and thereby sharpen, by agreement or by fiat if necessary, the distinctions between forced and free labor and those who are trafficked and those who merely move or migrate in search of work. The other would be to view these instabilities of definition and classification as simply a feature of trafficking rather than a problem or “bug,” something that can be productive, even revelatory, both with respect to the sources and dynamics of trafficking and to how the concerns around trafficking might be addressed.

In this chapter, I pursue the second intuition and use the dilemmas of definition as a way to explore the connections between trafficking and migration, exploitative and merely precarious or “bad” work, forced

and apparently free work. As this exploration reveals, the distinctions between trafficking and forced labor on the one hand and mere “bad” work on the other that are drawn repeatedly in analyses of trafficking continuously erode and collapse. These collapsing distinctions are, I suggest, symptomatic of a deep interrelationship between trafficking and other economic structures and forms of work, one that endures even as advocacy and institutional responses remain preoccupied with what makes trafficking unique and distinctive.

This interrelationship, moreover, points toward very different strategies for tackling the problems related to trafficking and forced labor than those now in vogue. Doing something about trafficking has come to mean, in general, deploying criminal prohibitions against the perpetrators and human rights norms and mechanisms to protect the victims in ever more pervasive and thoroughgoing ways. In response both to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (Trafficking Protocol) (UN 2000) and to the US Trafficking Victims Protection Act 2000, virtually all states have adopted a criminalist model of regulation (Chuang 2006; Chuang 2014).

In recent years, support for anti-trafficking initiatives has been generated by the development of ever more detailed and graphic accounts of trafficking. Some of the most well-publicized involve efforts to represent, count and measure those who are trafficked or engaged in forced labor and to value the profits their labor produces. The ILO, for example, has released a series of such reports over the last decade, each of which paints a more detailed and methodologically elaborate empirical picture of trafficking and forced labor than the last (ILO 2005, 2009a, 2009b, 2012, 2014). More recent reports set out definitive markers or indicators of the presence of trafficking and forced labor (ILO 2009b) with detailed guidelines on how they might be applied in the field (ILO 2012), as well as calculations of the illegal profits that are generated in different sectors (ILO 2014).

This heavy institutional investment in definitively representing, categorizing and counting those who are trafficked reflects the belief that clarity about the unique characteristics and circumstances of those involved provides the most secure foundation on which to tackle and eliminate trafficking. Yet whether the concern is the predicament of those who find themselves trafficked or the conditions that enable the perpetrators to succeed at their plans, there are reasons to query this assumption. When it comes both to the analysis of trafficking and to the legal and policy responses to trafficking, it may be more

productive instead to take the connections with precarious work as the starting point. Indeed trafficking might be seen in relation to – even as a species of – precarious work. Because it so often overlaps with ordinary work and economic activity, trafficking can be productively examined through a consideration of the complex structures and regulatory institutions that both sustain it *and* join it to other forms of work. Whatever its distinctive characteristics, focusing on the similarities between trafficking and other work situations allows us to subject key terms such as coercion to insights and forms of analysis that are already well-developed in the discipline of labor law. Still broader legal analysis can enable us to better identify contexts in which both trafficking and forced labor are likely to emerge, and at the same time bring a host of rules, institutions and practices into view whose relevance to trafficking and forced labor we might otherwise miss.

To this end, this chapter follows the following itinerary. The first part suggests how and why trafficking might be understood as a normal rather than exceptional part of the world of work. It describes how trafficking is now deeply integrated into ordinary economic processes and activities in the private sector, and for that reason is not easily separated from other forms of work, especially precarious work. The second part considers the legal definition of trafficking as well as two key terms and concepts, exploitation and coercion, that are central to the identification and analysis of trafficking and forced labor. Over and over, these definitions and terms continually fail at their central task. Rather than merely an unfortunate contingency or shortcoming, this failure has analytic roots. Exploitation provides no explanatory basis on which to distinguish trafficking and forced labor. And because it is a ubiquitous element of labor contracting, coercion cannot provide a secure or tractable way to differentiate trafficking and forced labor from precarious work.

...

...

#### NORMALIZING TRAFFICKING

Trafficking is routinely exceptionalized, that is, trafficking is distinguished both normatively and descriptively from ordinary labor, the contractual forms through which it operates, the organizational practices in which it is embedded and the migration patterns by which people travel to engage in it. It is distinguished, moreover, in ways that typically carry profound material and symbolic significance for the parties involved. Yet whatever might be distinctive about trafficking, there are powerful reasons to think of trafficking as an integral part of contemporary labor markets. Trafficking might even be imagined as entirely normal in at least four respects.

First, like forced labor in general (ILO 2012: 20), trafficking can be found in a quite wide range of jobs and industries; it is an ordinary, even quotidian, part of work in many places. In the words of the ILO, “[f]orced labour can be found in practically all countries and all economic sectors” (Ibid.). Due to assiduous advocacy efforts and legal reform campaigns, it is now conventional to associate trafficking with sex trafficking, trafficking of women and girls in particular. However, just over half of those officially counted as trafficked are female, and although such persons can be found in the historic, and expected, locales of domestic and agricultural labor, they also work in entirely modern sectors of the economy such as construction, manufacturing, catering and hospitality (Dowling et al. 2007). Put simply, lots of men as well as women are trafficked, and women are trafficked for non-sexual as well as sexual labor.

Second, trafficking is linked in myriad ways to the ordinary circulation of resources within the global economy, as well as to the increased flows of labor migration associated with social, economic and political change and upheaval (Thomas 2011). Indeed migration and trafficking are deeply interlinked; we might think of trafficking as a feature of the dark side of global markets, part of the market for “bads” that inevitably travels with the market for goods (Braithwaite 2005). Processes that facilitate the participation of workers in licit global labor markets also facilitate their participation in informal, grey or simply illegal markets

(Andreas 2000). What sustains the global flows of ordinary migrant labor frequently enables trafficking as well, along with many other forms of work that involve elements of force, fraud, coercion and exploitation. The supply and contracting chains now so integral to global production and service delivery may not fundamentally differ in structure and operation from the circuits through which people are trafficked; sometimes they are the very same thing (Dowling et al. 2007). For related reasons, many persons who are trafficked are integrated in one way or another into the transport or production of other goods and services. Forced labor, some of which may result from trafficking, routinely forms part of global production chains (ILO 2005: 63). At the bottom end of the labor market, the parallels and continuities can be especially stark: here, there often seems little to distinguish trafficking and forced labor on the one hand from work that is designated simply bad or precarious on the other. The circumstances that produce the latter will often ensure the emergence of the former (see Brennan, this volume).

Third, trafficking is frequently interlinked with events and upheavals in the broader economy and polity, events that invariably roll labor markets as well. It is now recognized that upticks in the numbers of trafficked persons are routinely linked to increases in poverty and insecurity; the ILO has even observed a “striking correlation between household vulnerability to sudden income shocks and the likelihood of ending up in forced labour” (ILO 2014: 1). Trafficking routinely follows in the wake of economic instability, whether that instability arises from periodic downturns in the business cycle, generalized financial crises that provoke rising unemployment or from structural changes in the economy that result in the decline of jobs and industries, or even the loss of entire ways of life. For related reasons, trafficking frequently tracks profound political and economic transformations. Take, for example, the transition to market economies in Central and Eastern Europe and the states of the former Soviet Union, a process catalyzed by shock therapy and the introduction of new market institutions which produced, *inter alia*, a collapse in production, declining incomes, the degradation of the social safety net and a sharp rise in poverty as well as extreme hardship and deprivation for much of the population (UNICEF 1993: 1). With organized crime asserting control over much of the economy in the wake of weak or collapsed state institutions, it is hardly surprising to find the emergence of trafficking for sexual and other services, including the commercial sexual exploitation of children (UNICEF 1997: 60–61).

Fourth, private actors in a wide range of states and regions appear to participate in the phenomenon of trafficking (ILO 2005: 17). Although trafficking and forced labor are historically associated with conditions of backwardness (social and cultural as well as economic), virtually every country is today either a sending, transit or receiving country (ILO 2012: 20). Like trafficking in drugs, trafficking in persons can even plausibly be characterized as a first world issue, insofar as the growth and persistence of trafficking is often traceable to demand emanating from global cities, and profits from forced labor are highest in wealthy countries (ILO 2014: 13). Destinations for trafficked persons often appear to be either developed or rapidly industrializing states such as the burgeoning metropolises of the Middle East. Even trafficking that looks, at least at first glance, to be a purely local or regional phenomenon may turn out on further inspection to be linked to first world consumption and investment patterns: think for example of those trafficked for sex work in Southeast Asia, a significant number of whom service clients from Europe, Australia and North America (Derks 2000); trafficking that is integrated into the production of globally distributed goods such as clothing and electronics (Verité 2014); or trafficking in construction labor associated with the pressures of meeting the deadlines and requirements of international events such as the World Cup (ITUC 2014).

Trafficking and ordinary labor operate within common economic, social, political and legal contexts and forces; they also involve essentially similar operations and logics. Consider the insourcing and outsourcing of work (Bosniak et al. 2005). At the most basic level, both are designed either to connect workers to new labor market opportunities or to introduce services and create markets that exploit the possibilities of profiting from the circumstances and characteristics of particular workers, for example those who suffer from racial, ethnic, gender or other forms of discrimination (ILO 2005: 271–274). Both trafficking and ordinary labor migration may arise to fill gaps in local or domestic labor markets. That is, both may be a response to the problem of jobs that cannot be filled through local markets at the price on offer, or sometimes at any price at all. Trafficking, like many other forms of labor insourcing, involves moving to new markets or to new work situations those who are, in social, political or legal terms, relatively less secure and more vulnerable than local or national workers, and therefore unlikely or unable to refuse terms that other workers cannot be compelled to accept. But the logic behind outsourcing and offshoring,

the engines of global supply and value chains, is the same: it merely operates in the other direction.

Outsourcing typically involves relocating work to places populated with (relatively) lower-wage workers, workers who are also more easily controlled because they possess either no or very few better alternatives for securing income. It should not be surprising that forced labor occurs most frequently in these contexts, where there are lengthy subcontracting chains (Ibid.: 48). The efforts to match workers to labor market opportunities involves similar, and predictable, pressures and risks when it comes to working conditions and workers' rights, whether the context is trafficking or simple labor migration. The capacity of outsourcing to place downward pressure on labor standards is well-recognized; indeed, work may be outsourced to particular locales expressly for the purpose of evading higher labor standards or stronger associational rights in the home jurisdiction (Standing 2011). Insourcing carries similar – and related – risks, making it difficult for those in higher-wage jurisdictions and labor markets to maintain, or improve, wages, working conditions and associational rights (Weil 2014).

Trafficking also overlaps with ordinary migrant work insofar as both rely on intermediaries: transborder as well as domestic. It is well recognized that all migrant workers are “at...risk of coercive recruitment and employment practices” (ILO 2005: 18). Trafficking often involves networks of actors involved in gray, even illegal, market activity (Andreas 2000; ILO 2005: 53; Thomas 2011). But the networks and intermediaries through which trafficked persons travel overlap significantly with those through which legal commerce is conducted, and some trafficking even occurs in the context of formal migration schemes. For example, many states have well-institutionalized arrangements for the supply and reception of migrant workers (Preibisch 2010; Faraday 2012: 14–15). Yet workers who use these licit channels nonetheless regularly end up working in situations that possess the markers of forced labor or trafficking (Faraday 2012: 23; ILO 2005: 53; Dowling et al. 2007; ITUC 2014).

For all of the reasons – the presence of forced labor across a wide range of geographical locations and labor sectors, linkages to broader economic and political phenomena and similarities in global processes and intermediaries as well as in the terms of work itself – there may be little to distinguish trafficking and forced labor from ordinary forms of labor.

## DRAWING DISTINCTIONS: DEFINITIONS AND KEY TERMS

### Defining Trafficking and Forced Labour

The legal definitions of trafficking and forced labor are, at least in a formal sense, settled and widely accepted at the global level (Galagher, this volume). As commonly recited, and as articulated in the ILO Forced Labour Convention (ILO 1930) and the Trafficking Protocol, key to the identification of forced labor are the elements of involuntariness and menace of a penalty,<sup>1</sup> while trafficking involves action such as the recruitment, transportation or harboring of persons through coercion, fraud or like means for the purposes of exploitation.<sup>2</sup> As Janie Chung has noted, trafficking and forced labor are now conceptualized in increasingly convergent ways, with the ILO working group on the implementation of the UN Protocol, for example, recommending that trafficking be found even in the absence of transit or transportation (Chuang 2014: 631–632).

Notwithstanding this convergence, an astonishing amount of institutional and scholarly attention remains devoted to the definitions of trafficking and forced labor, as well as to constituent concepts like coercion and exploitation. Even accepting the inherent openness of legal norms, trafficking remains remarkable in the extent to which its most central concepts are contested: “the very parameters of the offence of trafficking and its scope continue to be up for grabs” (Koritswaran 2014: 360). This contestation is just as visible in the field as it is within legal and policy debates: it is well-recognized that many of the people now classified by experts and institutions such as the ILO as trafficked or engaged in forced labor do not themselves identify as such (ILO 2012: 8, 70), and that rather than providing relatively sharp and tractable distinctions, in real life those categories often overlap or break down completely. The 2014 report, *Profits and Poverty*, notes, for example, “a clear correlation between the need to borrow money for the payment of recruitment fees” – a common predicament for those who migrate in search of work – and “the risk of ending up in forced labour” (ILO 2014: 46). Not only can it be extraordinarily difficult to distinguish exploitative from non-exploitative work; it is well-recognized that being trafficked itself is an unstable condition, because workers often find that their work has materialized, or been transformed, in ways that they did not anticipate. For example, people may expect to migrate, or even to be smuggled,

in order to work, yet find themselves subject to force or fraud either by intermediaries or by those who ultimately employ them. Or people may move to take up some forms of work, but discover when they arrive that they are subject to conditions and constraints which they did not bargain for; indeed, they may be engaged in wholly different forms of work than they contracted to do. As the ILO has put it, the “circle of deception” in trafficking can close at a later point (ILO 2005: 49).

A central objective of definitions of trafficking and forced labor is to distinguish legally and morally acceptable from unacceptable work. The legal definitions of trafficking and forced labor both presuppose a distinction between work that is coerced and work that is freely accepted and work that is degrading and demeaning versus work that is minimally fair or acceptable in its conditions. Underpinning these distinctions is an attempt to cordon off those who are trafficked from those who, however unfortunate in their position, are merely subject to the ordinary economic pressures of the market.

Despite their instability, these legal definitions perform conceptual as well as moral and expressive work. For example, they operate to separate trafficking from other forms of work and labor migration, including those in which labor market intermediaries play a crucial role. They distinguish the situation of some workers from those to whom they might otherwise seem to be closely related, for example because of shared working conditions or labor market position or links to a common economic enterprise. They typically also plot the distance between those thought to be victims of harm and abuse and those to whom some degree of economic agency is ascribed. These conceptual categories, in turn, often track different regulatory strategies. For example, they may delineate the boundary between workers whose concerns are to be addressed through strengthened associational rights and higher labor standards and those whose plight is the target of human rights and criminal law measures (see Plant, this volume). Yet over and over again, these distinctions prove incapable of performing their imagined roles. This weakness is not merely an unfortunate contingency; rather, as explained next, key terms will not bear the analytic weight that is placed upon them.

### Exploitation

In the Trafficking Protocol, trafficking is performed for a purpose, that purpose being labor exploitation (Art. 3). Yet while exploitation has been described as the “crucial element” of the Trafficking protocol

(European Commission 2004: 53; ILO 2005: 7), what it adds to the identification of trafficking remains stubbornly elusive. The problems with exploitation turns out to be similar to the problems identified with the concept of intervention in the public-private distinction (Olsen 1985). Exploitation is an ideological rather than an analytic term. While it sends a strong signal of moral disapprobation, it turns out to be either redundant or simply conclusory in action, providing a weak — if any — basis on which to distinguish trafficking from other contexts and work situations.

The concept of exploitation seems to presume either the possibility of non-exploitation or, more minimally, agreement about the nature of unacceptable versus acceptable terms of work. For example, a familiar marker of exploitation is work performed in contravention of legal norms or entitlements; failure to respect legal norms and entitlements at work is also a common source of the penalty experienced by workers in situations of forced labor. But, as described below, *many* workers suffer from infringements of labor standards, some of which are quite serious. Thus, the infringement of rights at work cannot, on its own, be an indicator of forced labor. And where the question is the adequacy of labor standards or workers’ rights, exploitation suffers from an additional deficiency: whether workers are trafficked or merely engaged in precarious work, any effort to use exploitation as a means of setting labor standards raises the baseline problem identified first in debates over free trade, namely establishing the legal rules and institutions through which *non-exploitative* work is organized (Tanullo 1987). As debates about the place of labor standards in the first WTO Singapore Ministerial meeting revealed and the resulting ILO Declaration confirm, agreement on this baseline is extraordinarily difficult to achieve, particularly among countries at vastly different levels of economic development where, in addition to conflicting interests between workers and employers, the issue of workers’ rights and labor standards also engages the question of comparative advantage among states (ILO 1998 Art. 5).

Exploitation might also be approached through the lens of fundamental rights. Here, the offense of exploitation is understood as the assault on workers’ dignity through the instrumentalization of labor for economic gain without respect for the minimum conditions of human existence or the inherent value and worth of the worker herself. But rather than resolve the fundamental question, efforts to secure workers’ dignity by identifying those minimum conditions often simply restate the conundrum in a new frame, for example the language of human

rights or core labor rights or standards (Rittich 2003). It is not surprising in this context that with a few exceptions, proposals to formalize workers' rights at the international level remain stalled (Mundlak and Rittich 2015: 88).

Exploitation also becomes progressively less helpful, and more difficult to deploy as a term of condemnation that is uniquely descriptive of the offense of trafficking, once both employers and workers are actively encouraged to maximize the productivity of labor. After all, it is difficult to use exploitation as a marker of unacceptable work in a policy environment that privileges flexibility for employers and which presumes that, like other factors of production, labor is properly subject to, and allocated by, competitive forces (ILO 2005: 64; Rittich 2006). Where, as at present, legal regimes and the organization of production are increasingly structured so as to mobilize competitive forces within labor markets (Standing 2011; Weil 2014), then the question is how, at least for the purpose of distinguishing between free and forced labor, exploitation retains any purchase at all.

Yet although exploitation, on its own, does not provide the analytic traction with which to conclusively identify trafficking, continuities across trafficking and precarious work can still be understood in analytic as well as moral terms. Trafficking results from the economic subjection of those who are weak and vulnerable by those who are more socially and economically powerful. But trafficking also results from efforts of workers to take advantage of the best, the easiest, most available or perhaps the only real economic opportunities on offer. In economic parlance, trafficking might be described as a function of the comparative market disadvantage of those whose options range from very low-wage labor to no paid work at all, whether that disadvantage arises from discrimination on ascriptive grounds such as caste, gender or citizenship (ILO 2005: 58) or simply from their structural position within local or global markets (ILO 2014: 30). This doubled quality of trafficked work – as exploitation and labor market choice – raises a conundrum which surfaces as the apparently contradictory nature of “self-exploitation” (Chuang, this volume) in contemporary debt-financed migration.

### Coercion and Choice at Work

If the concept of exploitation suffers from conceptual incoherence, then the other pivotal element of trafficking and forced labor, coercion, turns out to suffer from similar problems. A repeated conundrum for those

tackling the problems of trafficking, forced labor or just very bad work, all of which at the extreme may lead to injury or even death, is coming to terms with the decisions that workers themselves make concerning such work. There are, of course, workers who find themselves engaged in work not of their own choosing or working under conditions that they would never have agreed to in advance. However, in general, workers do possess some degree of agency over their work choices; sometimes they seem to possess a fair degree of it. And whatever the degree of choice initially exercised, although some workers desperately want to turn back the clock, many do not. Even those who are trafficked routinely report that they do not want to be rescued and they do not want to “go back”; some do not even want to be found at all. Like those in merely “bad” work, those who are trafficked do not always seek different work. But they almost always want their work to be better (Brennan 2014).

One response to such problems of choice is to foreclose further inquiry and simply move to sanction all work that fails to meet certain conditions or standards, whatever the view of the person affected. To repeat, however, what those conditions and standards are or should be remains a deeply contested matter; as a result, any decision is destined to seem either over- or under-inclusive from the standpoint of some important party. These sometimes puzzling decisions on the part of workers do however suggest another line of inquiry altogether: how do workers make choices about work? How much choice is required to make that choice free? In what ways, exactly, is free labor different from forced? Why do the distinctions between forced labor and work performed under mere economic compulsion sometimes seem so difficult to make, even arbitrary? And if prohibition alone is rarely if ever the answer to trafficking and forced labor, can we think about the relationship between coercion and law in a way that is more productive?

Taking workers' choices about work (more) seriously provides not just a new optic on the links between trafficking and forced labor and other forms of work. It may also permit something of a general account of the dynamics of choice in respect of work. A useful place to begin here is with what we already know about choice at work.

First, whether workers exercise choice, and how much choice they exercise, about work cannot be determined either by the nature of the work or by the character of the work relationship. Free choice at work cannot be assumed merely by the absence of bonded labor, debt servitude and other forms of obvious unfreedom on the one hand and the

presence of a market in which workers are formally in a position to contract with others for their labor on the other (Sen 1999). As the indicators of trafficking and forced labor confirm, reliance upon these classic measures of freedom and unfreedom at work will fail to capture many contemporary forms of coercion at work described below, such as forced overtime, loss of employment rights and dismissal or exclusion from future employment (ILO 2012: 24). Nor will they help elucidate the processes through which new forms of coercion are exercised and new forms of unfreedom emerge.

Second, when workers do exercise choice about when, where and how to work, they do not make those choices in the air or in the abstract; they make them in light of the alternatives, both perceived and actual, on offer. For many workers, not only those engaged in forced labor, those alternatives are often scarce to non-existent.

Third, and relatedly, coercion in labor markets is ubiquitous. It has long been recognized that for the most part, workers do not bargain over the terms and conditions of work but simply accept or reject the terms of work on offer. A significant, even preponderant, majority of workers, moreover, have limited choice over whether to accept what is on offer. Instead, economic circumstances turn into the exigencies of life: as social and political theorists have long noted, the absence of capital or access to property means that wage labor is effectively compelled (Smith 1776; Weber 1978). Social, ethnic, gender and family norms, even national or community circumstances, routinely constrain those options even further. In the end, not only is there no real choice about *whether* to work; there may be little, if any, choice whether to accept or decline any particular job or work opportunity. Coercion, then, turns out not to be the opposite of free choice at work; instead, choice exercised under constraints is the *normal* condition in which workers make decisions about work. It follows that distinctions between free and forced labor do not mark the absence or presence of coercion in the labor contract; instead they represent norms or decisions about the nature, forms and extent of coercion at work that should be alternatively tolerated or proscribed.

Fourth, although their role is often deeply receded in popular consciousness, choice and coercion are, at work as elsewhere, in part produced by legal norms and institutions (Davis and Klare 2010: 446). Rather than simply features of economy and society, coercion emanates from the legal rules that structure the parties' incentives and bargaining power; by extension, legal rules also affect the distribution of income

from productive activity (Ibid.: 444–446). Because rights are, in addition, relational, they operate simultaneously as sources of empowerment and disempowerment at work. The recognition of a right, power or immunity for one party – the employer, investor, or capital holder for example – implies a correlative obligation, disability or “no-right” for the worker; the opposite is, of course, also true (Hohfeld 1913). Thus, if the compulsion to labor often flows in the first instance from limits on access to resources defined by property law and backed by the state, as does the power of some to compel others to labor on their behalf (Hale 1923; Cohen 1927), then the variable degree of power possessed by workers to decline such work, too, is in part a function of law. As Hale observed, *both* parties are in a position to exert coercion against each other, in that each may compel the other to either do or grant things that run counter to their preferences (Hale 1923). We might understand this reciprocal relation to coercion, then, as simply another name for the operation of power in the Foucaultian sense: it is mobile, multi-directional, dynamic, horizontal, even capillary (Foucault 1980: 94–95). From this standpoint, when and why the nature or effects of this omnipresent coercion warrant a legal or policy intervention becomes the question.

Anti-trafficking regimes and initiatives against forced labor aim to eradicate activities and forms of work that are thought to be particularly coercive. But it is worth bearing in mind that legal prohibitions also delineate the boundary of the legally permissible (Holmes 1894); thus, the lines determining prohibited forms of work will, of necessity, also license some degree of coercion at work. Depending on how the definitions and categories of trafficking and forced labor are established, then, such regimes and initiatives may serve to normalize other forms of precarious work, or even to increase their incidence overall.

One key to the analysis of trafficking and forced labor now is to recognize that the sources of coercion may be located in a wide range of norms and instruments, informal as well as formal. In a global legal order that gives pre-eminent significance to the protection of individualized rights, property rights surely retain their status as a major site of attention. But we operate now under conditions of asymmetric globalization, in which goods, capital and services are increasingly free to circulate but labor, in general, is not. In such conditions, important sources of coercion can be located in other legal regimes and legal rules, including in immigration laws and citizenship requirements (ILO 2005). For example, when the entitlement of migrant workers to enter and remain

within a jurisdiction is tied to an offer of employment, employers' power over those workers will spike sharply upward. Under a bargaining analysis (Kornhauser and Mnookin 1979; Kennedy 1993), we should expect that, at least some of the time, employers will use the power conferred by that legal requirement to extend offers of employment on terms and conditions that approach – or reach – the situation of forced labor. And that is, in fact, what occurs in states as disparate as Canada (Faraday 2012: 78, 103) and Qatar (ITUC 2014). Fear of repatriation will also effectively mute workers' complaints of labor law infractions (Law Commission of Ontario 2012: 70) and increase the degree of precarious work at the same time.

Much of the power that private actors possess over the terms and conditions of work emanates simply from the background legal norms through which work is conducted. Consider the role played by contract law, for example, in the operation of global supply chains. Among their other attractions, global supply chains serve to insulate lead firms and those higher up in the chain from liability for unpaid wages, forced overtime and other violations of labor standards lower down the chain (Weil 2014). Rather than a natural state of affairs, however, or even an expression of raw economic power, this insulation from liability is a function of law, a result of the bilateral nature of contractual obligations in a world of production organized as multilateral networked enterprises (Fudge 2006; Munnalak and Rittich 2015). In this legal environment, supply chains permit lead firms to place continuous downward pressure on the substantive terms of the contract, and thus in general degrade the conditions of work, as intermediaries in the chain can only extract profits or rents at the price of lower returns to those below them. This is why, as the ILO has noted (ILO 2005: 63), it is routine rather than exceptional to find those at the bottom end of the supply chain working either below the legal minima or what they have contracted for – both definitions of forced labor – or otherwise subject to extreme coercion and disadvantage, while those at the top reap the vast majority of the rewards. This disjuncture between legal responsibility and effective control helps explain why corporations such as Apple, for example, can register profits of historically unparalleled magnitude (Alba 2016) at the same time as the workers who produce Apple's products earn low wages, endure numerous violations of rights and suffer intolerable working conditions (Garside 2012).

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#### NOTES

1. Under Art. 21 of the ILO Convention No. 29, the term *forced or compulsory labour* shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.
2. Article 3 of the Trafficking Protocol states that (a) "Trafficking in Persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

# ANTI-IMPUNITY AND THE TURN TO CRIMINAL LAW IN HUMAN RIGHTS

*Karen Engle*

## INTRODUCTION

Since the beginning of the twenty-first century, the human rights movement has been almost synonymous with the fight against impunity. Today, to support human rights means to favor criminal accountability for those individuals who have violated international human rights or humanitarian law. It also means to be against amnesty laws that might preclude such accountability.

Human rights advocates have garnered significant success with their relatively recent turn to criminal law. Judicial and quasi-judicial human rights bodies, international and regional human rights institutions, and international human rights law scholars have largely concluded that states are responsible for criminally investigating, prosecuting, and punishing individuals who commit war crimes, crimes against humanity, and genocide, as well as other “serious” human rights violations. They further generally agree that a state’s failure to fulfill such a duty constitutes a violation of international human rights law and that, in certain instances, international criminal institutions should be created or used to punish individual perpetrators.

... In this Article I question the often unsupported or even unstated assumption that the turn to criminal prosecution is a clear success for the human rights movement by suggesting some of the disabling effects of that focus. I do not simply consider what has been missed by the turn but attempt to demonstrate that, as criminal law has become the enforcement tool of choice, it has negatively affected the lens through which the human rights movement and the international law scholars who support it view human rights violations. In short, as advocates increasingly turn to international criminal law to respond to issues ranging from economic injustice to genocide, they reinforce an individualized and decontextualized understanding of the harms they aim to address, even

while relying on the state and on forms of criminalization of which they have long been critical.

...

## I

### OVERVIEW OF THE ANTI-IMPUNITY TREND

From the mid-1970s through the late 1980s, the human rights movement—at least as represented by large international NGOs based in Europe and the United States—primarily concerned itself with the protection of individual civil and political rights. These NGOs mostly used naming and shaming tactics to put pressure on states to end their direct violations of human rights. They did not generally call on states to prosecute individuals who committed the violations, in large part because states—not individuals—were considered the perpetrators.

Moreover, during this period, much human rights advocacy was directed at states’ criminalization of political activity and at abuses of their penal systems. When AI [Amnesty International] first began its letter-writing campaigns in 1961, it called for the release of those it deemed prisoners of conscience. . . . As early as 1964, however, it began scrutinizing the criminal justice system’s treatment of all political prisoners. . . . By 1968, it officially expanded its mandate to express concern for the treatment of all prisoners—political and “ordinary”—using Article 5 (prohibiting torture and cruel and inhumane punishment) and Article 9 (prohibiting arbitrary arrest and detention) of the UDHR. Opposition to the death penalty became part of its mandate in the early-1970s. While AI might have found some states’ criminal justice systems more suspect than others, it saw all countries as capable of abusing their penal power. . . .

... [In contrast,] the rise of neoliberalism that accompanied the end of the Cold War often called for a strong punitive state, even while relaxing government control in many other areas. Criminal law played an important role in economic restructuring and rule of law projects throughout the world. Allegra McLeod explores in detail the United States’ increased exportation of its own criminal justice model throughout the 1990s to combat transnational crime.<sup>1</sup> Noting that then-Senator Kerry “repeatedly

<sup>1</sup> Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL’Y REV. 83 (2010).

declared that transnational crime was ‘the new communism, the new monolithic threat’” and that it was up to the United States to lead the crusade against it, she contends that “[b]lattering transnational crime became a vehicle to organize U.S. global engagement in the post-Cold War period.”<sup>2</sup> The exported model favored retributive justice, and its spread corresponded to the rise of prison rates in the United States.

In the early 1990s, the focus and approach of the human rights movement also began to change in ways that coincided with, and perhaps fueled, the increased attention to and faith in criminal justice systems—domestic, international, and transnational. During that time, human rights advocates began to see the threat of impunity in much the way then-Senator Kerry understood the threat of transnational crime.

AI’s 1991 “policy statement on impunity” is exemplary of the term’s usage:

Amnesty International believes that the phenomenon of impunity is one of the main contributing factors to [“persistent patterns of gross human rights violations” that ‘are still occurring in many countries throughout the world.’] Impunity, literally the exemption from punishment, has serious implications for the proper administration of justice . . . . International standards clearly require states to undertake proper investigations into human rights violations and to ensure that those responsible are brought to justice.<sup>3</sup>

Note that in this quotation, impunity is not simply a failure to remedy human rights violations; it is a unique cause of them. . . . Such impunity, of course, might occur from a state’s passive failure to investigate human rights violations; or it might result from explicit decisions not to prosecute abuses of human rights, such as through amnesty laws. Advocates began to oppose both, increasingly decrying the “culture of impunity,” a term that had rarely been used before 1991.

<sup>2</sup> McLeod details how the three primary modes of export—the Office of Overseas Prosecutorial Development Assistance and Training, the International Law Enforcement Academies, and the International Criminal Investigative Training Assistance Program—have been largely influenced both by Cold War counterintelligence and drug war training and by the American legal academy’s “Law and Development Movement.” *Id.* at 96–102.

<sup>3</sup> Amnesty Int’l, *Policy Statement on Impunity*, in 1 TRANSNATIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 219 (Neil J. Kritz ed., 1995).

Seeing impunity as cultural suggests deeply entrenched attitudes that can only be changed over time. While one could imagine multiple ways to respond to that culture, the stage was being set for individual criminal responsibility to emerge as the primary and even legally necessary response to it. . . .

... Domestic and international human rights NGOs as well as regional and international institutions, including human rights courts, eventually concluded that the protection of international human rights and humanitarian law (which increasingly overlapped) required criminal accountability at both domestic and international levels.

#### IV CONCERNS ABOUT THE TREND

... As my description of the trend has already suggested, I have serious misgivings about the criminal turn. I am concerned not only about the significant time and resources that have gone into building criminal institutions but also about how the existence of international criminal institutions and the possibility of, even demand for, domestic prosecutions have helped shape and limit human rights aspirations. . . .

##### A. Individualization and Decontextualization

The criminal law lens often reveals a simple picture of a world infused with a few bad actors, even monsters. Hannah Arendt brought this danger to our attention long ago: We convince ourselves that if we remove the bad actors, we deal with evil. That view affects the human rights movement’s understanding of the world and affects its strategies and ability to attend to underlying structural causes of human rights violations. In obscuring state responsibility, it misses the ways in which bureaucracy functions—even through individual actors—to perpetrate human rights violations. It also misses the multiple ways in which even well-meaning people act both criminally and noncriminally, inside and outside of state structures, to produce and reproduce injustice. . . .

Individualization not only narrows historical inquiry and down-plays the role of the state but it also “may even serve as an alibi for the

population at large to relieve itself from responsibility.”<sup>4</sup> Robert Meister argues that the same logic applies to the human rights movement itself, which, due to its focus on evil and its sense that it has accomplished justice, fails to see the ways in which it and those with whom it aligns are often complicit in creating and continuing conditions of gross structural inequality.<sup>5</sup>

### B. Conceptions of Economic Harm and Remedy

Advocates of economic and social rights have often challenged the dominance of civil and political rights within human rights law and advocacy. For years, they have pushed to make economic and social rights more justiciable at the domestic and international levels, with mixed success. Many now often concentrate their efforts on holding corporations criminally or civilly liable, as the state of cases against corporations in the United States under the Alien Tort Statute attests. . . .

The turn to criminal law in this context arguably perpetuates biases against economic restructuring already inherent in the human rights framework. . . . The aim of advocates is therefore to prevent excesses, rather than to restructure. They do not, for example, focus on changing property, contract, corporate, or tax law in their efforts to reduce corporate power.

It is also difficult to pursue economic reparations in the criminal justice context. . . . While economic remedies are important for most victims, their award is generally dependent upon a finding of guilt and a proven “‘but/for’ relationship between the crime and the harm.” Given the selectivity of criminal prosecutions, granting of these types of reparations is relatively arbitrary. Moreover, although the [International Criminal] court lists the return of “lost or stolen property” as a possible form of reparation, the remedy leaves little room for the significant redistribution of property that might be needed to attend to long-standing inequalities.

### C. Alignment with the State

Human rights advocates also participate in the governance of the

state when their advocacy encourages states to overreach in their investigations, prosecutions, and punishments. . . .

This concern about overreach is not only about penal systems that do not meet formal rule of law requirements. As discussed in Part I, many penal systems in the world have undergone a neoliberal makeover—often as a direct result of explicit exportation of United States criminal justice, aimed largely at transnational crime. That criminal justice project has favored large-scale incarceration and eschewed criminal justice reform initiatives—from carceral abolition to restorative justice. Thus, at the same time that “justice” came to mean “criminal justice” in human rights advocacy, “criminal justice” largely came to mean incarceration in the United States and in its exported models.

Moreover, advocates might be less likely in general to be critical of governments that seem finally to be attempting to remedy past wrongs, even if through the penal system. In line with several of the previously stated concerns, advocates might also begin to conceive of the broader issues they promote as criminal issues, as though their victories in punishing a few bad actors could address centuries of biases based on race, class, and gender, thus relieving pressure on the state to attend to structural issues of distribution.

## CONCLUSION

... I have taken a position against a strong anti-impunity focus, with a critical look at the implications of connecting human rights remedies to criminal law. Being against anti-impunity is not the same as being for impunity. . . .

My aim is to encourage human rights advocates to imagine a world in which the culture of impunity is not their principal opponent. . . . In fact, as I have suggested above, anti-impunity is more often than not today the battle cry of each side to any given conflict. As such, it provides a way for all sides to avoid overt discussion of distribution, even while deploying in their political struggles the criminal justice system, a potentially potent weapon of which the human rights movement has long been critical.

<sup>4</sup> M. Koskeniemä, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N.L. (2002) 14.

<sup>5</sup> See generally ROBERT MEISTER, *AFTER EVIL: A POLITICS OF HUMAN RIGHTS* (2011).

# CRITICAL LEGAL THEORY IN A NUTSHELL

(DRAFT)

*Karl Klare*

## § 1. Law (partially) structures social life.

Legal rules and practices play a part in constructing social life. Societies do not have a ‘natural’ form of organization. They are organized by humanly crafted and culturally transmitted norms and practices which, in modern societies, are typically embodied in legal rules. All institutions, power relationships and interactions in contemporary societies are at least partially constituted by rules of law. For example, markets cannot exist without legal ground rules to define capacity, allocate property entitlements, distinguish voluntary exchange from coerced transfer, divide the outputs of joint productive activity, and so on. There is no such thing as “the” market. There are only “markets,” discrete institutional arrangements, each structured by a particular set of background rules. Similarly, there is no “the” family. Family life is structured by myriads of rules which determine who may marry, what constitutes a family, how decisions are taken within families, whether wives have capacity to contract or own property, and so on. (These propositions are referred to by the phrase “constitutive theory of law.”)

Likewise, there is no such thing as a “free market” (a market unregulated by law) or “family privacy” (defined as family arrangements unregulated by law). The law does not “stay out of” or “enter into” markets and families. One way or another, it is always “in” from the start. One cannot even talk about what a market or a family is without sooner or later, usually sooner, getting to questions of law.

## § 2. Backgrounding.

The nature and importance of these rules is pushed very far into the background of legal and popular consciousness, so far, indeed, that such rules are virtually invisible and not thought of as rules at all. Examples of rules backgrounded to the point of invisibility: the default rule that employers own the products made by factory workers; the rule that parents may determine their child’s place of residence.

## § 3. Legal rules dispose distributive stakes.

Rules that establish ground rules of social and economic interaction often play a significant role in shaping distributive outcomes—who gets how much of what?—within relationships (employer/employee, owner/neighbor, railroad/adjoining farmer, landlord/tenant, seller/consumer, husband/wife, parents/children, etc.) that implicate the pursuit of well-being (wealth, income, knowledge, fulfillment, etc.). Defining entitlements, privileges and liabilities one way rather than another may produce quite different consequences for the distribution of power and welfare. For example, the particular array of background rules that structure a market will have differential distributive consequences for various market-participants (e.g., the rules may tend to favor employers vis-à-vis employees, sellers vis-à-vis buyers, landlords vis-à-vis tenants, and so on). Therefore, legal decisions can alter or sustain the prevailing social distribution of power and well-being. With differently formulated background legal rules, we would observe over the long run different power relationships and a different distribution of welfare.

## § 4. Legal rules and practices dispose cultural and ideological stakes.

Legal practices play a part in constituting social life in a second way (besides setting background rules that distribute power (see § 3 supra)). Legal practices and discourses create meanings and thereby contribute to the store of culturally-available symbols and artifacts which comprise

the medium within which people understand and interpret (“have”) their experiences and enact their identities. To the extent they are salient and diffused in society, legal discourses and practices orient consciousness and construct identities.

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### **§ 5. Law as legitimating ideology.**

Historians have discussed important instances in which the cultural and psychological impact of legal discourses and practices spread to grass roots level. But typically, legal discourses are elite discourses, and therefore the most common cultural effect of legal discourses is to legitimate the status quo, that is, to induce people to believe that existing social arrangements are fair or, at any rate, the best we can do. Elite legal discourses “naturalize” the background rules that sustain the social status quo. For example, legal practices that treat women in certain ways induce people to believe that such legal treatment is appropriate to the identity of “being a woman.” Similarly, it takes a moment of reflection to realize that an employer normally has the power to fire an employee, not because this is the only or a particularly good way to run a society, but because the common law decisions taken by identifiable persons (judges and others) grant the employer permission to do so.

### **§ 6. Transformative possibilities (I)—Foregrounding.**

Transformative possibilities flow from the distributive and socially constitutive powers of law. True, many rules exist so far in the background of consciousness that we hardly think of them as rules of law at all. We forget that each and every common law rule is a humanly-crafted artifact. An example is the default rule of property by virtue of which employers own the commodities produced through the joint activity of management and factory employees. There is nothing ‘natural’ about this principle of social organization—it was centuries in the making.

However, just because they are products of human agency, judge-made, legal rules can be brought out of the background and into the spotlight of foreground, where their distributional and ideological consequences can reconsidered. Legal practices may alter the social distribution of power and well-being by altering the background, institution- and relationship-structuring rules (“market reconstruction”). As appropriate, the rules should be revised so as to aim for more egalitarian and solidaristic outcomes.

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### **§ 7. The content of legal rules is not meta-historically determined.**

The precise content of the background legal rules which structure social institutions and relationships is not determined by the “inherent nature” of the institution or the “type” of society in which it is found (e.g. capitalist, feudalist, socialist). A social institution of a particular type—say, a market for the purchase and sale of labor power in a capitalist society, or for the purchase and sale of goods, or for the leasing of residential property—can be grounded upon a wide variety of foundational legal rule-sets, including rule-sets with quite different distributive consequences (rule-sets that are more or less favorable, as the case may be, to workers or employers, consumers or merchants, tenants or landlords).

### **§ 8. Rules and rule-applications are chosen, not discovered.**

The program of foregrounding, reassessment and transformative development assumes that background legal rules and outcomes are not *tightly* determined by neutral decision procedures. Decision makers must make choices when they are engaged in translating general principles into specific legal rules and/or applying rules to specific cases. These choices are and must be referred, self-consciously or un-

self-consciously, to culturally transmitted values, sensibilities, and experiences external to legal reasoning. In particular, the background rules that structure economic activity, family life, gender relations, and racial interaction cannot be neutrally derived. The background legal rules and arrangements that structure social life are *chosen* in the course of legal practices that are value-laden (political) and context-sensitive.

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#### **§ 15. Indeterminacy of foundational concepts.**

People disagree about what the foundational concepts and values of the legal system are and should be. But put that aside for the moment, and instead assume consensus on the foundational concepts or a rigorously democratic process for specifying them. That is, assume that legal decision makers commence analysis and argument with an authoritative set of foundational concepts and values. The interpretation and application of such concepts is indeterminate.

Decision makers cannot simply deduce the rules that should govern particular cases from foundational principles or rights-concepts like “private property,” “freedom of contract,” “reasonable expectations,” “good faith,” “efficiency,” *sic utere*, “family privacy,” “freedom of speech,” or “due process.” These conceptual building blocks of legal discourse are not self-defining, and the meaning of each is elastic (although not infinitely so, within the experience of any particular legal culture). Often basic legal concepts embody *conflicting* ideas and values. Consequently, much of what passes for “deduction” in legal discourse is actually circular or conclusory argument (Felix Cohen’s “transcendental nonsense”).

#### **§ 16. Private property.**

For example, “private property” embodies the idea of protecting the owner’s freedom to act self-interestedly, but it *also* embodies the idea an

owner’s use of his/her property is subject to duties to neighbors and even strangers. For example, private-property law empowers owners to evict trespassers—except in those cases where private-property law prohibits owners from doing so (*Shack, Matthews*). When and why private property owners have the right to exclude trespassers are questions of public policy the answers to which depend on all the facts and relevant policy considerations in context. When and why owners may evict trespassers cannot be determined by deduction from the concept of private property itself, since the concept of private property points in two directions. Likewise, the idea of private property by itself cannot tell us whether I may use my land without regard to my neighbor’s interests (*Thurston*, re: the neighbor’s house; *Rylands*, re: mining for coal in communicating shafts), or whether I must so use my land as to protect my neighbor’s interests (*Thurston*, re: my neighbor’s soil; *Rylands*, re: installing a reservoir).

#### **§ 17. Contract.**

Similar observations can be made with respect to all the other building blocks. Thus, freedom of contract protects *both* freedom of action (offers revocable until accepted) *and* security of expectations (unaccepted offer sometimes irrevocable to protect reliance or substantial-performance commenced). Parties must keep their bargains, except in the well-known cases where the law permits breaching defendants to escape (impossibility, impracticability), permits breaching plaintiffs to recover (*Britton, Hayward, Jacob & Youngs*), or limits damages to less than full expectation (*Hadley v. Baxendale, Peeryhouse*).....

excerpted from

## Anti-Trafficking and the New Indenture

Janet Halley

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### INTRODUCING THE BAD MAN LABOR BROKER

Anti-trafficking is primarily a criminal law regime with administrative bureaucracies assisting in the enforcement of a flagship crime. Trafficking is a new *crime*. So is migrant smuggling. The anti-trafficking and anti-smuggling Protocols constitute a single large reconstruction of the criminal-law border-control apparatus on a global scale.

The limits of a criminal law regime in actually preventing the wrongs it promises to punish are easy to see when we are dealing with garden-variety prohibitions. Assuming that “we are all realists now,” (Singer 1988: 567) I think it is safe to say that we all know that criminalization, in addition to the benefits of punishing and incapacitating the convicted, of announcing norms, and of deterring would-be wrongdoers from engaging in the subject conduct, also produces a whole range of less wonderful outcomes. Even when it succeeds in incarcerating only those who actually have violated the criminal law, it generates social costs: it prefers punishment over other methods of social repair; it strengthens elements of the state and political forces by putting coercive tools in their hands that they often use for non-benign ends; it saturates civil society with surveillance tools and the power of arrest in ways that can hobble political life and destroy individuals, families, and communities; and it can ratify and entrench social dominations and maldistributions that originate not in the criminal law enterprise but elsewhere. In the wake of the Black Lives Matter movement, progressives in the United States are grappling with this melange of good and malign consequences. Moreover, criminal law inevitably punishes and malign consequences. Moreover, criminal law inevitably punishes innocents. We can call these false positives. Advocates for those innocents can produce the paradoxical effects of simultaneously delegitimizing the law in whose name they were punished and legitimating the very conduct we were trying to prohibit. And criminal law enforcement comes with an inevitable tolerated residuum of abuse (Kennedy

1993: 126–213, 171–173, 1–76, 182, 185–186, 377 n. 44): false negatives, or wrongful conduct that escapes detection, prosecution, and/or conviction. The tolerated residuum of abuse leaves a margin in which the wrongful conduct can and does persist and can even flourish: whole illegal underworlds can emerge in the margin of toleration.

And – key for my argument here – where prohibition runs out, permission begins. Anything you didn’t include in your definition of the crime – assuming it is not otherwise prohibited and effectively suppressed – becomes legal.

This zone of permission creates a nearly-illegal world in which Oliver Wendell Holmes’s Bad Man operates. I refer of course to the Bad Man whose figure Holmes invoked in “The Path of the Law,” where, after pleading with his audience to set morality aside in deciding what the law is, he suggested taking the point of view of the Bad Man who predicts what the legal order will *actually* do if he adopts various courses of self-regarding conduct (Holmes 1897). The Bad Man would conclude that the law is not only what it punishes but what it permits – and that anyone who wants to see law clearly should try to see it exactly as the Bad Man does.

The Bad Man gauges the level of enforcement, the risk that he will be arrested, prosecuted, or convicted if he engages in conduct that skims just within the letter of the law (or anticipated actual enforcement), or only sometimes beyond it, or even substantially beyond it. He calculates when risks of punishment or prosecution or investigation are “worth it.” The Bad Man finds the edge and skates close to it. Especially if people think the criminal enforcement regime is working, the wrongful and near-wrongful conduct that escapes detection, prosecution, and/or conviction will appear legitimate or at least legitimated. Advocacy can vastly expand the range of this effect.

This effect can result from a spectacular public trial or from a chronic, silent failure of the system to include Conduct X within Prohibition Y. For an example of spectacle, just recall the last time you had your moral heart set on the conviction of a notorious wrongdoer, and he or she was tried *and acquitted*. Your grief or rage objected not just to the failure of the system to exact retribution against this one defendant but to the message that his or her conduct was actually morally okay. Meanwhile, his or her supporters threw a celebration over the message that his or her conduct has been actually *vindicated*. Much more pervasively and more difficult to contest is the silent treatment. There, legitimacy is less an acutely felt and acutely contested political value

than common sense. Realist thinking recognizes that this legitimation effect is not a mistake of the criminal law system but a predictable effect of it.

Somehow anti-trafficking has largely escaped this realist critique. Are any of these problems emerging in the anti-trafficking regime? Surely anti-trafficking is doing some punishing and deterring – but are the benefits of the anti-trafficking regime outweighing its costs? What *are* the benefits? What *are* the costs? It is time to begin asking.

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