Chapter 5
Trafficking in Hegemony

My short talk on the subject ‘Truth in a Thousand Words’ draws on the analysis in this draft book chapter. The full manuscript, Making People Illegal: Migration Laws for Global Times, is presently under review. In November 2005 I spoke to an earlier version of the entire chapter at the University of Toronto Faculty of Law Diversity Workshop. I am looking forward to the opportunity to focus on the stories told by photographs in the U.S. State Department’s Trafficking in Persons Report as an example of a ‘narrative of contact and arrival’.

The phenomenon of human trafficking stands out as the starkest example of illegal border crossing. Illegal migration with a difference, trafficking has ‘victims’. As victims, those who are trafficked fit differently into the imagination than many of those who are rendered illegal by the migration laws of prosperous nations. The label ‘illegal’ will hardly stick, as the victims are innocent. This makes it more difficult for states to rhetorically cast the victims of trafficking transgressors, thus altering the familiar illegal migration discourse. It is even problematic to equate the victims of human trafficking with those who suffer from the trafficking of drugs. Drug addicts are discursively more blameworthy than human trafficking victims, they are associated with some initial choice, a lack of will power, or at the very least, a deep weakness. Trafficked humans have none of these markers. While people trafficked are not only women and children, they are overwhelmingly so. And while they do not exclusively serve the sex trade of the prosperous, sex work and sex slavery predominate as explanations for the success, in market terms, of trafficking in human beings.

The importance of human trafficking to globalized migration laws is all about victims. What it means to be a victim, how victims are constructed and named, how victims shape criminals and how victims call forth remedy, or lack the power to do so. More than refugees, the victims of trafficking trouble the insider-outsider dichotomy. Faced with the victims of trafficking, some of the righteous indignation that defends prosperous borders crumbles away. Because of the importance of victims to legal developments in this area, I focus here on
the United States’ annual Trafficking in Persons (TIP) Report which makes trafficking victims central to its story as well.

The moral panic about illegal migration is heightened in the case of human trafficking. In this one instance, I almost hesitate to use the moral panic label because it could be read to suggest that I have my doubts about the importance of the concern about trafficking. Moral panic, as I said at the outset, is a half made up concern that serves powerful interests and reaches beyond any observable account of the phenomenon itself. Is it even possible to be too concerned about selling children into sexual slavery? What amount of outrage here would ever be enough, let alone too much? Outrage, even vicious screaming condemnation, is called up by these facts. This is an appropriate response, or at least the beginnings of one. The reasons why I persist in capturing trafficking within the moral panic about illegal migration are key to understanding state and legal responses to trafficking at this point in time. It helps to understand why the outrage of buying and selling mostly women and children, and mostly for sex, attracts the particular legal responses that it does. By examining human trafficking as part of the globalized moral panic about illegal migration, key features of contemporary legal responses to trafficking are brought into sharper focus. For example, it becomes clearer why the United States has largely been given the room to assume moral authority in this area, at a time when other hegemonic initiatives are attracting rigourous critique.¹ Paying attention to the moral panic dimensions of trafficking also calls attention to the inability of the law to construct ‘remedies’ for this harm, and the importance of refugee law in this juncture. Finally, the moral panic factor also helps understand why it has been persistently important to separate human trafficking from human smuggling.

¹ I am thinking here of the academy’s concern, and particularly the concern of international lawyers, about the United States’ conduct in Afghanistan and Iraq, as well as in Guantanamo Bay and beyond. See for example, Gerry Simpson, “The War in Iraq and International Law” (2005) 6 Melbourne Journal of International Law 167; Michael C. Davis, ‘Human Rights and the War in Iraq’ (2005) 4 Journal of Human Rights 37; David Allen Larson, ‘Understanding the Cost of the War Against Iraq and how that Realization can affect International Law’ (2005) 13 Cardozo Journal of International and Comparative Law 387.
In this chapter, I address each of these elements of the moral panic. I turn first to the importance of victims for fitting trafficking into the migration–globalization narrative. Keeping this in mind, I next explore the American leadership role in this area of the law. This leadership is one key to understanding the unique place of the United States in my story, and so this point also links closely with Chapter Eight. However, the role that the one remaining superpower has chosen for itself is the bellwether in this subset of illegal migration, hence this Chapter’s title. The next section examines the potential of refugee law to provide a remedy and the disappointing conclusion that it may be the best feasible option. This is in spite of everything I have just said about refugee law and the domestication of human rights. Finally, I conclude this chapter by exploring what would be gained, and what lost, by giving up the defense of the line between smuggling and trafficking. This line is an all important front in the battle for sovereignty and the nation state as traditionally understood, and for maintaining the clear bright line between us and them which keeps things in their place.

Sketching Victims for the Human Rights Cause

In international law terms, the new Conventions regarding human trafficking and human smuggling came into force at lightening speed. The drafting process was coordinated through an ad hoc committee, first convened in the mid 1990s. The Convention against Transnational Organized Crime is a framework document, which sets a backdrop for a series of protocols addressing particular criminal enterprises. The first two protocols to be ratified were the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2003) and the Protocol Against the Smuggling of Migrants by Land,

Sea, and Air (2004). A third protocol on the illicit manufacturing and trafficking of firearms has been drafted but not yet brought into force. This trajectory is a stark contrast to the twenty years it took for the Migrant Workers Convention to cover the same ground.³

The quickly emerging consensus about the need for international law to confront human trafficking coincides with the crackdown on illegal migration. Part of the motivation for states to cooperate in this way surely derives from the same sources which fostered the spread of converging domestic regulation beginning in the 1990s. The emergence of these protocols at this point in time, reflects directly the transformation in the nation and migration pairing that globalizing conditions fosters, and the threat that migration law evasion represents to sovereignty. In this strand of narrative, trafficking and smuggling are the most sophisticated evasions of migration laws, and therefore the hardest to ‘crack down’ on because they are the best coordinated and the best resourced. The technologies of travel and communication marking globalization serve the trafficking industry well. Some have estimated that human trafficking is now more profitable than its parallels moving drugs or arms.⁴ This is another reason that that the first protocols of a treaty on international organized crime address migration crimes, despite the fact that international movements of drugs and arms have been prevalent concerns for a longer time.

Concern about human trafficking mirrors the phenomenon of globalization itself. Neither trafficking, nor regulation of it, are new. The first international law regulating trafficking specifically dates to the beginning of the twentieth century.⁵ The particular acts typically involved in a trafficking fact pattern have been criminalized for longer, under the names of kidnapping, forcible confinement,

---

assault, living off the avails of prostitution and so on. In as much as human trafficking often involves slavery, it has been condemned and legally proscribed for several centuries and stands out as a key example of humanity’s progress narrative. It would still be wrong, however, to say that there is nothing new about the way trafficking is now being treated discursively and legally. It is quite likely that there has been a marked increase in trafficking around the globe, facilitated by globalization’s technologies. It is certainly the case that the not-really-global crack down on illegal migration has improved the market for trafficking and smuggling enterprises. Notably, the moral panic about trafficking follows the start of these crack down measures by about five years. Obviously, legal attention to trafficking has increased, with many countries around the globe now specifying trafficking itself as the harm, not only its embedded elements. Like globalization, there is a cluster of phenomena involving intensification and speed, as well a perception and interpretation, that make the way trafficking now occupies popular, political and legal discursive landscapes different. This intensification of concern and response is new. Beyond discursive change, states are now starting to devote resources to enforcing these new legal regimes.\(^6\) Trafficking is a rich strand of globalization’s narrative: vital concern, seemingly unstoppable, and with individualized victims. Unlike the growing gap between rich and poor, or the knowledge that globalization is enhancing both inclusion and exclusion, in the case of trafficking the victims are among us. In de Sousa Santos’ terms, trafficking turns the global South into the inner South.

The fact of victims is another facet of understanding the rapid emergence, response, and shape of trafficking talk in the early twenty-first century. Trafficking, like security in Chapter Six, is a highly gendered phenomenon. Those who are trafficked around the globe are overwhelmingly women. A significant number are children.\(^7\) The gendering of the phenomenon goes

---

\(^6\) In addition to the sizable efforts being mounted in the United States and the European Union, there is interesting evidence of less high profile investment elsewhere. For example, in Vancouver, Canada, as of 2005 the national police force had established an anti-trafficking task force with more than twenty full time members.

\(^7\) United Nations Office on Drugs and Crime, *Trafficking in Persons: Global Patterns* (April 2006) at 33 estimates that 77% of victims are women, and 60% are children. See
beyond the story that the numbers, however disputed or approximate, can tell. Our understanding of trafficking taps into the familiar cultural (Western) elision of women and victimization. It conjures images of helplessness which are bolstered by the prevalence of children in the trade, and which emasculate men who are also trafficked. The gendered facts of trafficking underpin the importance of victimization to its narrative.

Two aspects of this narrative are important here. First is the recent insertion of a human rights perspective into an organized crime setting. Anne Gallagher, recounting of the drafting of the Trafficking Protocol, writes that human rights is the ‘cloak’ for the increasing emphasis on security measures in approaches to trafficking. That is, while the security elements of the new international law are written to have some teeth, the human rights statements are much weaker, or purely exhortatory. In this sense, the warm fuzziness of human rights talk justifies and lessens scrutiny of new securitization measures. Joan Fitzpatrick’s parallel account offers the insight that human rights advocates worked hastily to introduce accounts of victims into the negotiations, in order to ensure that a human rights perspective was reflected in the protocol. Whether human rights talk came first or hastily later, it is linked to victims and central to what we understand about trafficking. One marker of both moral panic and the domestication of human rights is that there is little precision to this story. There are a myriad of potential rights that are breached when someone is trafficked. These could include basic liberty, freedom from exploitation, control over one’s own body, the right to be compensated for one’s labour, freedom from

http://www.unodc.org/unodc/en/trafficking_persons_report_2006-04.html As discussed below, the American Trafficking in Persons Report in 2005 estimated that 80% of victims were women and 50% children.

8 The gendering of trafficking affects masculinity in the same way the gendering of rape does. To talk of rape in gender neutral terms mutes the power that underlies its violence, and at the same time. The acknowledgement that men too are victims of rape is legally but not emotively captured by gender neutral language.

9 Gallagher, supra note 3 at 976-977.

10 See discussion below at xx-xx.


slavery. Lurking just behind these rights might be claims like freedom of movement, freedom of choice, right to earn a living, the right to seek asylum. One moves fairly quickly from a series of rights statements that seem incontrovertible to statements that are bound up with the root causes of trafficking and with the barriers - sovereignty and borders – to effective solutions, in such a way that precision in rights discourse is probably a bad thing for all concerned. Human rights discourse, when talking about trafficking, is the short hand reminder that people, not only states, are harmed by this practice. Those who are ‘rights holders’ in this scenario are silenced victims, not powerful claimants.

The second facet of the gendered/victimized narrative which is important, and which overlaps with the first, is the intense debate about women’s agency which was present throughout the work on the protocol. At the core of this debate is the old issue of consent and one’s opinion of the sex trade. Is prostitution a legitimately chosen occupation or is working in the sex trade always at some level coerced? Is it coerced by patriarchy or just by men? Is it chosen by free market actors or by fallen women who need to be rescued? Most Western states have prostitution laws which reflect varying degrees of ambivalence about these points. The Trafficking Protocol’s definitions stake out a carefully negotiated line, intricately sidestepping most of this debate; but not settling it

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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs…

14 Protocol to Prevent Trafficking in Persons, supra note 2, at art. 3(a).
The discourse of victimization erases the possibility of women’s agency. Once one is viewed as a victim, consent is compromised at best. It hardly matters if the law contemplates consent if all the discourse and decision making which surrounds it does not. The subject position of victim robs women of voice. This in turn impoverishes debate by silencing one of the most authentic positions from which to hear. It also paternalizes the issue – creating an ‘us’ group which knows what is best for ‘them’.

It is also notable that the recent upsurge in concern about trafficking coincides with the end of the Cold War, and with it, the opening of new markets in Eastern Europe. Women from Eastern Europe are high profile trafficking victims, often featuring in pop culture representations of trafficking. The racialization of this fact is inescapable. The ‘whitening’ of trafficking victims since the early 1990s coincides with prioritizing trafficking as an international crime. This is only one factor in many, but it is important given the role of victims and victimization in shaping the trafficking debate. Just as the international community found it easier to act to confront genocide in Yugoslavia than in Rwanda, race tugs at any analysis of global trafficking trends and responses. There are other explanations, of course, these days there always are. Here too, the moral panic response comes into play. By this I mean that we might conclude that trafficking is getting more attention these days because of the emergence of white women and white children as victims, and still say that any attention to trafficking is good attention, any response is a good response, and that the murky and racist-but-well-meaning origins of such responses are not important, or are at least forgivable, if the results of any actions taken are not similarly racialized. The comfort one can draw from this reasoning depends on one’s capacity to believe that racializing origins can be overcome. This is a faith I do not have. Instead I see the racial marking as a troubling of the ‘us-them’ line which was once national but is going global.

---

15 Two films which screened commercially in the early years of the twenty-first century were *The Natashas*, and *Dirty Pretty Things* (Celador Films, 2002).
The paternalization of trafficking talk points us to children, and their special role as trafficking victims. Paternalizing is the role of parents. There may be nothing that is not worth doing to free children from sexual slavery. Legitimate debate about prostitution does not contemplate children giving meaningful consent. Children are the ‘best’ rhetorical victims because their needs are acute, the damage they suffer is life long, and there is no troubling frisson of conscience about agency. The stories of children intensify the discourse of victimization. The place of children in this story is so horrific it compels us like roadside carnage to stare mutely or to turn away. Both rob us of analytic capacity. Children, and our reactions to their images, are important to the story of American hegemony among legal responses to trafficking.

American Leadership on the Frontier

The United States was slow to ratify the Trafficking Protocol, despite having taken an important role in its drafting and despite Americans as NGO actors taking lead roles in shaping the debate about consent which was central to the drafting. This is a familiar story of American involvement with international human rights law, part of what it means to be the globe’s undisputed hegemon at the start of the twenty-first century. Nevertheless, the United States is staking out a leadership role for itself, based in domestic legislation aimed at combating trafficking. The central tool being used to construct this role is the annual Trafficking in Person’s Report produced by the American State Department. This report is, in the words of the State Department ‘... the primary diplomatic tool through which the U.S. Government encourages partnership and increased determination in the fight against forced labor and sexual exploitation.’

---

16 The U.S. ratified in late 2005.
17 This statement appears on the home page of the Office to Monitor and Combat Trafficking in Persons, online: <www.state.gov/g/tip/>.
The TIP Report is mandated by the 2000 Victims of Trafficking and Violence Protection Act.\(^\text{18}\) This law requires, among other things, that the U.S. government report on the activities of other governments in combating human trafficking. The legislation is quite specific. The report is to focus on ‘severe forms of trafficking’\(^\text{19}\) exclusively and minimum standards for the elimination of trafficking are specified.'\(^\text{20}\) The legislation also specifies indicators to assist in assessing the minimum standards. On the basis of assessments against these minimum standards, countries report on are then placed in Tier One (in full compliance with minimum standards), Tier Two (not in full compliance but making significant efforts to bring themselves into compliance), or Tier Three (do not fully comply and are not making significant effort to do so).\(^\text{21}\) To ensure that the Report does not function merely as an extraterritorial survey exercise, from 2003 onwards, countries that were placed in Tier 3 could then be subject to sanctions by the United States through withdrawal of non-humanitarian, non-trade-related assistance and U.S. opposition to assistance coming from the International Monetary Fund and the World Bank and similar organizations.\(^\text{22}\) Since 2003 a number of sanctions have in fact been applied.\(^\text{23}\) A 2003


\(^{19}\) Defined as ‘…(a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (b) the recruitment, harbouring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjecting to involuntary servitude, peonage, debt bondage, or slavery. Victims of Trafficking and Violence Protection Act, supra note 18 § 103(8) at 1470.

\(^{20}\) These are: 1) The government should prohibit trafficking and punish acts of trafficking. 2) The government should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault, for the knowing commission of trafficking in some of its most reprehensible forms (trafficking for sexual purposes, trafficking involving rape or kidnapping, or trafficking that causes a death). 3) For knowing commission of any act of trafficking, the government should prescribe punishment that is sufficiently stringent to deter, and that adequately reflects the offense’s heinous nature. 4) The government should make serious and sustained efforts to eliminate trafficking. Victims of Trafficking and Violence Protection Act, supra note 18 § 108 at 1480.

\(^{21}\) U.S., State Department, Trafficking in Persons Report 2000 (U.S. State Department, 2000) at 5.

\(^{22}\) Victims of Trafficking and Violence Protection Act, supra note 18 at 1483.

\(^{23}\) In 2003, full sanctions were imposed on Burma, Cuba and North Korea, and partial sanctions were imposed on Liberia and the Sudan. In 2004, full sanctions were imposed on Burma, Cuba and North Korea, and partial sanctions were imposed on Equatorial Guinea, Sudan and Venezuela. In 2005, full sanctions were again imposed on Burma, Cuba and North Korea, and partial sanctions were imposed on Cambodia and Venezuela. See U.S., United States Government Accountability Office Better Data, Strategy and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad (GAO-06-825) (Washington D.C.: United States Government Accountability Office, 2006) at 29.
reauthorization of the American legislation further specified that from 2006 onwards, countries would have to deliver up specific data about prosecutions and convictions in order to be considered for Tier One status.\footnote{Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003).}

In short, the report is a recipe for hegemonic governance through surveillance, aimed at disciplining the globe. While it may or may not eventually contribute to reducing the numbers of people who are trafficked annually, it certainly does contribute to putting the U.S. in a prominent position of international leadership on this front. Or perhaps it is more apt to cast this as a frontier, given the elements of frontier mentality embedded in this report.\footnote{See the excellent analysis of law and frontiers see Ruth Buchanan and Rebecca Johnston, “The ‘Unforgiven’ Sources of International Law: Nation-building, Violence and Gender in the West(ern)” in Doris Buss and Ambreena Manji, eds., International Law: Modern Feminist Perspectives (Oxford: Hart Publishing, 2005) 131.}

The role of international enforcer is, by 2005, a familiar one for the United States. In the case of trafficking, there is little opposition to this role.\footnote{It is, predictably, common for countries that are listed on Tier 3 to issue press releases objecting to this classification.} Rough and ready justice has always been more morally satisfying on the frontier than in back in civilization. The place of victims in the trafficking narrative is vital to understanding why the strong arm of the law finds such a comfortable fit here. Rather than assuming the classic posture of critique of United States’ foreign policy, we in the chattering classes appear close-to-grateful that the United States is able and willing to commit it resources to doing something, anything, about trafficking.

The Report has grown in reach and stature since it was first issued in 2001. That initial report contained a mere 102 pages and ranked 82 countries on its tiers. The bulk of the report was devoted to the ‘country narratives’ about each of the countries ranked. The other material amount to 9 pages, mostly devoted to describing the requirements and methodology building the report. By 2005 the annual report was 256 pages long and ranked 142 countries. Significant additions to the report included highlights of international best
practices (which began in 2003), regional maps with law enforcement statistics (new for 2005), descriptions of United States government efforts (which began in 2003), the addition of a Tier 2 Watch List (new from 2004), a matrix of relevant international conventions noting which countries, other than the United States, have signed and ratified which treaties (dates from 2003). Country narratives in 2005 are considerably longer than in previous years, as are the introductory elements of the Report. The special section on anti-trafficking ‘heroes’ began in 2004.

One thing about the Report that has not changed at all over its first five years is the aggregate estimate of people being trafficked around the globe over international borders. In 2001, the estimate was ‘at least 700,000’ and in 2002 it was ‘at least 700,000 and possibly as many as 4 million.’ By 2004 new data had been assembled, leading to an estimate of 600,000 to 800,000, and adding gender (over 80% women and girls) and age (up to 50% minors). Of all the statistical challenges in tracking illegal migration, an accurate count of persons being trafficked is perhaps the biggest. Some people who are trafficked will even appear in legal migration statistics. As the TIP Report is increasingly careful to point out, not all trafficking involves international borders, although my focus in this chapter is primarily on trafficking that also infringes immigration laws. The difficulty of assessing trafficking numerically makes it nearly impossible to track results of initiatives aimed at curbing it. One conclusion from the statistics over the first five years of the TIP report could be that the report is not accomplishing anything. Approximately the same number of people, as near as anyone can tell,

28 The 700,000 figure drew on American data from 1997.
29 The estimates in the TIP Report are similar to those published by the International Organization for Migration (IOM) and considerably lower than estimates by the International Labour Organization (ILO). The IOM, “Counter-Trafficking Brochure,” online: <http://www.iom.int/unitedstates/Fact%20Sheets/factsheets.htm> estimates that between 600,000 and 800,000 persons are trafficked worldwide. The ILO, A Global Alliance Against Forced Labour (Geneva: International Labour Office, 2005) at 46 estimates that 2.5 million people are currently the victims of trafficking.
30 This is because of my broader focus on illegal migration. The horrors of trafficking are not altered by the occurrence of a border, although trafficking which does not involve border crossing is probably easier to remedy, see remedies discussion below.
are being trafficked now as in 2001. On this logic we could look at the new laws around the world and conclude that the spread of targeted legislation is similarly ineffective. This may also be true, although it is probably too soon to draw a conclusion, but at any rate it is only a guess. This points to the important distinction between law itself and an ideological commitment to rule of law, in any form.

The problem of finding a way to measure results is perhaps one reason why the United States is now turning to counting prosecutions and convictions. These are quantifiable and, in most places, easily publicly verifiable. Unfortunately, though, these numbers cannot tell us if trafficking in persons is being reduced. Indeed, it is plausible that an increase in numbers of prosecutions and convictions may mean that trafficking itself is on the rise, rather than the reverse. It may also foster laying indefensible charges, or entering questionable convictions. In order for a prosecution to commence, someone must have already been trafficked, the battle has to have already been lost. Quantifying at this end does not seem any more likely to contribute to a solution than attempting precision at the level of broadest statistics. These statistics are nonetheless interesting to sociolegal scholars attuned to globalization’s machinations. They provide a succinct picture of the hegemonic sway of American regulation. Who will chose to conform to this imperative and what will the consequences be of not doing so? Prosecution and conviction statistics also tell us something about the functioning of the law. In combination with other approaches to assessment, therefore, they can help interpret the usefulness of law in responding to human trafficking.

There is probably no accurate numerical response to the question of whether trafficking is being reduced, but there are important qualitative ways to answer approach an answer to this question. These involve asking community workers, sex trade workers, and front line law enforcers. These assessments involve listening to those who have been trafficked, and to others they have encountered in their home communities, en route and where they have arrived.
It mandates a level of inquiry which is best described as sub-local, giving voice to those who are marginalized and hidden even from what is usual taken to constitute the local community. Not only is such an accounting the only way to understand if trafficking can be reduced, it is also the beginning of understanding how to remedy the abuses which trafficking entails. This type of research is very difficult to conduct, and ethically intricate, but it offers a way forward in an area where other avenues are bleak. This potential fits within the dynamic of globalization as well, where attention to measures at the national level is less likely to yield results. Trafficking by its nature calls up a response at that both spans borders and goes beneath them.

While the TIP report has grown, one element has disappeared. The 2001 and 2002 reports contained laudatory references to the Trafficking Protocol. These ended in 2003, presumably as it became clear that the United States would not ratify the agreement during the Bush II administration. This stance is typical of the American approach to international human rights law generally. The United States has one of the lowest rates of ratification of major human rights treaties among prosperous Western states. What differs here is that the United States is still pursuing, and achieving, a position of international leadership in this area. Further, this differs from the pattern of human rights instruments under conditions of globalization, but conforms to the patterns of globalized migration laws. While migration is by definition a global phenomenon, most laws confronting it are national. The observable legal convergence, especially in crack down measures, is related to globalizing forces, but not primarily to international law. This is another indicator that states are reacting to trafficking as a migration issue rather than as a human rights issue, rhetorical assertions aside.

31 Subsequent versions do refer to the Protocol, but not as a key means of combating trafficking. In the 2005 report, the Protocol’s definition is cited, followed by the statement “Many nations misunderstand this definition, overlooking internal trafficking or forms of labour trafficking in their national legislation, and often failing to distinguish trafficking from illegal migration.” U.S., State Department, Trafficking in Persons Report 2005 (U.S. State Department, 2005) at 12.
As the TIP Report has evolved it has become an increasingly compelling document. One key aspect of its draw is the addition, since 2003, of victim profiles and of photos. Victim profiles, like the individualized hero stories, humanize the story, drawing the reader closer to the horror of human trafficking, fostering compassion which is so difficult to engender at a statistical level. It is well understood that ‘the names may be changed to protect the innocent’. In this setting our expectations of ‘truth telling’ are culturally conditioned by our habits of confidentially. But the photos are different. Indeed, photos occupy a different space in our understanding of veracity. A picture is worth a thousand words. The camera never lies. The photos transform the Report into a visual medium as well as textual, and give a form to what we imagine while reading it.

The 2003 edition contained 10 photos, counting the cover composite as one. Eight of the photos are captioned in the report with a snippet of the story about the trafficked person or persons they portray. The cover composite, like those of 2004 and 2005, shows the eyes of four individuals, presumably also victims. The only photo which is not situated in some way is the frontispiece image, half obscured, of a young child’s face. The one visible eye looks steadily out from the page. Brown skin and neatly trimmed dark hair. I guess this child to be young by the smoothness of the skin and the shape of the nose, but as I step back from this, I realize I might be wrong. I might see youth here only because of my own fears, my own horror, of what trafficking imports. I guess my conclusion from this must be that the image has what I presume to be the desired effect on me: it stops me in my rhetorical tracks; it makes me afraid. I can find no commentary on this photo in the report. Aside from this arresting image, all the photos here show us ‘real’ victims. They provide a glimpse into a type of truth.

The following year, this approach to illustration was altered, there were many more photographs, and the following statement:

33 From 2003 to 2005 the cover of the report has featured a composite photograph showing parts of four faces. The photos are cropped so that only the eyes, eyebrows and part of each nose appear, and then arranged as a band across the cover.
34 All of the photos are credited at the end of the Report.
The photographs on this Report’s cover and most uncaptioned photographs in the Report are not images of confirmed trafficking victims, but are provided to show the myriad forms of exploitation that help define trafficking and the variety of cultures in which trafficking victims can be found.\textsuperscript{35}

In this version of the Report, about half of the photos are not of trafficking victims but of people who look like they could in some way be involved in trafficking.

Some photos are captioned ambiguously, they could be ‘true’ or ‘posed’ or merely ‘coincidental’. For example, the caption; ‘sex tourism draws men from wealthy countries to less developed countries where they can take advantage of economically vulnerable women and children and weak criminal justice systems’ is set between two photos. One shows a grey-haired white skinned man in a beach chair beside an Asian-looking young woman, also reclining. Their eyes are obscured so that they cannot be identified. The other photo is of two young Asian looking women dressed in bikini tops and short-shorts, viewed from behind, talking to two white-skinned men whose eyes are obscured.\textsuperscript{36} The caption does not tell us that anyone in these photos is involved in sex tourism. The photos could be posed as illustrative examples of what sex tourism \textit{might} look like. However, hiding the identities of those in the photos does suggest that these images are ‘true,’ or at least that the people who have posed for the photos do not want to be identified. This may tell us another kind of truth.

Not all of the uncaptioned photos obscure identity. There are many instances where photos without captions are set beside text, with the suggestion that they are related to the text. For example, the caption stating, ‘This Vietnamese woman was sentenced to 15 years for sex trafficking of underage girls in Cambodia’ is set between two photos. One is of a woman, eyes downcast, whom an arrow identifies as the convicted trafficker of the caption. The other photo is a headshot of an Asian-looking child wearing a singlet.\textsuperscript{37} The child stares seriously at the camera. It is difficult to look at this page and not link


\textsuperscript{36} \textit{Trafficking in Persons Report 2005}, supra note 31 at 8.

\textsuperscript{37} \textit{Trafficking in Persons Report 2004}, supra note 35 at 15.
the child to the girls trafficked by the person in the companion photo. Was she? Is this photo even of a girl?

The use of photos, and especially of photos which are not of trafficking victims, brings our attention sharply to the role of victims and exploitation in the trafficking narrative. In the 2004 and 2005 versions, the photo selection is dominated by ‘real’ or posed victims, but also includes anti-trafficking heroes, and significant sites such as the Thai government’s central shelter for trafficking victims,38 or a Beijing sign advertising fresh clean foreign women.39 The photos work. They make the TIP report more compelling, they add a human face, they give us pause. But the way they work is disturbing. It is easy to understand why the State Department has moved to using photos which are in some way inauthentic. It is understandably hard to obtain photos, and permission to use them, of people who have actually experienced trafficking, in whatever form. The ‘true’ photos pose the further problem of replicating exploitation. To have one’s image used in a publication with a potentially immense audience as someone who has been forced into prostitution, raped, sold, owned, bartered and enslaved requires personal fortitude. To stand before the camera and say, ‘yes, this is what happened to me and I am still here,’ is an enormous thing. Stated like this, it sounds like a moment of empowerment. It could be. But there is always the risk that it may make someone feel exposed, or marked, or simply known in a way that obscures knowing anything individual or personal.

The inauthentic photos seem to solve this problem, but they raise others. I am not sure how these photos were obtained, but I am curious. Were these children paid models? Would I allow one of my children to pose as a trafficking victim? Would I want my daughter’s face staring out from beside the image of the identified child trafficker? Is the cause of making this report engaging vital enough to justify this? Or perhaps the pay was exceptionally good, and how good would it have to be for me to overcome my uneasiness at this? What is the

38 Ibid. at 85.
victimization of posing as a victim? Can children too young to understand this reasonably be asked to do it? I am not sure how to answer any of these questions, but they disturb me. There is also the question of inauthenticity itself. If standing in such a photo as one who has survived trafficking can be a moment of empowerment – of self-proclamation – does allowing others who have not experienced this horror to stand in the same position, on the same page, diminish the courage of the survivors? Does it make ‘victims’ even more invisible and socially constructed for myriad purposes to select others to stand in their places, as though their actual identities are not the most important thing? How do we ask others to act as representative examples of ‘forms of exploitation’ and ‘varieties of cultures’? Can one represent a form of exploitation? And do so without that in itself being exploitative? How can a photo of a person standing in for a trafficking victim represent a culture at all? The dilemmas of the inauthentic photos have a kaleidoscopic complexity. They may negate what is best about the ‘true’ photos, without offering anything of unproblematic value in return.

Understanding our reactions to these photos requires examining why they achieve their objectives and at what cost. It is not wrong to work to humanize and individualize the TIP Report. It is unrealistic to deny the power of images as tools. The photos help convey the message that trafficking is such a hideous blight that all measures should be used to stop it. They fuel the moral panic which fosters the moral authority of the United States in this area. They help build that case that perhaps this is so bad that we, whether as Americans or as others, should simply be grateful that the one remaining super power is capable of deploying its resources in this way and chooses to do so. Trafficking provokes the same sense of outrage that Anne Orford writes of in her eloquent discussion of Australian demonstrations in support of armed intervention in East

---

That is, there are some things so horrifying, some cases where we so desperately want to do something, that our usual rational objections to, in that case, turning things over to military decision making or international leadership, dissipate. Orford reflected on the image of children being thrown over the barbed wire fence into the UN compound in Dili. In the end she urged upon us a re- visioning of that image which focused on the agency of everyone involved, and on the portraits of caring and rescue contained in that moment. The problem, she concluded, with the image as stilled photo was the helplessness it imposed upon the observer.42

The photos in the TIP report have the same effect. The reduce those who have been victims to their victimization. The inauthentic pictures further reduce the capacity of the ‘true’ to stand as survivors, marking with their image their very existence. They belie any discourse in which agency can be attributed.43 They render hegemony a blessing. There are ways to move beyond the ‘stop and stare’ effect of these images, but as yet the so-called ‘remedies’ available to those who are trafficked have by and large not done so. It is to this issue that I turn next.

**Remedies: Sovereignty, Law and Refuge**

People who have been trafficked are human rights victims, but there are few human rights remedies available to them. State sovereignty, and the immigration laws that define and defend it, get in the way of providing remedies for trafficking that could have the potential to shift its global dynamics. Sovereignty here leads

---

41 *Supra* note 11 at ch. 6.
43 The 2005 Report takes an unambiguous position in the consent debate which plagues the international law. The Report states:

> The vast majority of women in prostitution do not want to be there. Few seek it out or choose it, and most are desperate to leave it. A study in the scientific journal *Journal of Trauma Practice* found that 89 percent of women in prostitution want to escape prostitution. Children are also trapped in prostitution – despite the fact that a number of international covenants and protocols impose upon state parties an obligation to criminalize the commercial exploitation of children.

to failure of the imagination, and thus of law reform, and the worldwide crack down on extra-legal migration expands the trafficking market.

When the question of remedies is raised, the idea that trafficking is a generalized problem which does not always involve borders quickly fades into the background. A key problem in meeting the needs of people who have been trafficked across borders has been states’ tendency to treat them as migration law transgressors and to simply send them home. I am interested in looking at the alternatives to this, in the border crossing context only. Of course, I do not mean to suggest that appropriate remedies are always available for people who are trafficked ‘domestically’, but rather that the barrier to appropriate remedies are different, and often lesser, in domestic legal setting.

The Trafficking Protocol reveals that it was difficulty for negotiating parties to address that needs of victims, especially in the migration law context. States party are obligated to enact legislation criminalizing all aspects of trafficking (Article 5) and are obliged to cooperate with other signatories (Article 10). States are specifically required to facilitate the return of their own nationals who have been trafficked (Article 8), and to ‘…strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons’ (Article 11). Requirements for preventative actions are also strongly worded (Article 9). On the other hand, measures regarding those who have already been trafficked are cast in more open terms. For example, the privacy and identity of victims is to be protected ‘…in appropriate cases and to the extent possible’ (Article 6). Similarly, states party ‘shall consider’ implementing measures aimed at assisting the social, physical and psychological recovery of victims and ‘shall consider’ providing support such as housing, counseling and education (Article 6). Signatories are also to consider temporary or permanent visa status for those who have been trafficked (Article 7). Thus while an array of mechanisms are canvassed in the Protocol, none are mandatory. I turn now to considering the array of potential remedies, within and beyond the parameters of the treaty.

Offering secure immigration status for trafficking victims is a remedy that takes a variety of forms. Not surprisingly, the most high profile of these has been
the temporary visa regime created by the United States in the same legislation
that grounds the TIP Report. Under this scheme, trafficking victims who
comply with ‘…any reasonable request for assistance in the investigation or
prosecution of acts of trafficking’ are permitted to remain in the United States
for 3 years. At the end of this period, they may apply for permanent residency.

To date, very few of these ‘T-visas’ have been issued; even fewer former victims
have become permanent residents in the United States. There are a number of
other countries where similar temporary residency, specifically linked to
trafficking prosecutions, is available.

The T-visa program is one of the most frequently praised features of the
American approach to trafficking. There are good reasons to laud this program.
It provides targeted support to trafficking victims. It makes prosecutions possible,
and prosecution is a vital part of a comprehensive response to trafficking. It also
provides a bridge to permanent immigration status which is one reason why the
trafficking matrix often contains an element of choice. For all these reasons, the
T-visa, and parallel programs elsewhere are good remedies for trafficking. This
formulation does not, and cannot, go far enough to alter the fundamental
globalized dynamics of the problem. In Santos’ terms, trafficking is a modern
problem for which there is no modern solution. The T-visa is a solution which
comes from within the modern paradigm, rather than challenging it. It therefore
reinforces the features of modern globalized migration laws which protect the
market for trafficking.

Offering a temporary visa to those who participate in prosecutions
reinforces the present (modern) structure of migration laws – and their problems
– in three ways. First, it retains the focus on prosecution, rather than on ending
trafficking or even on assisting victims. Prosecution is certainly has a role to
play, but ought not be an end in itself and it cannot measure anything but itself.

44 Victims of Trafficking and Violence Protection Act, supra note 18.
45 Victims of Trafficking and Violence Protection Act, supra note 18 § 107(e)(1)(C)(iii)(a-b) at 1478.
46 Victims of Trafficking and Violence Protection Act, supra note 18 at § 107(c)(3) at 1477.
47 This route has been followed in several EU jurisdictions. details to be added.
48 See discussion in Chapter 3 at 9-12.
Second, this remedy retains in its focus an incentive to choose the trafficking-as-migration path. We know that the initial ‘choice’ to engage with a smuggler or a trafficker is often complicated down the line by unscrupulous traders changing the terms of the bargain. Still, if the golden prize of American (for which we can almost fully substitute Canadian, British, French, Australian etc) citizenship remains at the end point, and other access to that prize is strictly limited (especially to those we stereotype as potential trafficking victims – poor and uneducated women and children), then the incentive to choose to become a trafficking subject is a meaningful one. Finally, and perhaps most importantly, this kind of remedy is not a human rights remedy. It scarcely addresses the human rights dimensions of trafficking at all because it hinges the remedy – migration status – to participating in prosecution, rather than to the harm of being trafficked. In order to be an effective remedy, it must attach and relate to the harm, not to service to assist the state, mostly in enforcing its migration laws.

These final two points are at odds with each other, but they both contribute something to our understanding of the current law and politics of sovereignty. States are willing to tolerate, even to create, an incentive to subject oneself to gross abuse in order to gain a slim chance of becoming permanent residents, when numbers are very low. States remain in control of this number by decisions about prosecution, because eventual permission to remain is strictly tied to assisting the state. This control gives states the sense that what they are controlling is in fact their borders, and sovereignty is saved. The notion of giving all trafficked persons permanent status is dismissed out of hand as an impossible surrender of sovereignty. An excellent articulation of permanent residency as a human rights remedy is written by Audrey Macklin.\(^\text{49}\) When Professor Macklin made this suggestion in June 2005 meeting convened to discuss the 2005 TIP Report, American and Canadian officials laughed out loud and rolled their eyes. This kind of reaction was possible because the meeting was being held by videoconference in 4 locations and Professor Macklin could not see what was

going on in my location. Despite this reaction, however, this remedy would respond precisely to the desire of the United States and others to increase prosecution rates, as well as to actually end trafficking. If trafficking victims could become permanent residents, a key aspect of the trafficking market would disappear. Traffickers would lose the threat which comes of turning people with no secure immigration status over to the authorities, which in most cases means being sent home. Some individuals would want this, for others home is a place of danger or disgrace. We do know that many people are trafficked more than once. Giving all trafficking victims permanent resident status would increase the incentive to allow oneself to be trafficked. But this is not why state officials laugh out loud at it. They react that way because granting permanent residency to all trafficking victims would be a surrender of control and therefore sovereignty. The fact of trafficking is a loss of control, all politically feasible remedies at this juncture are aimed at re-inscribing that control, at least at a rhetorical level.

There are two other important factors to consider about permanent residency as a remedy to human rights abuse. First, it would lead indirectly, but not directly, to somewhat greater rates of prosecution. Some people would participate as witnesses because of their desire to see their tormentors brought to justice, just as some women participate in sexual assault prosecutions or domestic violence prosecutions. States pursuing higher prosecution rates would therefore have incentives to ensure that trafficking victims were well supported in the community and quickly reunited with family members, because these would then be the factors that would make them able to participate in prosecutions. People with robust psychological support also make better witnesses.

The other factor is to consider what would happen to the trafficking matrix with this remedy firmly in place. Some people might be more willing to be trafficked, but perhaps not so many more than those who already become involved with some degree of volition. Trafficking is horrific. Much is not voluntary. One must be careful not to make too much of the incentive idea. But this alone is not enough to end trafficking, just to deflate the market somewhat. Still, it actually functions as a ‘remedy’ in a way that the T-visa does not. But I do
not want to tarry too long here as I think possibility of such a remedy being adopted anywhere, let alone widely, is politically remote.

There is, however, a legal framework that is already widely applied which can function as a limited remedy for some victims of trafficking, and that is refugee law. For all the reasons that refugee law is not perfect, it is not a perfect remedy for the victims of trafficking. However, because of its limited constraint on sovereignty and its uneasy relationship with human rights law, refugee law has already surmounted some of the barriers to states accepting it as a remedy for trafficking. In addition, many Western states grant permanent residency to refugees even though they are often not strictly required to do so, and thus refugee law provides this type of security as well, usually with concomitant family reunion rights. All of these points fit squarely into the discussion in Chapter Four.

It is easy to envision that trafficking itself will meet the threshold of harm to qualify as ‘being persecuted’ under the Refugee Convention. While ‘persons who have been trafficked' per se may not meet the current criteria for a ‘particular social group’ under the Convention, there are many ways that trafficking victims can meet the nexus requirement of the refugee definition. There are two aspects of refugee protection, however, which are potentially problematic for individuals who have been trafficked: the role of the home state and the requirement that assessment be future looking. Refugee law stands as surrogate protection when a citizen’s home state is not able or willing to protect them from particular risks for particular reasons. The ‘state protection’ requirement is a formidable hurdle to obtaining protection of another state because states are generally assumed to be able to protect their own nationals, and because the protection provided need not be a perfect guarantee of safety. So if a state were making efforts, in a non-discriminatory fashion, and with some success, to protect trafficking victims upon their return, the argument for refugee

---

50 Writing a sentence like this brushes over extensive jurisprudence nuance and advocate aspiration and almost calls forth an entire paper rather than a footnote.
52 Audrey Macklin discusses the tensions in current analysis of the state protection standard in ‘State Protection Jurisprudence’ prepared for the Canadian Federal Court Immigration Education Seminar, September 2006.
status would be weak. Similarly, while having been trafficked probably constitutes persecution, the question in refugee determination is whether one is at risk of being persecuted upon return. This clearly is the case for many trafficking victims. We know that some people are trafficked repeatedly. We also know that those who are trafficked are often threatened with reprisals against them or against family members. These threats are realistic given that trafficking is often a sophisticated organized criminal activity. Finally, refugee determination is individualized. This means that small differences in circumstances between similarly situated people may mean that one is refugee and the other is not. Despite these hurdles, some victims of trafficking have made successful refugee claims.\textsuperscript{53}

Refugee law is not a panacea for trafficking. In addition to the fact that it is only provides a remedy for some individual victims, it also does nothing to reduce the market for trafficking. Given the structure of refugee law as a limited constraint on sovereignty with an uneasy relationship with human rights, it provides support for features of the protected ‘market’ for trafficking. As there is no right to enter another country within refugee law, border crossing itself retains its place as a core feature of the market. To the extent that refugee law can provide a ‘remedy’ it is no more than that. The remedy arises only after someone has been trafficked. It does not have a preventive effect. The current crackdown on refugee seeking movements supports the trafficking market by making border crossing harder. Some activists have argued that traffickers use refugee law in support of their criminal activities. In this scenario trafficking victims, who might have legitimate refugee claims, are supported in making spurious claims for refugee status. When they are successful, they attain a secured immigration status and can then work more openly in the host state. Their ‘market value’ to the trafficker changes. Secure immigration status also provides greater avenues for escaping trafficking’s enslavement, but it does not guarantee anything. The

\footnote{Successful claims in Australia have included: RRT Reference NO3/47757 (11 May 2004), NO3/45573 (24 February 2003), N02/42226 (30 June 2003).}
backdrop of immigration law enforcement is only one feature of the trafficking matrix.

For all these reasons, the hope offered by refugee law to confront trafficking is slim. On balance, it remains an important and politically feasible route. This desultory conclusion reflects the conditions of globalized migration laws. Refugee status offers permanent immigration status, family reunification, and some types of protection. It has two vital features for this setting. First, refugee law focuses on the individual rather than the interests of the state. Second, under current pressures, refugee law is taking on increasingly law like characteristics as I discussed in Chapter Four. States motivated to limit their obligations are working within the Refugee Convention rather than withdrawing from it. In the trafficking matrix, sovereign assertions at the border contribute to problems rather than solutions. In present globalizing times where the movement of people over borders is increasingly the centre of sovereignty, further compromises seem unlikely. Refugee law has proven resilient and has interpretive flexibility. Advocacy within it for people who are trafficked is an important pragmatic avenue.

The array of legal remedies currently available to confront trafficking make a weak arsenal: prosecution of traffickers, temporary or even permanent immigration status for witnesses, refugee status. Even the possibility of permanent immigration status as a human rights remedy, which respects the structure of contemporary immigration laws, is presently viewed as fanciful. The social conditions which fuel trafficking certainly have sophisticated features, but their broad outlines are not difficult to discern. This human exploitation is fostered by vast disparities in wealth between individuals and between nations, by prosperous and impoverished societies alike demeaning women and tolerating their position as subordinate citizens, by a transactional ideology in

which value is always and ever market value, and by the global system of border enforcement. These are conveniently called ‘root causes.’ Measures aimed at addressing these causes are not counted for the purposes of the TIP Report. There are many reasons why addressing the root causes cannot count. One is certainly that trafficking is fostered by key elements of the comfortable status quo, chief among these is the entrenched gulf between rich and poor people and nations, and the sovereignty of borders that ensure this. The moral panic about human trafficking shields these factors from attention. Trafficking is about children with smooth skin and serious eyes, about sullen looking women in handcuffs and silver haired men on tropical beaches. These images are the immediate face of trafficking. These are the things that call out for us to do something, anything, to stop this horror. And so we should. This moral panic is a shrill call to action, to rescue the good and lock up the bad; to focus on individuals, both as victims and as perpetrators. The slavery of the eighteenth century was once viewed as a necessary if unseemly aspect of the way the world worked. In time, however, ‘civilized’ people came to believe that race based slavery was inhuman, beyond unacceptable, something worth sacrificing parts of life-as-we-knew-it to end, even if it supported, and was supported by, the status quo. We have not reached this point in our understanding of trafficking. It replicates that older slavery, using international borders and domestic illegality to make it invisible to us. It runs on systems of social organization that secure our privilege as citizens of prosperous Western states. Our reactions of horror to the human face of trafficking support remedies which legitimate and extend that privilege, but that cannot, ever, address the ‘root causes.’ The on-going development of law and more law cannot shift the parameters of the trafficking matrix, as modern law is itself bound up with securing the way-things-are. Something more far-reaching is needed. It is yet beyond our imaginations. This need for ‘something beyond’ calls up Peter Fitzpatrick’s argument about the need for ‘gods’ to shift the shape of international law, and his concomitant analysis that the outlines of this faith are already discernable. I return to this point shortly.
Smuggling, Undrawing Lines and Concluding

Nearly every discussion of trafficking turns, at some point, to the distinction between human trafficking and human smuggling. A key feature of the new international law initiatives has been analytically separating these phenomena and structuring separate legal responses to each. The distinction is based on exploitation: trafficking has it and smuggling does not.\(^{55}\)

Drawing a clear line between trafficking and smuggling is almost universally regarded as a considerable achievement. Given the evident overlaps and similarities, it is easy to imagine why this is so. Yet a vital insight into the place of trafficking in the global cluster of migration laws comes from querying this line drawing exercise. The distinction between the two brings us back to the centrality of victims of every aspect of this analysis: trafficking has victims and smuggling does not. The problem with the line drawing exercise also comes back to this point, a victim identity silences and obscures.

There are good reasons why separating trafficking and smuggling is difficult. Central among these is that the experience of clandestine migration is not neatly categorized. Moha, a young man from XXX may pay a sum for his journey to the United States and put himself in the hands of people he thinks he is buying a service from. He may know little about the journey, and find himself in dangerous circumstances. He hands over his passport for safekeeping. The journey becomes so dangerous that he wants to back out. He asks to go back and is denied. At the border, he is given a different passport, not his own, and told to tell a different story to border agents. On arrival, he is told he owes an additional $5000. He has no more money. He is told he must work washing dishes until it is paid off. His passport is not returned to him. He is locked up in the restaurant at night. Has he been trafficked or smuggled? Hard to tell. Has he been exploited? Have is human rights been abused? Is he in danger? In his

\(^{55}\) Article 3(a) of the Protocol Against the Smuggling of Migrants by Land, Sea, and Air, supra note 2 defines the “smuggling of migrants” as the “procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.” This is to be compared with the definition of trafficking in the Protocol to Prevent the Trafficking of Persons, supra note 14.
eyes does The Law look like a way out? The answers to these questions are easier.

Consider Clara from XXX. She learns of an opportunity to work in England. She has been out of work for months and life is pretty tough anyway. She has heard stories of women getting into difficulty working in the West, but the guy she has been talking to seems honest. And the money she could earn is more than a year’s salary at the factory each month. She knows there is a risk but decides to take it. She pays $1000 as an employment search fee. When she arrives she it told she must work in a brothel for three months or pay an additional $5000. She chooses the sex trade. At the end of this time, she is given a falsified passport and visa. She finds a job clerking in a grocery store and an apartment to share with another young woman whom she met at the brothel. From time to time she turns tricks on the weekend for extra cash. She saves her money and sends it back to XXXX. Her younger sister uses this money to complete high school. Has she been trafficked or smuggled? Hard to tell. Has she been exploited? Have her human rights been abused? Has she consented? Will The Law help her or narrow her life choices? Is she a victim of a crime or a criminal?

Eighteen year old Mario from XXX pays someone one to bring him to Canada. He spends 6 days in the back of a long haul truck. He arrives in Toronto tired, bruised and hungry, but otherwise without incident. He is dropped off at a house which serves as an overcrowded home for many young men from his home country. Following their advice, he shows up for work at a day-labour construction site. Work is easy to find. He works up to 16 hours a day, at half the minimum wage, without adequate safety equipment. He is paid cash. After food and rent, he hardly has anything left to send home to his family. He certainly doesn’t have enough money to return home. He works mostly building luxurious home and offices for upper middle class Canadians. His conditions of work in Canada are illegal, but so is his presence. He has no medical insurance, no time off, no recourse if he is injured on the job, no way to know if he will work next week, no hope of promotion. He puts up with the racial slurs. Has he been
trafficked or smuggled? Is he being exploited? Are his human rights being abused? Is he a victim? A criminal?

Drawing a line between trafficking and smuggling is about assigning guilt. People who are smuggled are culpable, ‘they’ have broken ‘our’ laws. People who have been trafficked never had a choice. They are removed from culpability by removing their agency. This helps explain reluctance to conceptualize trafficking as something that women can consent to it. If it is her choice, how can she be absolved of the migration law transgression that follows? The distinction between trafficking and smuggling serves the interests of some of those who cross borders clandestinely. It ensures that some of these people are ‘victims’ and thus have some access to the remedies that come with this label. The distinction does better service to state interests, by creating clarity about who is to be excluded and who cannot be. Primarily, however, drawing a clear bright line between smuggling and trafficking makes it harder to interpret the shades of grey where the two ideas are intertwined. In the area of criminally assisted migration, people suffer tremendous abuse, hardship, and unyielding legal consequences. Separating smuggling and trafficking turns our focus to the polarized limits of the phenomenon: the children in the TIP report photos and the wealthy passport purchasers.

What would we lose if we gave up defense of this line? The distinction between trafficking and smuggling stands as an easily ready shorthand, telling us who to blame. Without this distinction, we would have to think harder about victimization; examine its elements, weigh its degrees. Without this line, it is harder to use victim as a simple catch-all, a silenced, one-size-fits-all space. We would need to understand the differences, and the similarities, between Mario, Clara and Mohammad. We would have to give up the still life approach to trafficking images, allowing for moving pictures, interactions, agency. This is not easy for the law. Law specializes in drawing clear bright lines. The distinction facilitates a legal response. Such a response is limited by the capacity of the law. It is only as useful as the legal remedy it can support. Without distinction we are left with a muddle; with overlapping layers of inclusion and exclusion; with
degrees of agency and consent that tell us more about the array of choices available to different individuals than about the culpability of traffickers.

The line between trafficking and smuggling bolsters the state with a reinforcement of the insider-outsider dichotomy. Globalization’s dynamics are shifting the location of this line from the border of the nation state, but that does not render it any less important, nor any less vital to state interests. As with other instances of extra-legal migration, states are moving to ensure they can continue to tell ‘us’ from ‘them’. Defending the trafficking-smuggling border defends this border as well. It serves the interests of not-yet-post modern law, and impairs our imagination of solutions that look beyond. In this area it is vital to unthink the law, and there are few signs for optimism. The contemporary approaches to trafficking show globalization pinned to an unshakable economic logic and captured by hegemonic Americanization. While the United States looks to other states to halt trafficking, there is little discussion of role played by the massive American domestic market for trafficked persons of all types, and the effect of this economy on illegal migration generally, which I return to considering in Chapter Eight. Peter Fitzpatrick’s vision of a new future for international law is also grounded in a deep concern about American superpower in the international realm. Trafficking is perhaps one of the most pointed examples of this trend that can be brought, precisely because of the absence of critique. It is possible to be vitally concerned about the horrors of human trafficking and also concerned about transforming this horror into straightforward support of American initiatives. Voicing critique at this juncture must also mean calling for a community of ethics worthy of fledgling faith; hoping that the space opened for a change in the rule of law can be transformed in profound ways.

The pictures illustrating the TIP Report send an important beacon. In moving to confront human trafficking, we have images of exploitation but no truth. Confronted by a lack of knowledge and a global scale, we must listen to sub-local secrets, told in whispers. We must go to ground. If law can be a tool here, it must be grounded in the talk that is silenced by victimization. We need the thousands of words that the pictures replace. Hegemonic power cannot solve a
problem for which sovereignty is an insurmountable barrier, even in the imagination. While victimization replaces illegality in this migration context, it does not replace it with the empowered, rights bearing individuals that Western law is tooled to protect. This contrast between rights bearing individuals and victims is clarified by considering the difference between the moral panic surrounding trafficking with that surrounding security concerns in the migration realm. I turn to the matter of security in the next chapter, and consider how migration laws are responding to the new politics of terror.