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The New Abolitionism, International Law, and the Memory of Slavery

ARIELA J. GROSS AND CHANTAL THOMAS

I. Introduction

Today, millions of migrant workers, some of them caught in debt bondage, some victims of fraud or forced migration, and others simply desperate for a better life elsewhere but instead finding themselves working for below subsistence wages or no pay at all, could be called modern-day slaves. Campaigns to end modern-day slavery have taken many forms. Most visibly, what is sometimes called “the new abolitionism,” constitutes a strand of modern antislavery and antitrafficking movements that draws often on the analogy between these workers’ plight and chattel slavery in the Atlantic world.

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In this article, we ask how the project of understanding and redressing human vulnerability in the world today relates to the history and memory of slavery and the slave trade in the past. We also examine this relationship from the reverse direction, looking at the way memorials to Atlantic slavery are drawing connections to human trafficking in the present day. We suggest that contemporary movements built on the eradication of modern day slavery may do better to target structural inequalities perpetuated by labor law and immigration law.

The contemporary campaign against slavery rests on a platform created within international law on trafficking in persons, which one of us elsewhere has called the “slavery-trafficking nexus,”¹ drawing legal and conceptual connections between slavery in the past and in the present. This antitrafficking legal apparatus has a number of elements. First, under the leadership of the United States, the United Nations established the United Nations Convention against Transnational Organized Crime in 2000²—the fastest ever to come into force with now more than 140 signatories—and its Protocol Against Trafficking in Persons, which requires states to create and punish the crime of trafficking in persons.³ Second, the United States Department of State runs an extensive antitrafficking program featuring an annual report that potentially penalizes country recipients of foreign aid.⁴ Finally, since 2000, the United States has had federal antitrafficking legislation,⁵ and a majority of states now feature some form of state law against trafficking, all of which establish criminal penalties.⁶ The term “trafficking in persons” is now commonly used interchangeably with the term “slavery” in this realm of international and state criminal law.⁷

1. Chantal Thomas, “Immigration Controls and Modern-Day Slavery,” in *Shaping the Definition of Trafficking in the Palermo Protocol*, ed. Prabha Kotiswaran (Cambridge: Cambridge University Press, 2016).

2. *United Nations Convention Against Transnational Organized Crimes and the Protocols Thereto*, G.A. Res. 55/25 (November 15, 2000) <http://www.un-documents.net/a55r25.htm> (September 21, 2016).

3. *Ibid.*, 2.

4. Office To Monitor and Combat Trafficking in Persons, United States Department of State, *2015 Trafficking in Persons Report* (2015). <https://www.state.gov/documents/organization/245365.pdf> (September 21, 2016).

5. See, for example, The Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. §§ 7101–10 (2000) www.state.gov/documents/organization/10492.pdf (September 21, 2016).

6. Jessica Prois, “New Human Trafficking Laws Now Passed in 39 U.S. States: Report,” *The Huffington Post*, August 15, 2013 http://www.huffingtonpost.com/2013/08/15/us-human-trafficking-laws-_n_3761495.html (September 21, 2016). See, for example, Abolition of Child Commerce, Exploitation, and Sexual Slavery Act of 2011, Cal. Penal Code § 26.9 (2011).

7. State of California Department of Justice Office of the Attorney General, “What Is Human Trafficking,” 2016 <https://oag.ca.gov/human-trafficking/what-is> (June 11, 2016).

For the last 4 years, the president has issued proclamations declaring January “National Slavery and Human Trafficking Prevention Month”: “Today, millions of men, women, and children are victims of human trafficking.⁸ This modern-day slavery occurs in countries throughout the world and in communities across our Nation.”⁹ The United Nations Office on Drugs and Crime calls trafficking in persons “a modern form of slavery.”¹⁰ The discussion that ultimately led to the Trafficking Protocol originated in the United Nations Working Group on Slavery.

Likewise, memorials to slavery and the slave trade draw on the slavery–trafficking nexus, by pointing to contemporary human trafficking as the continuation of the history of slavery. For example, in March of 2012, the largest slave trade memorial in the world opened in Nantes, France. This port city in western France launched approximately 1800 slaving expeditions between 1688 and 1830 to carry Africans to plantations in the French colonies.¹¹ In 2003, the city commissioned the renowned artist-architect team of Krzysztof Wodiczko and Julian Bonder to transform a car park on the edge of the Loire into a public space to commemorate the international slave trade and its abolition. The memorial itself is a stark and powerful public space, evoking the hold of a slave ship partially underwater, and one can almost hear the echoes of chains rattling as footsteps descend the planks. As Wodiczko and Bonder explain, “The transformation of a space which is currently ‘empty’ into a ‘passageway’ provides a link with the ground under the city of Nantes, on both sides, land and sea. . . . In some places [visitors] will find themselves hemmed in by 20th century substructures, a feeling reminiscent of the extreme confinement experienced aboard the slave ships.”¹²

The aim of the Nantes memorial is not only to remember the Atlantic slave trade and its abolition, but to connect that past to the present. As the Mayor of Nantes explains, the Memorial is “not . . . an act of contrition but a genuine call to us all to remember past struggles in order to project ourselves into the future, fighting against all modern forms of slavery and

8. Proclamation No. 9225, 80 Fed. Reg. 825 <http://www.gsd.harvard.edu/project/memorial-to-the-abolition-of-slavery-in-nantes/>, accessed November 19, 2016.

9. *Ibid.*

10. United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons*, December 2012 https://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf.

11. *Memorial to The Abolition of Slavery–Nantes*. n.d. <http://www.gsd.harvard.edu/project/memorial-to-the-abolition-of-slavery-in-nantes/> (accessed November 19, 2016).

12. Memorial by Krzysztof Wodiczko and Julian Bonder (MDesS ’96), unveiled in Nantes, France, April 6, 2012 <http://www.gsd.harvard.edu/#/news/memorial-by-krzysztof-wodiczko-and-julian-bonder-mdess-96-to.html> (November 19, 2016).

denial of human rights in order to build a more united world.”¹³ In other words, the past of the Atlantic slave trade is connected to the present not through the particular history of the formerly colonized Antilles, or the descendants of slaves and their struggles in France today, but rather through the continuing history of “slavery” in the contemporary world.

This narrative, expressed in texts on the wall of the memorial as well as on its web site, carries from the Atlantic slave trade through its abolition to a history of abolitions, leading up to present-day new abolitionism. This trajectory supersedes other possible narratives, especially one that might lead from the French participation in slavery and the slave trade to France’s responsibility for the legacies of slavery and the slave trade, especially through “contrition,” to any possibility of reparation or redress for contemporary racial injustice in France.

In this article, we suggest that the “slavery–trafficking nexus” of the new abolitionism may at times contribute to a turning of attention away from legacies of the Atlantic slave trade, and especially away from a discourse of reparations, and furthermore, may constrict understanding of contemporary human vulnerability as a problem of immigration and labor law. We want to be clear that not all efforts to combat human trafficking take part in the rhetorical and strategic moves. There are important grassroots movements to eradicate contemporary bondage that do not draw the “slavery–trafficking nexus,” or that do so in a much more nuanced and pragmatic way.¹⁴ However, much of the public face of this movement is captured by the slavery–trafficking nexus that we describe here.

Our argument proceeds as follows. First, the new abolitionism depends for its moral force on a comparison of the “new” to the “old” slavery, and especially an argument that in some ways the new slavery is worse, or more invisible, or more widespread, or harder to combat, than the old slavery. Sometimes this argument depends on a claim that the “old” slavery was legal but the “new” slavery is illegal. This is almost certainly wrong, as the articles in this issue reflect. Second, at the same time, memorialization of slavery, in France and in the United States, has taken on new life. At times, it has privileged a conservative narrative of slavery to freedom, memorializing abolition over enslavement, which ties into a narrative of

13. “The Memorial Political Will,” *Memorial to The Abolition of Slavery–Nantes* <http://memorial.nantes.fr/en/le-memorial/une-volonte-politique/> (September 23, 2015).

14. See, for example, the materials collected in Bridgette Carr, Anne Milgram, Kathleen Kim, and Stephen Warnath, *Human Trafficking Law and Policy* (Durham: Carolina Academic Press, 2014); and Leonardo Barbosa, “Behind the Definition of Contemporary Slavery in Brazil: Concepts of Freedom, Dignity, and Constitutional Rights,” *Brésil/s* (forthcoming, 2017).

color-blindness and anti-reparations.¹⁵ Third, drawing a line from past slavery to contemporary slavery can be a way to turn attention away from the legacies of past slavery, whether a discourse on reparations or simply a spotlight on contemporary racial injustice at home, and toward slavery somewhere else. Finally, doing so deflects attention from alternative frameworks for understanding contemporary human vulnerability that implicate the immigration and labor regimes of the United States and other developed nations.

II. “Neo-Abolitionism” Depends on a Comparison of “Old” and “New” Slavery

One of the most common slogans of today’s new abolitionist movement is that “There are 27 million slaves in the world today . . . more than at any time in human history.”¹⁶ This figure comes from *Disposable People*, by Kevin Bales, the president of the nongovernmental organization (NGO) Free The Slaves. Sometimes this is stated in terms of there being twice as many slaves in the world today as at the height of the Atlantic slave trade, or even double the number of slaves today as that of all of the slaves transported from Africa via the Atlantic slave trade. Another comparative theme is that today’s slave is “disposable,” because the price of a slave is only \$90, whereas the price in today’s dollars of a slave in 1850 would be \$40,000.¹⁷ All of these comparisons are designed to maximize the horror of contemporary slavery.

Legality is also key to this comparison. Kevin Bales, one of the leaders of the new abolitionist movement, begins his book, *Disposable People*, by asserting that “slavery is not a horror safely consigned to the past.”¹⁸ He goes on to draw out the comparison: “In the past, slavery entailed one person legally owning another person, but modern slavery is different. Today slavery is illegal everywhere, and there is no more *legal* ownership of human beings.”¹⁹ Not only is modern slavery more pernicious because

15. For greater elaboration of this argument, see, generally, Ariela J. Gross, “All Born to Freedom? Comparing the Law and Politics of Race and The Memory of Slavery in the U.S. and France Today,” *Southern California Interdisciplinary Law Journal* 21 (2012): 523–60; and Ariela Gross, “When Is The Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument,” *California Law Review* 96 (2008): 283–321.

16. Kevin Bales, *Disposable People: New Slavery in The Global Economy* (Berkeley: University of California Press, rev. ed. 2012).

17. *Ibid.*, 16.

18. *Ibid.*, 3.

19. *Ibid.*, 5.

legal ownership is avoided, but slaves' bodies are disposable rather than worthy of maintenance.²⁰

Karen Bravo has examined "the uses made of the transatlantic slave trade in contemporary anti-trafficking discourse."²¹ "Often the implicit or explicit hypothesis appears to be that modern trafficking in humans is more widespread and awful, and involves greater victimization and human degradation than did the transatlantic slave trade." As she argues, this discourse has often been "superficial, counterproductive, and harmful."²²

The division between "old" and "new" slavery also posits a clean break between slavery that existed only in the deep past, and something that has emerged recently, as opposed to practices of coercive labor that have taken different forms in different places over the last several centuries, but have rarely disappeared entirely.²³ For example, George W. Bush expressed this view when he declared, "Nearly two centuries after the abolition of the transatlantic slave trade, and more than a century after slavery was officially ended in its last strongholds, the trade in human beings for any purpose must not be allowed to thrive in our time."²⁴ As Bravo notes, repeated references to one's own country's abolition of slavery, followed by mention of the "return" of slavery today, in the passive voice, reinforces the "denial of any complicity . . . in slavery's reemergence" or even its continuation in other guises, coupled with "condemnation of developing countries" that are responsible for modern slavery.²⁵ This "use of the transatlantic slave trade analogy denies the reality that transatlantic slavery did not end with abolition," writes Bravo, noting the various forms of forced labor that persisted in the United States, including peonage and convict leasing under Jim Crow.²⁶

20. *Ibid.*, 15.

21. Karen E. Bravo, "The Role of the Transatlantic Slave Trade in Contemporary Anti-Trafficking Discourse," *Seattle Journal for Social Justice* 9 (2011): 555–97.

22. *Ibid.*, 562.

23. For a discussion of this point, see Joel Quirk, "Uncomfortable Silences: Contemporary Slavery and the 'Lessons' of History," in *From Human Trafficking To Human Rights: Reframing Contemporary Slavery*, ed. Alison Brysk and Austin Choi-Fitzpatrick (Philadelphia: University of Pennsylvania Press, 2012), 25–43; and Joel Quirk, *The Anti-Slavery Project: From The Slave Trade To Human Trafficking* (Philadelphia: University of Pennsylvania Press, 2011).

24. Statement by His Excellency Mr. George W. Bush President of the United States of America, Address to the United Nations General Assembly, September 23, 2003 <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm>.

25. Bravo, "The Role of the Transatlantic Slave Trade," 567.

26. *Ibid.*, 570.

A better historical analogy than the transatlantic slave trade for contemporary practices of “human trafficking” may actually be the campaign against “white slavery” in the late nineteenth and twentieth centuries. The moral panic about white women being “trafficked” across state lines for the purposes of prostitution led to the passage of the Mann Act; the same kind of sex panic has led to the preoccupation of many (especially conservative) politicians with the sex trade and international trafficking of women for prostitution rather than other forms of forced labor or ownership of human beings.²⁷ For example, President George W. Bush’s initiatives on human trafficking emphasized sex trafficking over other forms of coerced labor, and often equated slavery with sex trafficking or prostitution more generally.²⁸

In fact, striking parallels connect the “white slavery” era and the contemporary era. International law provides one: as with the adoption of the contemporary Trafficking Protocol in the same year, 2000, as the founding United States statute on antitrafficking, the Mann Act against white slavery was adopted in the same year, 1910, as the establishment of an international treaty, the International Convention for the Suppression of White Slave Traffic.²⁹ International law reflected and reinforced local and national reform measures advanced by social movements focused on prostitution.³⁰ Both “moral panics” also arose in the context of broad-based social change and transformation, marked particularly by high levels of immigration in both eras.³¹ The analogy of prostitution to slavery, in both cases, may have helped to anchor and mobilize opposition to a perception of social threat related, in complicated ways, to interlocking dynamics of increasing border openness.

27. *Ibid.*, 563–80.

28. See, for example, President George W. Bush, Human Trafficking—A New Form of Slavery, September 29, 2015, 11:29 a.m. <http://georgewbush-whitehouse.archives.gov/infocus/traffic/> (November 18, 2016).

29. International Convention for the Suppression of the “White Slave Traffic,” May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20, *as amended by* Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23, *entered into force* June 21, 1951.

30. For an account of the role of contemporary feminists against prostitution in influencing international antitrafficking law and policy, see Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas, “From the International to the Local in Feminist Legal Responses: Four Studies in Contemporary Governance Feminism,” *Harvard Journal of Law & Gender* 29 (2006): 336–423, at 352–60.

31. See Chantal Thomas, “Disciplining the Global Social Body” (manuscript on file) (comparing immigration levels into the United States at the turn of the nineteenth and twentieth centuries).

III. Memorialization of Slavery and Abolition

The analogy and comparison between the Atlantic slave trade and contemporary slavery is also increasingly featured in memorials to the slave trade. Both the United States and France have seen a burgeoning of the memorialization of slavery, the slave trade, and their abolition in recent years. In 2001, the passage in France of the Taubira Law, declaring slavery and the slave trade a crime against humanity, marked a new kind of legal memorialization that had before then been reserved for the Holocaust in Europe.³² The law provided for teaching, research, and public commemoration of slavery, the slave trade, and their abolition in French schools and in the public sphere.

In the United States, the success of Holocaust reparations claims against Swiss banks and other institutions sparked a renewed interest in slavery reparations in the 1990s and 2000s, and a series of lawsuits against corporations and other entities (eventually consolidated in the Northern District of Illinois, where they were summarily dismissed).³³ At the same time, a number of universities in the North and South began to examine their own histories with slavery, and several museums and historical societies launched major exhibitions regarding slavery and abolition.³⁴ In both the

32. Loi 2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité [Law 2001-434 of May 21, 2001 for the recognition of trafficking and slavery as a crime against humanity] Legifrance: Le Service Public de la Diffusion du Droit [LegiFrance: A Public Service for the Dissemination of the French Laws].

33. Reparations discourse may appear more prominent today to the extent that other avenues to racial justice have been closed off. Al Brophy argues that reparations debates present "another front on...the culture wars." Alfred L. Brophy, "The Cultural War Over Reparations for Slavery," *De Paul Law Review* 53 (2004): 1181-213, 1182. Darren Hutchinson chronicles the discourse of "racial exhaustion," the argument prominent in many court opinions from the 1883 Civil Right Cases to the present that we have done enough about race. Darren L. Hutchinson, "Racial Exhaustion," *Washington University Law Review* 86 (2009): 917-74, 922. Reparations for slavery have been an ever-present demand in African American politics but have only begun to receive public attention in recent years. Historians Martha Biondi and Mary Frances Berry have recently published histories of black reparations movements, beginning with that of Callie House and the campaign for ex-slave pensions after the Civil War. Civil rights activists from Martin Luther King Jr. to black nationalist leaders demanded reparations for slavery. See, generally, Mary F. Berry, *My Face Is Black Is True: Callie House and The struggle for Ex-Slave Reparations* (New York: Vintage, 2005): 239; Martha Biondi, "The Rise of the Reparations Movement," *Radical History Review* 87 (2003): 5-18; and Brophy, "The Cultural War," 922.

34. Emory University recently held a conference on slavery, and the university chronicles numerous such efforts at universities across the United States, including Emory's own "Transforming Community" project. See, for example, Brown University Steering

United Kingdom and France, national commemorations took place in the late 1990s and early 2000s marking the anniversaries of the abolition of their slave trades.³⁵ Each of these initiatives varied in its motivation—some were spurred by local movements of slave descendants, and others by institutions or governments seeking to commemorate but also to move beyond a shameful past—and certain patterns can be discerned. Although some of these efforts, especially those based in universities or in grassroots movements that have spurred new research into institutional histories of slavery, have been enormously fruitful and at times politically radical, whereas the more official commemorations, as well as many of the popular cultural manifestations, are somewhat more triumphalist.

In particular, as one of us has argued elsewhere in greater detail, liberal and conservative political movements can join together in certain forms of slavery memorialization, especially those that emphasize the moment of abolition, or the narrative of slavery to freedom, in a way that serves to blunt the more radical demands of racial politics. In France and the United States, movements to oppose race-conscious laws to redress the harmful legacies of slavery and its aftermath often portray slavery as part of the deep past, whereas those seeking some form of recognition or reparation emphasize that slavery is “not even past.”³⁶

The teleological narrative of “slavery to freedom” that is so common in United States popular culture as well as in much political and legal writing, presents slavery as a prelude to the inevitable unfolding of freedom. In Europe as well as in the United States, the tendency to memorialize abolition rather than slavery itself contributes to expressions of national identity tied to a freedom principle. In contemporary conservative writings in the United States, abolitionism is also celebrated as uniquely Western, American, Christian, and/or white, which undergirds an argument that

Committee on Slavery and Justice, *Slavery and Justice*, 2006 http://brown.edu/Research/Slavery_Justice/ (November 18, 2016). The largest museum exhibition was staged at the New York Historical Society, funded by the Gilder–Lehrman Center at Yale University. New York Historical Society, *About the Exhibit, Slavery in New York* http://www.slaveryin-newyork.org/about_exhibit.htm (September 22, 2015). Richard Gilder and Lewis Lehrman are two of the largest funders of slavery studies in the United States today. See Howard Holzer, “Prizing History: An Interview with Richard Gilder and Lewis Lehrman,” *American Heritage*, 51(3) (May/June 2000): 95. This has raised questions about conservative influence on slavery studies. See, for example, Jesse Lemisch, “Are Gilder and Lehrman Tilting American History to The Right? A Case in Point,” History News Network, November 8, 2004 <http://historynewsnetwork.org/article/8420> (November 18, 2016).

35. See, generally, Gross, “All Born to Freedom?”

36. See, for example, President Barack Obama, A More Perfect Union (March 18, 2008) (quoting William Faulkner, *Requiem For a Nun* [New York: Random House, 1950]).

the debt of slavery has already been paid (by antislavery movements and by the Civil War).³⁷ Furthermore, conservatives wed the slavery-to-freedom narrative to a claim about a continuous color-blind principle in the American tradition. They argue that the 1787 Constitution contained within it timeless principles of antislavery and equality, vindicating the Framers from criticism, and making slavery appear to be a temporary deviation from those principles, rather than a bedrock of United States institutions.³⁸

In both France and the United States, another common conservative narrative emphasizes the omnipresence of slavery in world history, thereby decoupling slavery from race. For example, in France, opponents of the Taubira Law's focus on France's role in the Atlantic slave trade call attention to the fact that slavery was "practiced widely, including by Arabs and Africans themselves," and thereby imply that France bears no special responsibility for the part it played in the slave trade.³⁹ Opponents of the law also deplore the identification of blacks as descendants of slaves, arguing that this is a chosen identity, and deploy notions of French republican citizenship to tie race-blindness to a tradition of freedom.⁴⁰

Furthermore, in both countries, the originary revolutionary moment—in France, associated with the Declaration of the Rights of Man and "republicanism," and in the United States, with the 1787 Constitution, the Declaration of Independence, and the vision of the "Founding Fathers"—is invoked to create a sense of the timeless continuity of the principle of color-blindness, with slavery (and affirmative action) temporary deviations.⁴¹ The final abolition of slavery in France in 1848, and

37. See for example, Dinesh D'Souza, *The End of Racism: Principles for A Multicultural Society* (New York: Free Press, 1995); and *In re African American Slave Descendants Litig.*, 375 F. Supp. 2d 721 (2005), *aff'd in part and rev'd in part and modified in part*, 471 F. 3d 754, 780 (7th Cir. 2006) (detailing the great price that Union troops, enslavers, and generations of Americans paid for the Civil War).

38. See, for example, Herman Belz, "Conservative Principles and Black History: Affirmative Action and Identity Politics" <http://phillysoc.org/belz-conservative-principles-and-black-history/> (November 18, 2016). See, generally, Gross, "When Is The Time of Slavery."

39. The transcript for the May 17, 2016 interview, "Gare à la criminalisation générale du passé! [Watch out for the general criminalization of the past!]," by Figaro of Pierre Nora, cofounder of Liberté pour l'histoire, is available at http://www.lph-asso.fr/index.php?option=com_content&view=article&id=15%3Aapiere-nora-l-gare-a-la-criminalisation-generale-du-passe-r&Itemid=34&lang=fr (November 18, 2016).

40. See Christian Sauvage, "Un Prix pour les Traits Nègrières: Entretien avec Olivier Pétré-Grenouilleau," *Journal du Dimanche*, June 2005 <http://www.wasadugu.org/Petre120605.thm>

41. Gross, "All Born to Freedom," 528.

in the United States through the Civil War and Reconstruction, then appear as affirmations of those timeless principles.

More recently, however, both liberals and conservatives have embraced another kind of historical narrative, one that not only emphasizes abolition, but also embraces a history of abolitions and abolitionism that connects the past to the present day. The connections between the “slavery to freedom” story and the new abolitionism can be seen in Jacques Chirac’s presidential address commemorating abolition.

The “slavery to freedom” story was epitomized in France by the slogan of the 1998 commemoration of abolition, “Tous nés en 1848”: “All born in 1848.”⁴² In his presidential address, Jacques Chirac focused on 1848 in order to draw a line between the monarchical past of slavery and the republican present of freedom, unifying the nation in freedom and symbolically wiping the slate clean of responsibility for slavery.⁴³ President Chirac then drew the connection from France’s abolitionist past to its neo-abolitionist future, rooting out slavery wherever it continues to exist—elsewhere in the world.⁴⁴ By drawing a line from France’s slave past to a contemporary problem that exists elsewhere in the world, it becomes easier to absolve France of responsibility for these continuing harms. Although early drafts of the Taubira Law included a proposal for a committee to study reparations, this was tabled in the face of political opposition, and the current National

42. *Tous nés en 1848. 150^{ème} Anniversaire de l’abolition de l’esclavage, 1848–1998* [All born in 1848. The 150th anniversary of the abolition of slavery, 1848–1998], Ministère de la Culture et de la Communication. <http://ww.culture.gouv.fr/culture/actual/abolition/esclavage.htm> (September 22, 2015).

43. Jacques Chirac, Speech at the Reception in Honor of the Slavery Remembrance Committee: *Mémoire de l’esclavage* (January 30, 2006) <http://www.ambafrance-uk.org/Memoire-de-l-esclavage> [English translation of certain excerpts available at <http://www.ambafrance-uk.org/Speech-by-M-Jacques-Chirac,6848.html> (September 22, 2015)] (“L’abolition de 1848 est un moment décisive de notre histoire: l’un de ceux qui ont forge l’idée que nous nous faisons de notre pays, en tant que terre des Droits de l’Homme ... C’est ainsi qu’un peuple se rassemble, qu’il deviant plus uni, plus fort.” [“The Abolition of 1848 was a decisive moment in our history: one of those that reinforces the unity of our nation.”]). See also Elizabeth Kowaleski-Wallace, *The British Slave Trade and Public Memory* (New York: Columbia University Press, 2006), 207–8; Catherine A. Reinhardt, *Claims To Memory: Beyond Slavery and Emancipation in the French Caribbean* (Oxford: Berghahn Books, 2006) (describing the commemoration of slavery in the former French colonies of Martinique, Guadeloupe, and Haiti); and Christine Chivallon, “Bristol and the Eruption of Memory: Making the Slave-Trading Past Visible,” *Social & Cultural Geography* 2 (2001): 347–63.

44. Nicola Frith, *The French Colonial Imagination: Writing The Indian Uprisings, 1857–1858, From The Second Empire To The Third Republic* (New York: Lexington Books, 2014), 148; See also “Chirac Names Slavery Memorial Day,” BBC News, January 30, 2006, 15:07 GMT <http://news.bbc.co.uk/2/hi/europe/4662442.stm> (November 18, 2016).

Committee for the Memory and History of Slavery has as its mandate only teaching, research, and commemorations.⁴⁵ The fact that redress would not be part of the goal of the Taubira Law has been central to its success.

IV. Memorial Narratives and New Abolitionism: The Nantes Memorial

The narrative of “slavery to freedom to neo-abolitionism” is expressed as well in the texts promoting the Memorial to the Abolition of Slavery in Nantes, as well as those featured on its walls. The Nantes Memorial web site asserts, “The Nantes Memorial to the abolition of slavery also has a role to play in reminding us of the **dramatic urgency of the situation of slaves today**.”⁴⁶ It then repeats the claim frequently made by new abolitionists about the absolute number of slaves today being greater than at any time in the past: “Today, it is estimated that **27 million people** across the world live in slavery; twice as many as the total number of slaves deported by the Atlantic slave trade over four centuries.”⁴⁷ The chronology on the web site is not a chronology of slavery and race relations in France, or even across the world; it is a “chronology of abolitions” that proceeds from the first abolition of slavery in an American state (Vermont in 1777) through the various French abolitions of 1794–1848, to the present day adoption of French and international laws against human trafficking.⁴⁸

As the Nantes tourism web site explains, “Under the quayside, a 90 meter-long underground passage evokes the captives in the ships’ holds, inciting us to think about fighting for the abolition of slavery and the modern form it takes today.”⁴⁹ The texts in the underground passageway of the memorial itself move from poems and speeches about slavery and the slave trade to quotations regarding abolitions and slave resistance, and the final three texts are the Taubira Law, a report by the Joint Information Taskforce

45. See Johann Michel, *Devenir Descendant D’esclaves: Enquête Sur Les Régimes Mémoriels* [*Becoming A Slave Descendant: An Investigation of Memorial Regimes*] (Rennes: Presses Universitaires de Rennes, 2015), 190–202. The Committee for the Memory and History of Slavery has sponsored many terrific research and teaching initiatives <http://www.cnmhe.fr/> (November 18, 2016).

46. *Memorial to the Abolition of Slavery–Nantes* <http://memorial.nantes.fr/en/esclavage-et-lutte-pour-la-liberte/l’esclavage-aujourd’hui/> (September 22, 2015).

47. *Ibid.*

48. “The Atlantic Slave Trade and Colonial Slavery,” *Memorial To The Abolition Of Slavery–Nantes* <http://memorial.nantes.fr/en/esclavage-et-lutte-pour-la-liberte/la-traite-negriere-atlantique-et-l’esclavage-colonial/> (September 29, 2015).

49. *Memorial To The Abolition Of Slavery–Nantes*, <http://memorial.nantes.fr/en/esclavage-et-lutte-pour-la-liberte/l’esclavage-aujourd’hui/> (September 22, 2015).

on Modern Day Slavery to the French National Assembly regarding human trafficking in France, and Article 212-1 of the French Criminal Code regarding enslavement of human beings.⁵⁰

Although originally a museum space had been planned that would have displayed some of the historic relics of slavery in Nantes, and could have provided a narrative of Nantes' history of involvement in the slave trade, that structure was never built. Instead, there is an exhibit on slavery at the city museum several kilometers away. The memorial itself is quite abstract, evoking the holds of slave ships without any physical embodiments of enslaved people or enslavers. Critics of the memorial claim that it emphasizes abolition rather than slavery itself.⁵¹ As Franck Barrau explains, "this isn't a Memorial in memory of the victims, it commemorates the abolitionists, which to me, is a big difference."⁵² However, Barrau, a secretary general of the International Forum of Human Rights in Nantes, wants the focus of the memorialization project in Nantes to be abolition in the contemporary sense: "Nantes has to lead a new network of cities that are trying to fight different forms of contemporary slavery . . . The history of slavery concerns all of Europe and fighting its modern forms is a national and European responsibility."⁵³

The memorial itself has a history: it was the product of several decades of activism by black slave descendants in Nantes, as well as partisan political battles in which the memorial became an important part of the resurgence of the Left in city politics. First, in 1985, the 300th anniversary of the Code Noir prompted Nantes historians to propose a memorial event that would mix an academic conference with cultural activities in the

50. Loi 2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité [Law 2001-434 of May 21, 2001 for the recognition of trafficking and slavery as a crime against humanity] *Legifrance: Le Service Public De La Diffusion Du Droit* [LegiFrance: A Public Service for the Dissemination of the French Laws].

51. Dowoti Desir, a human rights activist, says, "A state-sponsored monument that addresses the abolition of slavery without ever addressing how it misleads people." Iglia Stankova, "Abolition of Slavery (Nantes) Two Years After its Inauguration," *Durban Declaration & Programme of Action Plan Watch Group*, December 24, 2014 <https://dowodesir.wordpress.com/2014/12/24/the-memorial-to-the-abolition-of-slavery-nantes-two-years-after-its-inauguration-by-iglika-stankova/> (November 18, 2016).

52. *Ibid.*

53. *Ibid.* Critics of the memorial have also focused on its abstract nature, arguing that it fails to convey the horrors of slavery or the Middle Passage. As Michel Feith writes, "What seems to be missing from the Memorial is a powerful reminder of the violent, scandalous nature of slavery." Michel Feith, "Introduction—Weaving Texts and Memories Around Toni Morrison's *Beloved*," *Black Studies Papers 1.1, 5*, 2014 <http://elib.suub.uni-bremen.de/edocs/00103772-1.pdf>.

city around the memory and legacies of slavery.⁵⁴ However, a newly elected right-wing city council unexpectedly cancelled funding for the public event, so that only the academic portion of the program was held.⁵⁵

The opposition to a public commemoration crystallized the sense among black residents of Nantes that their neighbors refused to acknowledge the city's slaving past. They began to hold annual commemorations, and also to ally with left-wing political challengers to the city council. In 1998, a statue of a freedman was erected by an Antillean association to commemorate the 1848 abolition, and was destroyed the night after its unveiling.⁵⁶ That crisis prompted the mayor's promise to erect a public memorial; however, it took another 14 years to build the memorial because of political opposition to "excess memory activism," high costs, and "technical obstacles."⁵⁷ The decision to frame the memorial in terms that do not connote "repentance"—and certainly not "reparation"—was a conscious one.⁵⁸ Therefore, it should not be a surprise that those who want to make the memorial meaningful in the present have turned instead to contemporary slavery as a frame of reference rather than the legacies of the slave trade in Nantes, or in France as a whole.

V. International Law Objections to the Slavery–Trafficking Nexus

Thus, the "slavery–trafficking nexus," or the comparison between slavery past and present, has become a powerful cultural, political, and legal referent. Turning in particular to the legal realm, one finds that several types of objection have been offered to the "slavery–trafficking nexus" as a

54. Renaud Hourcade, "Commemorating a Guilty Past, The Politics of Memory in French Former Slave Trade Cities," in *Politics of Memory, Making Slavery Visible in the Public Space*, ed. Ana Lucia Araujo (New York: Routledge, 2012), 127.

55. *Ibid.*

56. *Ibid.*, 129.

57. *Ibid.* See also Renaud Hourcade, *Les Ports Négriers Face À Leur Histoire: Politiques De La Mémoire À Nantes, Bordeaux Et Liverpool* [*The Slave Trade Ports Face Their History: The Politics of Memory in Nantes, Bordeaux and Liverpool*] (Paris: Dalloz, 2014); Nelly Schmidt, "Teaching and Commemorating Slavery and Abolition in France: From Organized Forgetfulness to Historical Debates," in Araujo, *Politics of Memory*; Emmanuelle Chérel, *Le Mémorial De L'abolition De L'esclavage De Nantes: Enjeux Et Controverses* [*The Memorial to the Abolition of Slavery in Nantes: The Stakes and Controversies*] (Rennes: Presses Universitaires de Rennes, 2012); Michel, *Devenir Descendant D'esclaves* [*Becoming A Slave Descendant*]; Nicola Frith, "Crime and Penitence in Slavery Commemoration: From Political Controversy to the Politics of Performance," in *France's Colonial Legacies: Memory, Identity and Narrative*, ed. Fiona Barclay (Chicago: University of Chicago Press, 2013).

58. Hourcade, "Commemorating a Guilty Past," 135–36.

framework for addressing human exploitation: legal, factual, and policy based. The legal objection is that trafficking and slavery are actually two separate juristic frameworks. The definition of “trafficking in persons” in the Trafficking Protocol involves the use of force, fraud, or coercion against persons for the purposes of their exploitation.⁵⁹ Specifically, in the protocol, “trafficking” means “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.”⁶⁰ Trafficking, therefore, turns on three elements of action, means, and purpose.

By contrast, several international lawyers, most prominently Jean Allain, have argued that the term “slavery” properly receives its definition under the 1926 Slavery Convention, which provides that “slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”⁶¹ If “slavery” regards property or ownership, or exercising the powers attached to the right of ownership, that is something different than forced labor or trafficking.

In part, this objection stems from lawyerly irritation with imprecise use of the term “slavery” by “scholar-activists” such as Bales, who defines “slavery” broadly as the “use or threat of violence, loss of free will, and appropriation of labor power.”⁶² But the legal objection is also a factual objection. Some of the international lawyers are “legal minimalists,”⁶³ such as Allain and Anne Gallagher, who argue that not only should the Slavery Convention be used to define slavery, but that it applies to a much smaller population than trafficked persons.⁶⁴ The factual objection

59. United Nations Office on Drugs and Crime, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplement the United Nations Convention Against Transnational Organized Crime*. G.A. Res. 55/25, Annex 2, Art. 3 (November 15, 2000).

60. *Ibid.*

61. *1926 Slavery Convention*, 60 LNTS 253, Art. 1 (1927). As Jenny Martinez has shown in her work on the international slave trade courts, there are numerous antecedent instruments in international law. See, generally, Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford: Oxford University Press, 2012).

62. Kevin Bales, *Understanding Global Slavery* (Berkeley: University of California Press, 2005), 57.

63. Thomas, “Immigration Controls and Modern-Day Slavery,” in *Shaping the Definition of Trafficking in the Palermo Protocol*, ed. Prabha Kotiswaran (Cambridge: Cambridge University Press, 2016).

64. Anne T. Gallagher, “Human Rights and Human Trafficking: Quagmire or Firm Ground?” *Virginia Journal of International Law* 49 (2009):789–848, at 810.

is that the term “slavery” is now being stretched to encompass a broader range of exploitative practices, which include trafficking in persons and debt bondage. Gallagher argues that out of the population of trafficked persons, only a tiny percentage could be accurately characterized as slaves.⁶⁵

However, it is not clear that using the Slavery Convention resolves the messy problems of defining contemporary slavery, or that the Slavery Convention should be the only authoritative instrument on slavery. Furthermore, the text of the convention is actually quite vague: “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”⁶⁶ One could interpret this quite narrowly, as referring only to de jure exercise of ownership, as expounded in the 2005 case in the European Court of Human Rights, *Siliadin v. France*, which ruled that slavery could only exist where there existed a “genuine right of legal ownership.”⁶⁷ But that would make the Slavery Convention largely irrelevant, because de jure slavery is now abolished almost everywhere; subsequent decisions of the European Court have found that such a narrow reading should not be permitted, as it deprives victims of “practical and effective protection.”⁶⁸

Consequently, most commentators have instead argued that de facto exercise of the rights attached to ownership should be encompassed, and this view has been picked up in practice: the 2008 Australian High Court opinion, *The Queen v. Tang*, applied “the 1926 definition to *de facto* situations.”⁶⁹

Here, some legal minimalists have argued that even if de facto, the de facto conditions that designate slavery must be very severe to distinguish them from lesser servitude; they must amount to total control or subjection.⁷⁰ The expert-drafted Bellagio-Harvard guidelines take a somewhat more open-ended stance, shying away from the insistence on *total* control, but still providing that a factual threshold has to have been reached. The guidelines provide that “control tantamount to possession” must be established before any of the acts of ownership, such as buying, selling, transferring, or using can be acts of slavery.⁷¹ The problem with the guidelines’

65. *Ibid.*

66. *1926 Slavery Convention*, 60 LNTS 253, Art. 1 (1927).

67. *Siliadin v. France*, 2005-VII Eur. Ct. H.R. 33.

68. *C.N. and V. v. France*, ECHR 374 (2012), application no.67724/09, at para. 121.

69. *Queen v. Tang*, [2008] H.C.A. 39 (Austl.)

70. Jean Allain and Robin Hickey, “Property and the Definition of Slavery,” *International and Comparative Law Quarterly* 61 (2012): 915–38, at 931 (“[A]s the Court made clear in *Tang*, the point about slavery is that it results in the total subjection of one person to another.”).

71. “The Bellagio–Harvard Guidelines on the Legal Parameters of Slavery,” *Global Dialogue* 14 (Summer/Autumn 2012): 14–21.

de facto definition of slavery is that the term becomes circular. The way one determines that “control tantamount to possession” is present is on the basis of evidence of the exercise of one of the powers of ownership, such as an act of using a person. In other words, an act of using a person will be slavery only if there is control tantamount to possession; however, control tantamount to possession will be determined to exist on the basis of whether there is an act of using a person (or another listed act of ownership). One would be hard pressed to resolve this circularity by establishing a cumulative requirement that more than one act of ownership exist, because this seems to run contrary to the explicit text of the 1926 Slavery Convention, which provides that exercise of “any *or* all” of the powers attaching to the right of ownership can meet the definition.

Fundamentally, then, the text of the 1926 Slavery Convention is quite open ended, and several interpretations are available. This means that, even if a guiding text in international law exists, such as the Convention, we must inevitably turn to policy considerations to define its parameters in application.

Beyond the legal and factual objections, then, is ultimately a policy objection about the implications of using the term. Legal minimalists warn against an expansionist understanding of slavery for policy reasons.⁷² The first problem is *dilution*: the prohibition on slavery is recognized as a rule of customary international law and regularly is identified as a legal obligation *erga omnes* and as part of *jus cogens*. This is heavy artillery under international law. Anne Gallagher has noted: “Unfortunately, as the concept of slavery expands to fit the needs of scholar-activists, its legal worth diminishes.”⁷³ This is the crux of a dilemma about the interaction of law with social movements and reform efforts. The force of the term “slavery” is precisely that we do not require a definition to bring to mind the image of the chattel slave; the term relies on that intuitive and rhetorical force, even though the vast majority of situations to which it is applied today do not resemble chattel slavery. But in using the term so freely, do we do a disservice to the term?

We have already suggested some of the regressive possibilities in expansionism: antislavery rhetoric both uses and dismisses the legacy of chattel slavery. Furthermore, in the present day, the slavery analogy could play a normalizing or legitimating function such that garden-variety labor abuses will not receive the same attention or concern. Rather than seeing exploitation as

72. See Anne T. Gallagher, “Two Cheers for the Trafficking Protocol,” *Anti-Trafficking Review* 4, 2015, <http://www.antitraffickingreview.org/index.php/atrjournal/article/view/88/109> (September 23, 2015).

73. Gallagher, “Human Rights and Human Trafficking,” 799.

endemic to a global economy, we may write it off as an exceptional condition attributable to individual criminal acts. If conditions of exploitation do not rise to the level of slavery, according to this concern, then they implicitly can be ignored because we do not have another viable and robust framework in which to discuss them. This leads to the second policy problem, which is about the remedy. The slavery framework casts the problem of labor exploitation in criminal law terms and suggests that the remedy is individual criminal prosecution. However, this individualized model ignores the larger forces of globalization that set up structural exploitation.

VI. Alternative Paradigms to the Slavery–Trafficking Nexus

By contrast, alternative paradigms, such as those of labor law or immigration law, might address these larger structural concerns. A labor law paradigm would focus on regulatory reform—both improving the legal conditions of work and better enforcing the existing legal rules—and not just on penalizing lawbreakers. The two paradigms, criminal law and labor law, do not have to work separately; in Brazil, both are used.⁷⁴ In the United States, however, up to now there has been relatively little interaction between the agencies charged with enforcing labor and employment law, and the antitrafficking laws. There are signs this is changing, however, assisted by the fact that the United States trafficking law permits civil as well as criminal remedies.⁷⁵

Even where criminal and labor legal structures are not formally interconnected, the discourse of trafficking can frame investigations into labor infractions. For example, “The Price of Nice Nails,” a recent *New York Times* series, investigated 2000 nail salons in New York City, revealing rampant withholding of wages and terrible working conditions.⁷⁶ One could call this a form of slavery, although the level of de facto possession or subjection is unclear, and

74. See, generally, Barbosa, “Behind The Contemporary Definition of Slavery in Brazil.” See also Rebecca J. Scott, Leonardo Barbosa, and Carlos Haddad, “How Does The Law Put an Analogy to Work? Discerning ‘A Condition Analogous to That of a Slave’ in Contemporary Brazil” (unpublished paper on file with author).

75. For example, in 2011, the United States Equal Employment Opportunity Commission announced that it would pursue civil claims against an employer for a range of violations, including trafficking laws and employment discrimination laws. See Press Release, “EEOC Combats Labor Trafficking, Severe Abuse and Discrimination in Lawsuits Filed Today,” April 20, 2011 <http://www.eeoc.gov/eeoc/newsroom/release/4-20-11.cfm> (September 21, 2016). The trafficking claim was ultimately dropped, in *EEOC v. Global Horizons*, 23 F. Supp. 3d 1301 (2014).

76. Sarah Maslin Nir, “The Price of Nice Nails,” *New York Times*, May 7, 2015 http://www.nytimes.com/2015/05/10/nyregion/at-nail-salons-in-nyc-manicurists-are-underpaid-and-unprotected.html?_r=0 (November 18, 2016).

although severe exploitation is clearly present. Despite the factual ambiguity, this case was framed in the context of trafficking and modern-day slavery. Rather than seeking prosecutions against the nail salon owners as slave-owners/traffickers, however, New York State responded with a targeted increase in labor inspections and regulation enforcement.⁷⁷

In many cases, an immigration lens may provide even greater insight into the conditions affecting vulnerability. Both in the United States and Western Europe, immigration controls may well constitute the single greatest formal legal factor contributing to exploitation amounting to trafficking or modern day slavery.⁷⁸ Most of the cases of the slave trade cite undocumented immigrants; others cite immigrants who are legal but in highly constrained situations, such as depending on temporary visas that rest on employment sponsorship.⁷⁹ Some of the labor law issues are immigration law issues. For example, “[a]lmost all of the [nail salon] workers interviewed by The Times, like Ms. Ren, had limited English; many are in the country illegally. The combination leaves them vulnerable.”⁸⁰ These workers are bargaining in the shadow of immigration law, paying off debts to smugglers, and fearing deportation.

Thus, the slavery–trafficking nexus may have limitations as a framework for understanding modern labor exploitation, and immigration law reform may be more worthy of our attention. Of course, such reform may have political pitfalls and raise its own host of legal questions; it may even require reimagination of our world as territorially bounded. Perhaps our “abolitionism” is misplaced, if we are concerned about eradicating modern day slavery. To address human exploitation, should we be abolishing borders?⁸¹

This question also touches on the conceptually deeper interaction among slavery, citizenship, and immigration status. The United States Civil War was fought over whether slaves and their descendants could exercise powers of citizenship, and the Reconstruction Amendments effectively overturned the *Dred Scott v. Sandford* holding that they could not.⁸² Today, slavery is abolished as a category, but citizenship as a marker of particular legal rights and privileges continues. If the distinguishing legal characteristic

77. Sarah Maslin Nir, “Cuomo Orders Emergency Measures to Protect Workers at Nail Salons,” *New York Times*, May 11, 2015 (“a new, multiagency task force will conduct salon-by-salon investigations” of wage theft, unfair labor practices, and health hazards).

78. Thomas, “Immigration Controls and Modern-Day Slavery.”

79. *Ibid.*

80. Nir, “The Price of Nice Nails.”

81. For further discussion of the ethics of open borders, see Chantal Thomas, “What Does the Emerging International Law of Migration Mean for Sovereignty?” *Melbourne Journal of International Law* 14 (2014): 392, 442–50.

82. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

of a slave is, according to some international law experts, “some destruction of the juridical personality,”⁸³ and if citizenship remains one of the accepted bases for deprivation of legal personality in terms of nonrecognition of rights, then the perpetuation of citizenship as a valid legal category and basis for exclusion may not be entirely benign.⁸⁴

Citizenship is constitutive, politically, of our social contract; and, legally, to international law and sovereignty. However, sovereignty and citizenship, as markers of particularity and embodiments of specific relations of power and identity, remain in tension with international human rights norms, which argues for the recognition and protection of rights and entitlements on universalistic grounds. The rights of migrants, as noncitizens, provide a particularly sharp expression of this tension. To some degree, the contemporary focus on “slavery” is just another manifestation of this tension between international human rights and citizenship as alternate grounds for the exercise of rights.

VII. Conclusion

The new abolitionist movement against modern-day slavery has done much to shed light on horrific social problems. It points to the gaps between conditions of exploitation created by a globalizing economy, and legal rules to redress that exploitation. It also raises important questions that have not been answered about the doctrinal, empirical and political implications of the antislavery framework.

We certainly do not want to condemn efforts to combat contemporary forms of slavery or to put modern slavery in historical context, or even attempts to connect the history of slavery to its present. Rather, we want to sound a note of caution that there are many ways to think about the present time of slavery, and the resonance, or echoes, of the transatlantic slave trade, in the contemporary world. Only one of those ways is to connect it to the campaign against trafficking. And when we do so, we might ask what purpose the analogy or comparison is serving. In our view, it may make it more difficult to see the continuities in the degradation of migrant labor across the centuries, as well as the systemic and structural inequalities engendered by European colonialism, if we posit two distinct eras of slavery, the “old” and the “new,” and then concentrate on a history of abolitionism to connect the two.

83. Gallagher, “Human Rights and Human Trafficking,” 808 (quoting Appeal Judgment, *Prosecutor v. Kunarac, Kuvac & Vukovic*, Case No. IT-96-23/1/T (2002).

84. Thomas, “Immigration Controls and Modern-Day Slavery.”