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TRAFFICKING IN HUMANS: NOW AND IN HERMAN MELVILLE'S *BENITO CERENO*

MARILYN R. WALTER*

INTRODUCTION

From the beginning of this country's history, its laws protected slavery and the slave trade.¹ The same American Constitution established to "secure the Blessings of Liberty"² contained a provision which forbade Congress from enacting any law ending the slave trade until 1808.³ The Constitution also provided that any fugitive slave who escaped to a free state would not thereby gain his freedom but would be returned to his owner.⁴ The Constitution did not abolish slavery until the ratification of the Thirteenth Amendment⁵ on December 6, 1865, following the Union's victory in the Civil War. In 1855, against the backdrop of the moral and legal crises of the slave trade, slavery, and the fugitive slave laws, Herman Melville wrote *Benito Cereno*, the story of a slave mutiny at sea.⁶

In this novella, Melville retells the actual story of an 1805 slave mutiny aboard the slave ship the *Tryal* prior to the abolition of the

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1. *E.g.*, U.S. CONST. art. I, § 9, cl. 1, *amended by* U.S. CONST. amend. XIII; U.S. CONST. art. IV, § 3, cl. 3, *amended by* U.S. CONST. amend. XIII.

2. U.S. CONST. pmb1.

3. U.S. CONST. art. I, § 9, cl. 1, *amended by* U.S. CONST. amend. XIII ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . .").

4. U.S. CONST. art. IV, § 2, cl. 3. The clause provides that:

No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

5. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

6. Page references to *Benito Cereno* in this article are to HERMAN MELVILLE, *BARTLEBY AND BENITO CERENO* (Dover 1990) (1856).

slave trade.⁷ He based the story on an account of the mutiny, recapture of the ship, and ensuing trial, written by Amasa Delano, the American captain of the ship which recaptured the *Tryal*.⁸ In *Benito Cereno*, Melville describes an immoral world in which human slavery was accepted as a matter of course and slaves had no right to freedom under natural law.⁹ In addition, through his portrayal of Captain Delano, he suggests northern complicity in the maintenance of slavery, northern racism, and the northerner's belief in his own innocence.¹⁰ Finally, through his summary of court proceedings, Melville illustrates how legal institutions ignored the immorality of slavery.¹¹ Instead, the judiciary responded to slavery and slave revolts through legally sanctioned violence and the enforcement of laws against the victims of slavery.¹²

Conditions approximating slavery and the slave trade exist today in the trafficking in human beings. Though the definition of trafficking varies,¹³ all definitions include the movement of human

7. *Id.*

8. AMASA DELANO, NARRATIVE OF VOYAGES AND TRAVELS IN THE NORTHERN AND SOUTHERN HEMISPHERES: COMPRISING THREE VOYAGES ROUND THE WORLD; TOGETHER WITH A VOYAGE OF SURVEY AND DISCOVERY, IN THE PACIFIC OCEAN AND ORIENTAL ISLANDS (Boston, E.G. House 1817). See Harold H. Scudder, *Melville's Benito Cereno and Captain Delano's Voyages*, 43 PLMA 502 (1928). Scudder "discovered" the basis of Melville's novella seventy-three years after it was first published in *Putnam's Monthly Magazine* when he came upon a volume of Delano's voyages. *Id.* Scudder was unimpressed with Melville's efforts, calling the story "ready made" and stating that Melville merely rewrote a chapter, suppressed a few items, and made some small additions, though he added that he would not wish to accuse Melville of plagiarism. *Id.* at 502, 529. Since his article, Scudder has become as well known for underestimating the novella as for originally identifying the source. LEA BETANI VOZOR NEWMAN, A READER'S GUIDE TO THE SHORT STORIES OF HERMAN MELVILLE 98 (1986).

Melville initially included a note revealing Delano's *Narrative* as the source for the story along with the manuscript. He later asked that it be deleted when he changed the name of his proposed collection of tales from *Benito Cereno & Other Sketches* to *The Piazza Tales* and altered the order of the tales so that *The Piazza* came first and *Benito Cereno* third, following *Bartleby, the Scrivener*. *Id.* at 96.

9. MELVILLE, *supra* note 6, at 65, 73.

10. Delano, who considers himself an innocent bystander, asks, "Who would murder Amasa Delano? His conscience is clean." *Id.* at 67.

11. MELVILLE, *supra* note 6, at 92-101.

12. Brook Thomas, *The Legal Fictions of Herman Melville and Lemuel Shaw*, 11 CRITICAL INQUIRY 24, 29 (1984).

13. In November 2000, the United Nations General Assembly adopted an international agreement to counter trafficking. The agreement entered into force on September 29, 2003. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/55/383/AnnexII (Nov. 15, 2000), available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf [hereinafter U.N. Protocol]. Article 3(a) of the U.N. Protocol defines trafficking as:

[T]he 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

beings across national or international borders using coercion or deception for the purpose of exploiting their labor.¹⁴ Trafficking is one of the fastest growing criminal enterprises in the world.¹⁵ Now producing \$7 to 10 billion annually, trafficking is third behind drugs and arms trading as the most profitable worldwide criminal industry.¹⁶ Due to the clandestine nature of trafficking, statistics are difficult to obtain or verify.¹⁷ Nonetheless, by even the most conservative estimates of the United States Department of State, 600,000 to 800,000 human beings are trafficked annually across international borders, of whom 14,500 to 17,500 are trafficked into the United States.¹⁸ Victims are trafficked for purposes of forced

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[.]

The United States Congress enacted the Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-7110 (2000) [hereinafter TVPA], as part of the Victims of Trafficking and Violence Protection Act of 2000. Pub. L. No. 106-386, 114 Stat. 1464 (2000). The TVPA defines the term "severe forms of trafficking in persons" 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, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

22 U.S.C. § 7102(8) (2000).

14. See, e.g., U.N. Protocol, *supra* note 13, at art. 3(a).

15. See, e.g., LeRoy G. Potts, Jr., Note, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT'L L. REV. 227, 229 (2003).

16. U.S. DEPT OF STATE, *TRAFFICKING IN PERSONS REPORT 14* (2004), available at www.state.gov/documents/organization/34258.pdf [hereinafter 2004 TIP REPORT] ("According to the U.N., human trafficking is the third largest criminal enterprise worldwide, generating an estimated 9.5 billion USD in annual revenue according to the U.S. intelligence community."); Kara C. Ryf, *The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000*, 34 CASE W. RES. J. INT'L L. 45, 46-47 (2002). See also Robin M. Rumpf, *The New Slavery: U.N. Report: The United Nations Interregional Crime & Justice Research Institute's Global Program Against Trafficking in Human Beings*, 19 N.Y.L. SCH. J. HUM. RTS. 879, 879-80 (2003); AMY O'NEILL RICHARD, *INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME* 1 (1999), available at www.cia.gov/csi/monograph/women/trafficking.pdf ("To the traffickers, people are highly profitable, low risk, expendable, reusable, and resellable commodities.").

17. E.g., Tal Raviv, *International Trafficking in Persons: A Focus on Women and Children — The Current Situation and the Recent International Legal Response*, 9 CARDOZO WOMEN'S L.J. 659, 660 (2003).

18. 2004 TIP REPORT, *supra* note 16, at 6, 23; see also U.S. DEPT OF JUSTICE, *ASSESSMENT OF U.S. ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS* 5 (2004), available at http://www.usdoj.gov/crt/crim/wetf/us_assessment_2004.pdf [hereinafter 2004 ASSESSMENT]. The 2004

prostitution, involuntary marriage, forced labor, domestic service, debt bondage, begging, and even organ harvesting.¹⁹ Trafficking in humans flows from the poor nations to the rich.²⁰

Even these horrors of modern trafficking, however, do not rise to the horrors of the slave trade in the eighteenth and nineteenth centuries that provide the background to Melville's *Benito Cereno*. During that period, millions of Africans were kidnapped from their homes,²¹ brought manacled across the ocean, and legally enslaved pursuant to state codes²² that were supported by federal legislation²³ and Supreme Court decisions.²⁴ Modern trafficking is more complex, though its essence remains the exploitation of human beings. Trafficking could not exist if not for an unholy alliance of international criminal syndicates, corrupt governmental officials, fraudulent individuals, deceptive employment, modeling or match-making agencies, family friends and neighbors, misled or desperate parents, and the trafficking victims themselves.²⁵ Persons trafficked

Assessment reports that females comprise approximately eighty percent of trafficking victims. *Id.* at 15 n.6. Of those women, roughly seventy percent are trafficked into the commercial sex industry. *Id.* The 2004 Assessment also found that "[r]oughly two-thirds of all global victims are trafficked intra-regionally within East Asia and the Pacific (260,000 to 280,000 people) and Europe and Eurasia (170,000 to 210,000 people)." *Id.* at 10. People trafficked into the United States most often come from East Asia and the Pacific (5,000 to 7,000 people), Latin America (3,500 to 5,500 people), and Europe and Eurasia (3,500 to 5,500 people). *Id.*

19. *E.g.*, 2004 TIP REPORT, *supra* note 16, at 9; Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 55 (2001); Raviv, *supra* note 17, at 660. *See also* U.N. Protocol, *supra* note 13, art. 3(a). UNICEF estimates that there are over one million child prostitutes in Asia alone, and the nongovernmental organization End Child Prostitution in Asian Tourism estimates that over one million children become involved in the slave trade each year. Jonathan Todres, *Prosecuting Sex Tour Operators in U.S. Courts in an Effort to Reduce the Sexual Exploitation of Children Globally*, 9 B.U. PUB. INT. L.J. 1, 1-2 (1999).

20. *See* Ryf, *supra* note 16, at 47 ("Most trafficking victims come from Southeast Asia, the former Soviet Union and Eastern Europe. North America, Western Europe and Japan commonly serve as their destinations."). One commentator has observed that Central and Eastern Europe have surpassed Asia and Latin America as regions of origin since the fall of the Soviet Union. Dina Francesca Haynes, *Used, Abused, Arrested, and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221, 225 n.14 (2004).

21. *E.g.*, ERIC SUNDQUIST, *TO WAKE THE NATIONS: RACE IN THE MAKING OF AMERICAN LITERATURE* 136 (1993).

22. *See generally* KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* 192-236 (1963).

23. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (repealed 1864); Fugitive Slave Act, ch. 7, § 4, 1 Stat. 302 (1793) (repealed 1864).

24. *E.g.*, *Ableman v. Booth*, 62 U.S. 506 (1859) (upholding the constitutionality of the 1850 Fugitive Slave Act); *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (unanimously upholding the constitutionality of the 1793 Fugitive Slave Act).

25. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193,

may be recruited, sold, or abducted.²⁶ The basic causes of trafficking are greed on one side and desperation on the other. Trafficking has been called the “underside of globalization.”²⁷

In writing about human trafficking in the nineteenth century, Melville offers some insight into the modern crisis of trafficking in humans. Trafficking today depends for its continuation on the desperation of its victims. Echoing a theme from *Benito Cereno*, popular indifference also supports trafficking. Today, few Americans are aware of the problem or consider it relevant to their lives.²⁸ In addition, many governments view trafficking as a crime control and migration problem rather than a human rights problem rooted in economic and cultural conditions that disproportionately impact women and girls.²⁹ This perception often results in prosecution of

§ 2, 117 Stat. 2875 (codified as amended at 22 U.S.C. § 7104 (2004)) [hereinafter TVPRA]; U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 5 (2003), available at www.state.gov/documents/organization/21555.pdf [hereinafter 2003 TIP REPORT]; Fara Gold, *Redefining the Slave Trade: The Current Trends in the International Trafficking of Women*, 11 U. MIAMI INT'L & COMP. L. REV. 99, 112-16 (2003); Inglis, *supra* note 19, at 55; Martina Vandenberg, *Complicity, Corruption, and Human Rights: Trafficking in Human Beings*, 34 CASE W. RES. J. INT'L L. 323, 326 (2002). See also RICHARD, *supra* note 16, at 5.

26. See, e.g., Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 39 (2001); Tiffany St. Claire King, *The Modern Slave Trade*, 8 U.C. DAVIS J. INT'L L. & POL'Y 293, 299 (2002). See also UNITED NATIONS OFFICE ON DRUGS AND CRIME, FACT SHEET ON HUMAN TRAFFICKING (2005), available at http://www.unodc.org/unodc/trafficking_fact_sheet.html. The Fact Sheet reports:

In Asia, girls from villages in Nepal and Bangladesh are sold to brothels in India for \$1000. . . . UNICEF estimates that more than 200,000 children are enslaved by cross-border smuggling in West and Central Africa. The children are often “sold” by unsuspecting parents who believe their children are going to be looked after, learn a trade or be educated.

27. 2003 TIP REPORT, *supra* note 25, at 5. For a discussion of the relationship between trafficking and globalization, see Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN'S L.J. 77, 79 (2002); Aiko Joshi, *The Face of Human Trafficking*, 13 HASTINGS WOMEN'S L.J. 31, 32-36 (2002).

28. E.g., Potts, *supra* note 15, at 227 (“Despite the large number of people who have become victims of trafficking enterprises and the growing impact of trafficking in the United States, the public is largely unaware of the problem.”); Ryf, *supra* note 16, at 45 (“Few Americans are aware of the scope and severity of the human trafficking industry and the extent to which this phenomenon occurs within our own borders.”). See also Terry S. Coonan, *Human Rights in the Sunshine State: A Proposed Florida Law on Human Trafficking*, 31 FLA. ST. U. L. REV. 289, 295 (2004) (“For most Americans, it is unthinkable that such exploitation could be occurring within our own shores, and indeed, within blocks of where we live and work.”); Becki Young, *Trafficking Humans Across United States Borders: How United States Laws Can Be Used to Punish Traffickers and Protect Victims*, 13 GEO. IMMIGR. L.J. 73, 81 (1998).

29. See, e.g., Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1144-45 (2003); Hyland, *supra* note 26, at 43 (noting that once deported, repatriation can be difficult for the trafficking victim because of her native country's civil strife, her arrest and detention for illegal migration, or her ostracism from family and friends); Inglis, *supra* note 19, at 56; Potts, *supra* note 15, at 240 (discussing the fear among

the victims rather than the traffickers.³⁰ Finally, legal efforts to eradicate trafficking at the international and national levels are in their infancy.³¹ Many nations — whether source, transit, or destination countries — lack appropriate legislation or effective enforcement, or such legislation as exists is undermined by official corruption.³² Despite recent efforts, the United States Department of State acknowledged that trafficking appears to be growing.³³

Part I of this article recounts the story of *Benito Cereno*, Melville's novella about slave trafficking. The story describes the events from the perspective of an American northerner who is oblivious to the horrors and moral crisis of slavery. Melville concludes the novella with a judicial proceeding that fails to consider the morality of slavery and the slave trade and condemns the victims of the slave trade to death.

Part II provides the legal context for the novella. The section discusses how judges in the nineteenth century subordinated natural law and morality to positive law when deciding cases concerning the slave trade, slave mutinies, and the fugitive slave laws. The deference to positive law often resulted in horrific legal conclusions, as in *Benito Cereno*, even when the case was heard by a judge who personally opposed slavery.

Part III considers the current efforts to combat human trafficking and offers recommendations for improvements. Unlike the period when Melville wrote *Benito Cereno*, an international statement of agreement now condemns both slavery and the slave trade.³⁴ In addition, both the United Nations and the United States

drafters of the U.N. Protocol that allowing victims to remain in the destination country would become a means of illicit migration); Young, *supra* note 28, at 73-75.

30. Ryf, *supra* note 16, at 52. Ryf observes:

[V]ictims . . . often suffer greater punishments than their traffickers. The immigrants are treated as illegal aliens and are fined, imprisoned, and deported for the other illegal activities they have committed. Conversely, traffickers escape with light punishments because the law is insufficient to address the types of activities in which they engage. (footnotes omitted).

31. See, e.g., U.N. Protocol, *supra* note 13; TVPA, *supra* note 13.

32. See, e.g., 2004 TIP REPORT, *supra* note 16, at 8 ("Government corruption is a major impediment in the fight against trafficking for many countries. The scale of government corruption relating to trafficking in persons can range from localized to endemic.") See also Katrin Corrigan, *Putting the Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to Stop the Flow of Traffic*, 25 FORDHAM INT'L L.J. 151, 193 (2001); Maya Raghu, Note, *Sex Trafficking of Thai Women and the United States Asylum Law Response*, 12 GEO. IMMIGR. L.J. 145, 167 (1997); Vandenberg, *supra* note 25, at 329.

33. 2004 TIP REPORT, *supra* note 16, at 6.

34. The United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948. G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), available at <http://www.un.org/Overview/rights.html> [hereinafter Universal Declaration].

have recently enacted laws condemning trafficking in humans.³⁵ To effect a significant change, however, governments in the wealthier countries must first increase their efforts to deal with the economic and political conditions in countries of origin which create the environment that traffickers exploit, particularly as they affect women and girls. Second, to have a significant effect, enforcement of laws against human trafficking must be significantly more aggressive and widespread and must be directed at organized crime. Finally, real efforts must be made to link law enforcement to the kind of moral outrage that ended the slave trade 200 years ago.

I. THE STORY OF *BENITO CERENO*

Written in the politically charged atmosphere of 1855,³⁶ six years before the outbreak of the Civil War, Herman Melville's novella about trafficking in human beings describes the slave trade in the late eighteenth century, a failed attempt by slaves to achieve their freedom through mutiny, and the weight of the law brought against them.³⁷ Melville begins *Benito Cereno*, the story of a conflict

35. U.N. Protocol, *supra* note 13; TVPA, *supra* note 13.

36. The Nat Turner-led slave revolt that killed fifty-five white men, women, and children in Virginia heightened southern fears of slave conspiracies and revolts. The revolt caused southerners to fear that "a Nat Turner might be in every family; that the same bloody deed might be acted over at any time and in any place; that the materials for it were spread through the land, and were always ready for a like explosion." IYUNOLA F. OSAGIE, *THE AMISTAD REVOLT: MEMORY, SLAVERY, AND THE POLITICS OF IDENTITY IN THE UNITED STATES AND SIERRA LEONE* 43 (1986) (quoting THOMAS W. HIGGINSON, *BLACK REBELLION* 174, 176, 212-13 (1969)). The pre-Civil War political conflicts over slavery added to the slave revolt panic of the 1850s. The 1850 Compromise included, among other things, the 1850 Fugitive Slave Act, which required northern, non-slave states to return fugitive slaves to their southern masters. The Act intensified abolitionist sentiment in the north. See HOWARD JONES, *MUTINY ON THE AMISTAD: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW, AND DIPLOMACY* 32 (1987). New controversies arose over the extension of slavery into the territories. Traffic on the underground railroad increased. *E.g.*, Eleanor E. Simpson, *Melville and the Negro: From Typee to Benito Cereno*, 41 *AM. LIT.* 19, 33 (1969). Disputes in the north raged between those who sought immediate abolition of slavery, those who feared the impact on southern society of the violent uprising of slaves, those who feared the impact of even peaceful emancipation on southern society, those who wished to confine slavery to its current borders and await its decline, and those who were disgusted with anti-slavery agitation, for both commercial and political reasons. See JONES, at 31-34; LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 60, 72, 85-86 (1956). Mass meetings, agitation in the streets, and impassioned newspaper accounts inflamed all sides. Two highly publicized slave mutinies at sea, aboard the *Creole* and the *Amistad*, also added to the fears of slave uprisings. C. DUNCAN RICE, *THE RISE AND FALL OF BLACK SLAVERY* 306-07 (1975); Jean Fagin Yellin, *Black Masks: Melville's Benito Cereno*, 22 *AM. Q.* 678, 679-80 (1970); Sidney Kaplan, *Herman Melville and the American National Sin: The Meaning of Benito Cereno* 42 *J. NEGRO HIST.* 11, 14 (1957).

37. See generally MELVILLE, *supra* note 6.

between blacks and whites, with an ambiguous gray. The scene is set in 1799 in the harbor of St. Maria, a small, uninhabited island off the southern coast of Chile.³⁸ Amasa Delano of Duxbury, Massachusetts, captain of a ship that has stopped for water, is informed that a "strange sail" is coming into the bay.³⁹ Everything is gray: "[T]he sea was sleeked at the surface like waved lead that has cooled The sky seemed a gray surtout Flights of troubled gray fowl, kith and kin with flights of troubled gray vapors among which they were mixed, skimmed low and fitfully over the waters."⁴⁰ The air is foreboding: "Shadows present, foreshadowing deeper shadows to come."⁴¹

Much of the story is told from Captain Delano's limited perspective. Suspecting the strange ship, the *San Dominick*,⁴² might be a ship in distress, Delano puts provisions in his whaleboat and sets off to board her.⁴³ As Delano nears the ship, he realizes it is a Spanish vessel "carrying Negro slaves, amongst other valuable freight."⁴⁴ Delano finds a chaotic scene upon boarding the *San Dominick*.⁴⁵ Whites and blacks tell him a tale of their suffering: scurvy, near shipwreck, few provisions, little water.⁴⁶ Looking for the ship's commander, Delano sees the young Spanish captain, Don Benito Cereno, passively standing by with a "dreary, spiritless look."⁴⁷ "[Cereno's] mind appeared unstrung"⁴⁸ The captain is

38. *Id.* at 37.

39. *Id.*

40. *Id.*

41. *Id.*

42. Melville changed the name of the ship from the *Tryal* to the *San Dominick*. Scudder, *supra* note 8, at 530. One author finds multiple meanings in this change. See H. Bruce Franklin, *Past, Present and Future Seemed One*, in CRITICAL ESSAYS ON HERMAN MELVILLE'S 'BENITO CERENO' 231-33 (Robert Burkholder ed., 1992). The name *San Dominick* evokes the island of Santo Domingo, which was the center of Spanish power in the New World and the original site of New World slavery. *Id.* Santo Domingo was also where Toussaint L'Overture led a slave revolution in 1791 which resulted in the abolition of slavery and the establishment of the black republic of Haiti. *E.g.*, OSAGIE, *supra* note 36, at 31-35. Saint Dominick is also the patron saint of the Dominican order. The Dominicans were the prime "executors of the Spanish Inquisition, a crucial instrument of imperialism and racism." See Franklin, at 232.

43. MELVILLE, *supra* note 6, at 38. Delano possesses both the good qualities and the limitations of the American. He is repeatedly depicted as generous, willing to share his ship's food and water with the unfortunates aboard the *San Dominick*, and unhesitating in his offer of help. He is also sufficiently confident in his own skill to surmise that the *San Dominick's* troubles resulted in part from clumsy seamanship and faulty navigation. *Id.* at 48-49.

44. *Id.* at 39.

45. *Id.* at 40-43.

46. *Id.* at 40.

47. *Id.* at 41.

48. *Id.* at 42. When Delano asks what events led to the dreadful state of the ship, Cereno appears faint, cringing, and suffering from insane terrors. *Id.* at 45, 51.

attended and physically supported by a black man of small stature, Babo the slave.⁴⁹

The fundamental fact that a slave mutiny has taken place is not clearly revealed to Delano or the reader until much later in the text. For most of the story, Delano, in a state of confusion, alternates between his bluff efforts to help,⁵⁰ racist comments about the nature of blacks,⁵¹ unease about his safety, and finally, fear that he is the victim of Benito Cereno's conspiracy to murder him and commandeer his ship.⁵² The possibility of a slave mutiny never occurs to him. Throughout, Babo physically supports Cereno, giving him liquid from a flask when he is in distress, keeping his eyes fixed on Cereno's face, and remaining constantly by his side.⁵³ When at last Delano boards a whaleboat to return to his own ship, he is astonished when Cereno jumps into the whaleboat with him and Babo follows with a dagger in his hand.⁵⁴ Delano finally grasps the true situation when he sees Babo attempt to stab Cereno.⁵⁵ Delano knocks the dagger from Babo's hand, and Delano's crew overwhelms Babo.⁵⁶ Delano then returns to his ship and dispatches his crew to storm the *San Dominick*.⁵⁷ Armed with superior weapons, Delano's crew takes the ship, reasserting control by the whites.⁵⁸ Babo and the other surviving blacks are taken to Lima, Peru, where the mutineers are judged by the Spanish court.⁵⁹ Extracts from Benito Cereno's deposition before the court provide the facts of the mutiny which took place months earlier.⁶⁰

This story of the slave trade and a slave mutiny is told not by a character who is outraged by the violation of human rights, but by Captain Delano, an American from Massachusetts who is unlikely to impute "malign evil in man" even when the evil is before his very eyes.⁶¹ Throughout the text, Melville reminds us of Delano's limitations. Delano is a "blunt-thinking"⁶² person of "singular guileless-

49. *Id.* at 43.

50. *E.g., id.* at 42, 69, 81-83.

51. *E.g., id.* at 41, 43, 49-50, 63.

52. *E.g., id.* at 57-59, 64-65, 68-69, 76, 85, 87.

53. *Id.* at 45-46, 51, 60, 79.

54. *Id.* at 86-87.

55. *Id.* at 88.

56. *Id.*

57. *Id.* at 88-89.

58. *Id.* at 90-91.

59. *Id.* at 91.

60. *Id.* at 92-101.

61. *Id.* at 37.

62. *Id.* at 48.

ness.”⁶³ Delano’s limited vision is not attributable solely to his direct nature. Delano never questions the underlying immorality of the slave trade or slavery. He accepts the stereotype of blacks as intellectually inferior and therefore suited for the role of slave.⁶⁴ With this justification, white eighteenth century New Englanders made fortunes either directly from the slave trade or through the slave triangle of slaves captured in Africa, who were exchanged for sugar and molasses in the West Indies which were then manufactured into rum in New England.⁶⁵ By passively accepting slavery, northerners were complicit in its continuation.⁶⁶

Although Delano is a man from Massachusetts, a fiercely anti-slavery state, he exhibits the typical northerner’s casual prejudice in his stereotypical view of the black man. Delano describes Babo as looking up into Cereno’s face “like a shepherd’s dog.”⁶⁷ He accepts the southern myth of the master-slave relationship, saying, when Cereno is leaning on Babo, “Faithful fellow! . . . Don Benito, I envy

63. *Id.* at 57.

64. See Franklin, *supra* note 42, at 244. Franklin opines:

Both Delano and the narrator epitomize all those good, respectable, prosperous nineteenth-century Americans who remained oblivious not only to the human price paid by others for their own comfort and power, but also to the future implicit in the exploitation and oppression to which the American republic had become deeply committed.

Id. See also JOYCE SPARER ADLER, WAR IN MELVILLE’S IMAGINATION 100 (1981) (“What Melville has given Delano is the outlook of the average white eighteenth century American to whom slavery and the slave trade were accepted institutions.”); Joshua Leslie & Sterling Stuckey, *The Death of Benito Cereno: A Reading of Herman Melville on Slavery: The Revolt on Board the Tryal*, 67 J. NEGRO HIST. 287, 291 (1982) (“Delano’s thoughts on blacks, as presented by Melville, were a conglomerate of mid-nineteenth century American racist views — from the romantic racialism that dominated a certain sector of the liberal New England consciousness . . . to the biological racism that also characterized the American mind . . .”).

Another commentator notes that “southern politicians, clergymen, novelists, poets, physicians, scientists, and moral philosophers . . . succeeded in convincing themselves, most other southern whites, and probably a majority of northern whites, that blacks were racially inferior to whites.” Paul Finkelman, “*Let Justice Be Done Though the Heavens May Fall*”: *The Law of Freedom*, 70 CHI.-KENT L. REV. 325, 349-50 (1994).

65. *E.g.*, ADLER, *supra* note 64, at 100. In addition, by the nineteenth century, the rapid development of cotton manufacturing in Massachusetts depended upon the production of cotton in the South, leading to a community of interest between, as the abolitionist Charles Sumner put it, “the lords of the loom and the lords of the lash.” LEVY, *supra* note 36, at 86. In August 2001 three Yale graduate students published an article detailing the involvement of the University’s founders and early presidents in the slave trade. Brent Staples, *Wrestling with the Legacy of Slavery at Yale*, N.Y. TIMES, Aug. 14, 2001, at A16.

66. See, *e.g.*, Simpson, *supra* note 36, at 36-37 (“Northern whites thus accepted and perpetuated images of the Negro which were not only false and derogatory, but which masked the depth of hatred and violence which slavery could breed in its victims.”); Yellin, *supra* note 36, at 682 (“[Delano is] blind to evil and unable to learn from his experience.”).

67. MELVILLE, *supra* note 6, at 41.

you such a friend; slave I cannot call him.”⁶⁸ He muses on “the beauty of that relationship which could present such a spectacle of fidelity on the one hand and confidence on the other”⁶⁹ and even jokingly offers to buy Babo.⁷⁰ Delano considers the black women on the ship from the same perspective. Watching a nursing mother, he opines that “like most uncivilized women, they seemed at once tender of heart and tough of constitution, equally ready to die for their infants or fight for them. Unsophisticated as leoparresses, loving as doves.”⁷¹ While Babo holds a knife to Benito Cereno’s throat to shave him, Delano interprets Babo’s use of the Spanish flag as an apron as merely reflecting “the African love of bright colors and fine shows”⁷² Even as Delano’s anxiety about the peculiar events aboard the ship increases, he cannot imagine that any harm will come to him. He sees himself as an innocent bystander and asks, “Who would murder Amasa Delano? His conscience is clean.”⁷³

Yet Delano’s racism leads him to misinterpret everything he sees. Throughout his experiences on the ship, despite his mounting fears for his safety, he only suspects the Spanish captain and his white crew as the potential source of danger to him. He never even considers that everything is planned and staged by Babo the slave. Only when Babo leaps into the whaleboat and attempts to kill his master with a dagger does Delano understand.⁷⁴ At last, “across the long-benighted mind of Captain Delano, a flash of revelation swept”⁷⁵ Despite all of the bizarre behavior, enigmas, and contradictions that he has witnessed on the ship, Delano does not realize until the very end that there has been a slave mutiny and that Babo, and not Benito Cereno, commands the *San Dominick*.⁷⁶ Everything has been a charade directed by Babo. Delano’s blindness is largely attributable to his inability to believe that blacks were smart enough to carry out such a deception.⁷⁷ Nor can Delano believe that Don Benito could be in complicity with the blacks. In

68. *Id.* at 47.

69. *Id.* at 47-48.

70. *Id.* at 60-61.

71. *Id.* at 63. In the deposition, the reader learns that the black women wanted to torture the Spanish crew members, not merely kill them. *Id.* at 99.

72. *Id.* at 74.

73. *Id.* at 67.

74. *Id.* at 87-88.

75. *Id.*

76. *Id.*

77. *E.g.*, ADLER, *supra* note 64, at 91 (“[Delano] does not suspect the blacks of any plot because he thinks they are by nature ‘too stupid’”).

Delano's mind, "[the blacks] were too stupid,"⁷⁸ and he cannot believe that a white man would be so much of a renegade as to be in league with blacks against other whites.⁷⁹ Finally, "the scales drop from [Delano's] eyes" when he witnesses Babo attempt to stab Benito Cereno.⁸⁰ He sees the blacks "with mask torn away, flourishing hatchets and knives in ferocious piratical revolt."⁸¹

Yet Melville describes a later conversation between Delano and Benito Cereno which suggests that Delano, the northerner, has learned nothing from the experience.⁸² In this conversation, Cereno remains despondent. In contrast, Delano appears to have completely recovered his equilibrium, despite his experience on the *San Dominick*. He implores Cereno to do the same: "But the past is passed; why moralize upon it? Forget it. See, yon bright sun has forgotten it all, and the blue sea, and the blue sky; these have turned over new leaves."⁸³ Cereno cannot, "Because they have no memory, . . . because they are not human."⁸⁴ Unable to understand, an astonished and pained Delano replies, "You are saved, . . . you are saved: what has cast such a shadow upon you?"⁸⁵ Cereno answers, "The Negro."⁸⁶ Cereno, representing the dying Spanish empire, is unable to forget the past or the present and dreads the future.⁸⁷ The American Delano, meanwhile, returns to his complacent, myopic self⁸⁸ and effortlessly separates himself from the moral crises of slavery and the slave trade.⁸⁹

78. MELVILLE, *supra* note 6, at 65.

79. *Id.*

80. *Id.* at 88.

81. *Id.*

82. The conversation takes place before the trial and as the ship is sailing to Lima. *Id.* at 101-02. The two captains discuss the difficulty Cereno had in playing his part and the danger to Delano if he did not. "Had I dropped the least hint," Cereno says, "made the least advance towards an understanding between us, death, explosive death — yours as mine — would have ended the scene." *Id.* at 102. Delano acknowledges that his very lack of understanding saved him. "Had it been otherwise, doubtless, as you hint, some of my interferences might have ended, unhappily enough. Besides, those feelings I spoke of enabled me to get the better of momentary distrust, at times when acuteness might have cost me my life, without saving another's." *Id.*

83. *Id.* at 103.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 102-03. See also Yellin, *supra* note 36, at 688.

88. MELVILLE, *supra* note 6, at 102-03. See also ADLER, *supra* note 64, at 88; CAROLYN L. KARCHER, *SHADOW OVER THE PROMISED LAND: SLAVERY, RACE, AND VIOLENCE IN MELVILLE'S AMERICA* 139 (1980); Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 883-84 (1986); Yellin, *supra* note 36, at 686.

89. See, e.g., Eric J. Sundquist, *Suspense and Tautology in Benito Cereno*, 8 GLYPH 103, 104-05 (1981).

Melville dramatizes Delano's oblivion not only by the indirect unfolding of the plot, but also through the use of an omniscient third person narrator⁹⁰ who comments on, among other things, Delano's racism⁹¹ and lack of perception.⁹² For example, the narrator notes:

At home, [Delano] had often taken rare satisfaction in sitting in his door, watching some free man of color at his work or play. If on a voyage he chanced to have a black sailor, invariably he was on chatty and half-gamesome terms with him. In fact, like most men of a good, blithe heart, Captain Delano took to Negroes, not philanthropically, but genially, just as other men to Newfoundland dogs.⁹³

Some commentators have attributed these comments to Melville himself and have accused him of racism,⁹⁴ but this is inconsistent

90. William B. Dillingham sees four points of view in the story: the reportorial (neutral), the official (the deposition), the authorial (Melville), and the individual (Delano). WILLIAM B. DILLINGHAM, *MELVILLE'S SHORT FICTION: 1853-1856*, 243 (1977).

91. See, e.g., MELVILLE, *supra* note 6, at 41, 43, 49-50, 63, 73-74, 77-78, 81.

92. The third-person narrator describes Delano as having a "singularly undistrustful good nature," but adds, "[w]hether, in view of what humanity is capable, such a trait implies, along with a benevolent heart, more than ordinary quickness and accuracy of intellectual perception, may be left to the wise to determine." MELVILLE, *supra* note 6, at 37-38. In this way, Melville provides a "subtle and often surreptitious dual perspective." Mary Rohrberger, *Point of View in Benito Cereno: Machinations and Deceptions*, 27 C. ENG. 541, 542 (1965). Rohrberger describes an omniscient narrator operating behind Delano who reveals the inadequacies of Delano's observations "through equivocation, metaphor, foreshadowing, [and] suggestion." *Id.*

93. MELVILLE, *supra* note 6, at 73. At other times, Melville shows the breadth of this racism by having the omniscient narrator expound views on blacks typical of many Americans at that time, both northern and southern. For example, a narrative voice notes that "[m]ost negroes are natural valets and hairdressers," with "[the] great gift of good humor" and "easy cheerfulness . . . as though God had set the whole Negro to some pleasant tune." *Id.* The voice continues that these characteristics are enhanced by the "docility arising from the unaspiring contentment of a limited mind, and that susceptibility of blind attachment sometimes inhering in indisputable inferiors." *Id.* Franklin suggests that Melville was commenting on the breadth of northern racism inherent in Delano's inability to distinguish between appearance and reality because of his views on blacks. Franklin, *supra* note 42, at 242.

94. Sidney Kaplan supports the racism argument in part through the animal imagery and connotations of evil associated with Babo and the other blacks on the ship. Kaplan, *supra* note 36, at 34-37. Melville gives one particularly stark image during the fight between the blacks and Delano's crew: "Their red tongues lolled, wolf-like, from their black mouths." MELVILLE, *supra* note 6, at 91. See also Simpson, *supra* note 36, at 33 ("Despite the wishful thinking of some well-intentioned liberals, it is clear that Melville did not intend Babo and his mutinous Negroes to come off as heroic fighters against oppression and injustice, thus allowing us to read the story as an anti-slavery tract. Melville wastes no time making clear what it is about the Negroes aboard the *San Dominick* that Captain Delano fails to see: it is their malice, their evil."); NEWMAN, *supra* note 8, at 134-35.

with the portrayals of blacks in his earlier novels.⁹⁵ The narrator's words allow Melville to state these views ironically.

Equally important, the omniscient narrator provides a running commentary on the judicial proceeding which follows the recapture of the ship.⁹⁶ There, the law is enforced against the victims of slavery and the slave trade.⁹⁷ The judicial proceeding provides the official grounds for the predetermined verdict of guilt, just as mid-nineteenth century American society used the law, in particular the fugitive slave laws, to support the continued existence of slavery.⁹⁸ Melville, like the real Delano,⁹⁹ inserted official documents from the judicial proceeding before the actual viceregal court. Through the third-person narrator, Melville expresses his skepticism of the truth of the testimony and the justice of the result¹⁰⁰ by including constant interruptions of an incomplete and one-sided text.¹⁰¹

The deposition portion of *Benito Cereno* begins with the third-person narrator skeptically regarding the credibility of the proceeding.¹⁰² The narrator notes that Benito Cereno's deposition was "selected . . . for partial translation."¹⁰³ He notes that several disclosures "were at the time held dubious."¹⁰⁴ He says the tribunal was inclined to believe that Cereno was "not undisturbed in his mind by recent events" and "raved of some things which could never have happened."¹⁰⁵ The tribunal, however, not only accepted as true several of the strangest of Cereno's statements corroborated by a few sailors, but also "gave credence to the rest" of his statements, presumably uncorroborated.¹⁰⁶ The tribunal acknowledged that it

95. See generally KARCHER, *supra* note 88; NEWMAN, *supra* note 8, at 119-27. See also Simpson, *supra* note 36, at 21-32.

96. MELVILLE, *supra* note 6, at 91-100.

97. *Id.*

98. SUSAN WEINER, LAW IN ART: MELVILLE'S MAJOR FICTION AND NINETEENTH CENTURY AMERICAN LAW 136-37 (1992).

99. Even Delano questioned the accuracy of these documents. Although presenting the "official documents," he indicated that there could be inconsistencies of testimony in light of the "bad linguist" who translated his deposition and that of the midshipman into Spanish and of the re-translation into English of their depositions and the depositions of Benito Cereno. Scudder, *supra* note 8, at 513.

100. Melville precedes the captains' conversation during the passage to Lima with the statement, "[i]f the deposition [sic] have served as the key to fit into the lock of the complications which precede it, . . . then the *San Dominick's* hull lies open today." MELVILLE, *supra* note 6, at 101. Melville's use of the word "if" suggests that the deposition did not in fact give the truth of the events. *Id.*

101. *Id.* at 92, 96-98, 100. A contemporary reader, however, could not see why Melville appended these "dreary documents" to the story. NEWMAN, *supra* note 8, at 142.

102. MELVILLE, *supra* note 6, at 92.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

would have been duty bound to reject the statements upon which the death sentences were based if such statements had not been corroborated by others.¹⁰⁷ Moreover, the narrator constantly disrupts the depositions, referring to omitted material, extracted portions, and “random disclosures.”¹⁰⁸ Cereno’s deposition contains numerous ellipses, including the portion of the deposition that enumerates the blacks and their individual parts in the events.¹⁰⁹ This record nevertheless provides the basis for the court’s verdict.¹¹⁰ The court based its decision solely on the depositions of the whites. Babo is silent.¹¹¹ The point of view of the slaves on the ship is never heard.¹¹²

Despite the flaws in the record, the court sentenced the mutineers to death.¹¹³ The penalty is severe, even brutal, indicating the extreme violence sanctioned by the rule of law to repress the

107. *Id.*

108. *Id.* at 93, 97, 100.

109. *Id.* at 95.

110. There is a reference to the *Tryal* mutiny in a letter to the governor of Santiago, written in 1805 by the members of the Consulado, a merchant group in Chile with authority to safeguard lives and property of those involved in the slave trade. Joshua Leslie & Sterling Stuckey, *Avoiding the Tragedy of Benito Cereno: The Official Response to Babo’s Revolt*, 3 CRIM. JUST. HIST. 125, 127-31 (1982). The letter contains recommendations on avoiding disasters like the one on the *Tryal*. *Id.* at 128, 130-31. It suggests appropriate procedures had not been followed, noting that the Consulado was “willing to overlook the fact that regular legal procedure has not been followed through the issuance of customary documents involving special tribunals, which was not done in this case.” *Id.* at 131.

111. Babo refuses to speak from the moment he is overpowered in the whaleboat: “His aspect seemed to say: since I cannot do deeds, I will not speak words.” MELVILLE, *supra* note 6, at 103. Babo’s refusal to speak calls to mind Gabriel Prosser, an African American slave leader of an unsuccessful slave insurrection in Richmond, Virginia in 1800. The insurrection was known as Gabriel’s rebellion, and Gabriel was brought before a special slave court. See Robert A. Ferguson, *Untold Stories in the Law*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 87-92 (Peter Brooks & Paul Gewirtz eds., 1996). Gabriel was given one opportunity to speak at the trial — his response in his defense to the formal accusation. *Id.* In a statement attributed to him, but which never appeared in the trial transcript, Gabriel refused to participate in the ritual, saying “I know that you have pre-determined to shed my blood, why then all this mockery of a trial?” *Id.* at 88. Similarly, Nat Turner pled ‘not guilty’ to the charges against him, “saying to his counsel that he did not feel so.” NAT TURNER, THE CONFESSION, TRIAL AND EXECUTION OF NAT TURNER 21 (Kenneth S. Greenberg ed. 1881). He introduced no evidence and the case was submitted without argument to the court, which found him guilty. *Id.* Turner said he had nothing more to add to the out-of-court “confession” he made to Thomas Gray. *Id.* Turner and the other slaves were silenced, as most slaves were at that time. Under the slave codes, they could not testify on their own behalf against whites in court. STAMPP, *supra* note 22, at 197-98. Stampp points out:

The trial of a slave was never the trial of a man by his peers. Rather, it was the trial of a man with inferior rights by his superiors — of a man who was property as well as a person. Inevitably, most justices, judges, and jurors permitted questions of discipline and control to obscure considerations of even justice.

Id. at 227.

112. See MELVILLE, *supra* note 6, at 92-101; Thomas, *supra* note 12, at 29, 32-33.

113. MELVILLE, *supra* note 6, at 92.

slave revolt.¹¹⁴ At the end of *Benito Cereno*, Babo's execution is described. Babo is "dragged to the gibbet at the tail of a mule The body was burned to ashes."¹¹⁵ The violence of the slave revolt is met with equal or greater violence by the state,¹¹⁶ but it is considered justice by the court. The original act of enslavement is never questioned.¹¹⁷ The right of revolution against slavery is completely denied by the Spanish tribunal.¹¹⁸ Instead, the law punishes the victims of the slave trade.¹¹⁹

II. THE SLAVE TRADE, SLAVE MUTINIES, AND THE FUGITIVE SLAVE CASES

To overcome evils like trafficking in humans, then and now, laws must be enacted and aggressively and uniformly enforced.

114. See, e.g., WEINER, *supra* note 98, at 136-37; Thomas, *supra* note 12, at 29; Charles Mitchell, *Melville and the Spurious Truth of Legalism*, 12 CENTENNIAL REV. 110, 111 (1968).

115. MELVILLE, *supra* note 6, at 103.

116. See Thomas, *supra* note 12, at 29 (observing that Babo's acts of violence aboard the *San Dominick* were "no worse than the one committed against Babo during his execution. . . . Violence is justified when backed by the authority of the law, condemned as brutal and Satanic when not.").

117. See Kermit Vanderbilt, *Benito Cereno: Melville's Fable of Black Complicity*, 12 S. REV. 311, 318 (1976) ("The Lima court now succeeds Delano's crew as the narrowly vindictive and ultimately powerless instrument of white oppression The court impersonally sanctions the original enslavement of blacks, viewing them but not the whites as defendants in a 'criminal cause.'"). See also ADLER, *supra* note 64, at 104 ("The justice meted out at the end of 'Benito Cereno' is also earthly justice. Specifically, it is the justice of the white European 'Christian' colonizers and 'civilizers' as determined by the slavery-sanctioning courts acting for the Spanish king").

118. See MELVILLE, *supra* note 6, at 92-101.

119. Babo is a complex character who commits acts of cruelty and even bloodthirstiness. To some commentators, Babo is an evil force. See, e.g., Kaplan, *supra* note 36, at 335 ("Babo . . . is 'conquering primitive man' — an image of 'motiveless malignity,' a mutinous baboon, a 'monster' who possesses a 'terrible joy of execution' which is as natural to him as kindness to Delano, and who goes far beyond his needs as a hard-pressed mutineer."); Simpson, *supra* note 36, at 33 ("Melville wastes no time making clear what it is about the Negroes aboard the *San Dominick* that Captain Delano fails to see: it is their malice, their evil."); Stanley T. Williams, *'Follow Your Leader': Melville's 'Benito Cereno'*, 23 VA. Q. REV. 61, 76 (1947). Babo certainly dispels the myth of the docile, happy slave.

More importantly, Babo lives out the principles of the American revolution which recognize inalienable rights, self-evident truths, and the right to abolish any government that denies these natural rights. WEINER, *supra* note 98, at 124. Babo, too, justifies his violent and mutinous acts as necessary in the fight for his freedom and that of the other slaves on the *San Dominick*. His actions, though brutal, can be seen as a response to "the atrocious denial of human freedom." Mitchell, *supra* note 114, at 111. See also Joseph Schiffman, *Critical Problems in 'Benito Cereno'*, 11 MOD. LANG. Q. 317, 318 (1950) ("Babo is evil because of an evil world."). In the end, Babo achieves a sort of moral victory. The court bases its decision solely on the deposition of the whites. MELVILLE, *supra* note 6, at 92. Babo refuses to speak. *Id.* at 103. The point of view of the slaves on the ship is never heard. Even after his death, however, his head, that "hive of subtlety," is fixed on a pole in the plaza where it "met unabashed" the gaze of the whites. *Id.* at 104.

Slavery and the slave trade, however, were protected by law from the beginning of this country's history.¹²⁰ The Constitution originally contained a compromise on the abolition of the slave trade — the Migration and Importation Clause — which prohibited Congress from abolishing the slave trade for two decades until 1808.¹²¹ Congress did pass a law to take effect on January 1, 1808, prohibiting the importation of slaves from Africa to the United States, and making the slave trade illegal,¹²² but the prohibition was constantly evaded.¹²³ Moreover, the abolition of the slave trade had no bearing on the legality of slavery itself within the United States.

In addressing these grave issues, a conflict existed between natural law, the "eternal, universal moral principles common to all humans and nations which are in accordance with right reason,"¹²⁴ and positive law, the explicitly enacted statutes and constitutions and well-established judicial decisions.¹²⁵ An emerging reliance on positive law over natural law meant that judges could distance themselves from the immorality of slavery and the slave trade in

120. See U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2; *id.* at art. I, § 9, cl. 1; *id.* at art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII.

121. *Id.* at art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . ."). Over the next nineteen years, Congress passed some limitations on the slave trade, for example, outlawing the export of slaves from the United States to other nations and banning the importing of slaves into any state that had banned such importation. Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1097 (1993).

122. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (1807). Here, positive law was based on natural law, not in conflict with it. A law which immediately abolished the slave trade, instead of permitting it to continue for another twenty years, would have been even more closely aligned with natural law.

123. See Holden-Smith, *supra* note 121, at 1098-99. Since Spain did not prohibit the slave trade until 1820 and Portugal until 1830, it was common for Americans to switch flags on the slave ships and procure the necessary papers. *Id.* at 1099 n.76. The weakness of the American Navy further contributed to the ineffective enforcement of the laws against the slave trade. *Id.* "President Madison informed Congress that 'it appears that American citizens are instrumental in carrying on a traffic in enslaved Africans, equally in violation of the laws of humanity, and in defiance of those of their own country.'" *Id.* at 1098 n.70. Evasion of the law was not limited to southerners, but extended to "New England shipmasters, Middle Atlantic merchants, and Southern planters [who] all disregarded the federal and state legislation when they found it expedient to do so." *Id.* Speaking for the United States Supreme Court, Chief Justice Marshall wrote in the case of *The Antelope*, "Americans, and others, who cannot use the flag of their own nation, carry on this criminal and inhuman traffic under the flags of other countries, is a fact of such general notoriety, that Courts of admiralty may act upon it." 23 U.S. 66, 130 (1825).

124. BAILEY KUKLIN & JEFFREY W. STEMPER, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 49 (1994).

125. See, e.g., ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 17, 27, 34 (1975).

deciding cases.¹²⁶ In the "hierarchy of sources of law, 'natural law' was subordinate to constitutions, statutes, and well-settled precedent."¹²⁷ Increasingly, the view was that natural law was relevant only in the absence of positive law.¹²⁸ Where positive law was clear, a judge was obliged to follow it, regardless of his personal views or any conflict with the principles of natural law and natural right.¹²⁹ Accordingly, judges applied positive laws against the victims of slavery in three contexts: cases involving the slave trade, slave mutinies, and the fugitive slave laws.

A. The Slave Trade and Slave Mutinies

In dealing with human trafficking in the nineteenth century, judges ultimately focused not on issues of morality, but on positive law.¹³⁰ An earlier case that had condemned human trafficking in the slave trade as contrary to natural law was later overruled by the Supreme Court.¹³¹ *United States v. La Jeune Eugenie* was decided in 1822 by Supreme Court Justice Joseph Story,¹³² sitting on circuit.¹³³ *La Jeune Eugenie* was a schooner captured off the west coast of Africa by an American naval vessel and brought to Boston.¹³⁴ The vessel was empty, flew a French flag, and was registered in Guadeloupe.¹³⁵ Its construction suggested, however, that it was an American-built slave ship, operating in violation of

126. *Id.* at 60 ("The free and equal clause cases demonstrate thoroughgoing judicial positivism and contextual sensitivity . . . [T]hey show the nineteenth-century judges unwilling to be sucked into an open-ended exploration of the natural rights of slaves unless explicitly authorized by 'law.'").

127. *Id.* at 34.

128. *Id.*

129. *Id.* at 29-30.

130. *Id.* at 60.

131. *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822).

132. Justice Story has been described as "one of our greatest jurists and legal theorists." Paul Finkelman, *Storytelling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 247 (1994) (quoting KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 282 (1985)). See also, COVER, *supra* note 125, at 238 ("No man ever was more steeped in the law, intellectually and interpersonally. . . . He wrote nine important treatises, [and] taught at — virtually created — the Harvard Law School . . ."); Holden-Smith, *supra* note 121, at 1088 ("There is no denying that his contributions to the development of American law were legion."); Craig Joyce, *Statesman of the Old Republic*, 84 MICH. L. REV. 846, 848 (1986) (book review) ("No figure of Story's era even roughly compares with him in terms of impact on the American legal system.").

133. *La Jeune Eugenie*, 26 F. Cas. at 832.

134. *Id.* at 833.

135. *Id.* See also Hon. Michael Daly Hawkins, *John Quincy Adams and the Antebellum Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 OKLA. CITY U. L. REV. 1, 18 (2000).

the prohibition against the slave trade.¹³⁶ In this opinion, Story described the horrors of the slave trade and denounced the continued and clandestine participation of his fellow citizens in it.¹³⁷ He criticized the slave trade as contrary to the law of nature and suggested the identity between natural law and the law of nations.¹³⁸

The major legal question Story addressed, however, was whether the African slave trade was prohibited by the law of nations.¹³⁹ Story began the analysis by conceding that slavery itself was not contrary to the law of nations because "it has existed in all ages of the world . . . and forms the foundation of large masses of property in a portion of our own country."¹⁴⁰ He condemned the slave trade itself, however, as carrying with it "a breach of all the moral duties, of all of the maxims of justice, mercy and humanity, and of the admitted rights, which independent Christian nations now hold sacred in their intercourse with each other."¹⁴¹ After cataloguing the horrors of the slave trade,¹⁴² Story rejected the argument that the legality of slavery justified the slave trade.¹⁴³ Rather, he reasoned that

136. Justice Story wrote:

The vessel was equipped in the manner that is usual for the slave trade. She had two guns, a false or movable deck, and a large quantity of water and provisions, and water casks, quite unusual in ordinary voyages, and indispensable in this particular class of voyages. If there are any persons, who entertain doubts as to the real destination and employment of this vessel, I profess myself not willing to be included in that number. . . . [T]he sole purpose of the voyage was a traffic in slaves; and that the intention was to carry them from Africa to some one of the French colonies

La Jeune Eugenie, 26 F. Cas. at 840.

137. *Id.* at 841, 845 ("It cannot be concealed, however humiliating the fact may be, that American citizens are, and have been, long engaged in the African slave trade, and that much of its present malignity is owing to the new stimulus administered at their hands."). *Id.* at 841.

138. *Id.* at 845-46. See also COVER, *supra* note 125, at 101-02.

139. *La Jeune Eugenie*, 26 F. Cas. at 840, 845.

140. *Id.* at 845.

141. *Id.*

142. Justice Story opined:

It begins in corruption, and plunder, and kidnapping. It creates and stimulates unholy wars for the purpose of making captives. It desolates whole villages and provinces for the purpose of seizing the young, the feeble, the defenceless, and the innocent. It breaks down all the ties of parent, and children, and family, and country. It shuts up sympathy for human suffering and sorrows. It manacles the inoffensive females and the starving infants. It forces the brave to untimely death in defence of their humble homes and firesides, or drives them to despair and self-immolation. It stirs up the worst passions of the human soul, darkening the spirit of revenge, sharpening the greediness of avarice, brutalizing the selfish, envenoming the cruel, famishing the weak, and crushing to death the broken-hearted. This is but the beginning of the evils.

Id.

143. *Id.*

slavery's legality did not support the proposition "that a traffic, that involves [war, slavery, plunder, selling of human beings], that is unnecessary, unjust, and inhuman, is countenanced by the eternal law of nature, on which rests the law of nations."¹⁴⁴ Specifically addressing the slave trade, Story stated:

It is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice [I]t is impossible, that it can be consistent with any system of law, that purports to rest on the authority of reason or revelation.¹⁴⁵

Despite the passion of this statement, Story acknowledged that a nation had power under its own laws to protect the slave trade, and that a citizen of such a country could show that he was entitled to carry on the slave trade despite the condemnation of other countries.¹⁴⁶ The claimants here offered no such proof; thus Story rejected the claims of the French owners of the vessel since the slave trade was contrary to the law of nations and the law of France.¹⁴⁷ In reaching this conclusion, he followed the law of the ship's flag in ordering that the ship be delivered over to the government of France for its disposition of the case.¹⁴⁸

To the extent that *La Jeune Eugenie* suggested that natural law condemned human trafficking, that view was soon rejected by the United States Supreme Court.¹⁴⁹ A few years later in 1825, the Court itself¹⁵⁰ considered the question of the legality of the slave

144. *Id.*

145. *Id.*

146. *Id.* at 850.

147. *Id.*

148. *Id.* at 851.

149. *The Antelope*, 23 U.S. 66 (1825).

150. Commentators have noted the great influence that the South had on politics and the Court from the time of the American Revolution to the Civil War. Of the seven members of the Supreme Court who decided *The Antelope* in 1825, two were slaveholders. Hawkins, *supra* note 135, at 57-58, App. A. Of the eight members of the Supreme Court who decided *The Amistad* in 1841, three were slaveholders. *Id.* Of the nine members of the Supreme Court who decided *Dred Scott* in 1857, five were slaveholders. *Id.* In addition, "[s]outherners and their sympathizers in the 1830's and 1840's gagged congressional discussion of anti-slavery petitions, barred the federal mails to abolitionists, [and] assaulted abolitionist editors, killing one of them" William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 533 (1974) (internal citations omitted). Another author writes that the Union was "dominated by slaveholding presidents, a proslavery Supreme Court, and more often than not a Congress controlled by southern politicians." Finkelman, *supra* note 132, at 249-50 (internal citations omitted).

trade in *The Antelope*.¹⁵¹ There, Chief Justice John Marshall based his opinion on positive, rather than natural, law.¹⁵² The case involved the American seizure of a ship off the coast of Florida which held over 250 slaves captured on the coast of Africa.¹⁵³ At the outset, Chief Justice Marshall commented on the judge's restricted role, stating "this Court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law,"¹⁵⁴ despite his characterization of the slave trade in the same opinion as a "criminal and inhuman traffic."¹⁵⁵ He acknowledged that the slave trade was unquestionably contrary to the law of nature, since "every man has a natural right to the fruits of his own labour."¹⁵⁶ Regardless, he did not believe this rendered the slave trade contrary to the law of nations.¹⁵⁷ Marshall reasoned that since the slave trade had been sanctioned in modern times by the laws of all countries with colonial possessions and had the sanction of general use and acquiescence, it was not contrary to the law of nations.¹⁵⁸ Accordingly, the slave trade could be carried on by the subjects of those nations which did not prohibit it by municipal laws or treaties.¹⁵⁹ Moreover, even if one nation could formulate a rule for itself by positive law, it could not bind any other nation.¹⁶⁰

The question, therefore, to the Supreme Court was not whether the slave trade was contrary to natural law or morally abhorrent, but whether it was legal under the positive law in the country of the ship's flag.¹⁶¹ Because the Court was divided three-to-three on the question of whether the Spanish claim ought to be recognized, the Court affirmed the decree of the Circuit Court which directed restitution to the Spanish claimants of the Africans on board, since the law of Spain did not then prohibit the slave trade.¹⁶²

151. 23 U.S. 66 (1825).

152. *Id.* at 120-21. See also Roger S. Clark, *Steven Spielberg's Amistad and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery*, 30 RUTGERS L.J. 371, 406-07 (1999).

153. *The Antelope*, 23 U.S. at 68, 124.

154. *Id.* at 114.

155. *Id.* at 130.

156. *Id.* at 120.

157. *Id.* at 120-21.

158. *Id.* at 115, 120-21. Marshall opined if "consistent with the law of nations, it cannot in itself be piracy." *Id.* at 122.

159. *Id.* at 122.

160. *Id.*

161. *Id.* at 118. If the law of the ship's flag supported the slave trade, then in cases involving capture, restitution would be ordered. *Id.*

162. *Id.* at 126-27. Justice Story did not dissent, despite his passionately expressed views in *La Jeune Eugenie*. Clark, *supra* note 152, at 410. But see Hawkins, *supra* note 135, at 33 n.109 ("[N]o dissents are identified in *The Antelope* opinion. The opinion does indicate it 'was

The supremacy of positive law over natural law was also clear in the decisions by American courts regarding slave mutinies at sea, including the *Amistad* in 1839¹⁶³ and the *Creole* in 1841.¹⁶⁴ The *Amistad* was a Spanish ship licensed in the coastal trade between the ports of Havana and Guanaja.¹⁶⁵ Jose Ruiz and Pedro Montez, subjects of Spain and residents of Guanaja, Cuba, bought fifty-four slaves at a slave market in Havana.¹⁶⁶ Ruiz and Montez put the slaves on board the *Amistad* in Havana, with permits from the governor of Cuba for the slaves to be transported as freight from Havana to Guanaja.¹⁶⁷ Three days after leaving Havana, the slaves rose up, killed the master of the ship and the cook, and took command.¹⁶⁸ After sailing for sixty-three days, the *Amistad* came into U.S. waters off Long Island and was seized by a ship of the United States Navy.¹⁶⁹

The district court rejected the claims of the slave owners.¹⁷⁰ The court began with the premise that in Cuba there were three classes of Negroes.¹⁷¹ First, there were Creoles, who were born "within Spanish dominion."¹⁷² Second, there were Ladinos, who had been domiciled in Cuba for a sufficiently long time, so that the laws of Spain operated upon them.¹⁷³ Members of both of these groups were considered to owe their allegiance to Spain.¹⁷⁴ Third, there were Bozals, blacks who had recently been imported from Africa.¹⁷⁵ The court concluded that the blacks on the *Amistad* were Bozals as they were all born in Africa.¹⁷⁶ Since the Spanish law of 1820 made the African slave trade and importation of slaves into Cuba illegal, their transport on the *Amistad* was illegal.¹⁷⁷

divided,' and in later correspondence, Story made clear his disagreement with the essential holding.").

163. *Gedney v. L'Amistad*, 10 F. Cas. 141 (D. Conn. 1840), *aff'd sub nom.* *United States v. Amistad*, 40 U.S. 518 (1841).

164. See CARL B. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME V: THE TANEY PERIOD 1836-64, 197-99* (1974).

165. *Amistad*, 10 F. Cas. at 144.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 144-51. The Spanish slave owners' claims were asserted in *United States* federal court by the Spanish government through a district attorney of the United States, pursuant to a treaty between the United States and Spain. *Id.* at 141-42.

171. *Id.* at 146.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* The district court reasoned that the only document the Spanish government

Two years later, the decision was basically affirmed by the Supreme Court in *United States v. Amistad*.¹⁷⁸ John Quincy Adams,¹⁷⁹ one of the lawyers for the blacks in the case, pointed to a copy of the Declaration of Independence mounted on a courtroom pillar and declared, "I know of no other law that reaches the case of my clients, but the law of Nature and of Nature's God on which our fathers placed our own national existence."¹⁸⁰ Justice Story's decision in the *Amistad*, however, was based not on natural law, but on positive law; specifically, the 1795 treaty between the United States and Spain.¹⁸¹ Relying on the specific language of Article 9 of the treaty,¹⁸² the Supreme Court rejected the claim of the United States.¹⁸³

offered was the governor-general's pass, which was merely a license or permit for them to transport fifty-four Ladinos to Guanaja. *Id.* The court concluded, however, that the blacks were not Ladinos, who might be legally sold and transported, but Bozals, who could not. *Id.* The court acknowledged a custom in Cuba of buying black slaves who were Bozals and transporting them as Creoles or Ladinos, even though the policy was against Spanish law. *Id.* at 147-48. The district court noted, "[n]o one can set up in a court of justice an illegal custom, against positive law." *Id.* at 148.

178. 40 U.S. 518 (1841).

179. Adams, as Secretary of State when The Antelope was seized, did not recommend support of the government's claim on behalf of the slaves in that case. Hawkins, *supra* note 135, at 12.

180. JONES, *supra* note 36, at 176.

181. *Amistad*, 40 U.S. at 592.

182. The Court recognized applicable law:

[A]ll ships and merchandize, of whatever nature soever, which shall be rescued out of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of and restored, entire, to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof.

Id. at 590-92 (quoting Article 9 of the 1795 treaty with Spain).

183. To recover the blacks for the Spanish claimants under the treaty, the United States would have had to prove that the blacks were merchandise, that they had been rescued from pirates or robbers, and that sufficient proof had been made of ownership. *Id.* First, whether the blacks were "merchandize" depended on whether they were lawfully held as slaves under Spanish law. The Court assumed that lawfully held slaves were property, or "merchandize," within the meaning of the treaty. *Id.* Accordingly, the Court based its decision on positive law, not the principles of natural law, to which slavery was abhorrent. Looking to Spanish laws and treaties, however, the Court noted that "the African slave-trade is utterly abolished; the dealing in that trade is deemed a heinous crime; and the negroes thereby introduced into the dominions of Spain, are declared to be free." *Id.* at 592. Since the blacks on the *Amistad* were not slaves, but kidnapped Africans, they could not be considered merchandise. *Id.* at 592. The second question was whether the blacks were "pirates or robbers" within the meaning of the treaty. *Id.* The Court reasoned that since they were not slaves but kidnapped Africans, despite their violent acts on the ship, they could not be said to be pirates or robbers under international law, the treaty with Spain, or the laws of Spain. *Id.* at 593-94. Finally, since the Court concluded that Ruiz and Montez were not "true proprietors" within the meaning of the treaty, their claims were denied and the blacks were free. *Id.* at 597. The blacks won, not because of their rights under natural law, but on the grounds that they were on a Spanish ship, and since 1820, the positive law of Spain prohibited the slave trade. *Id.*

A second slave mutiny aboard the *Creole* in 1841 was also apparently decided on the basis of positive, rather than natural, law.¹⁸⁴ The *Creole* was an American ship with a cargo of tobacco and 135 legal American slaves en route from Virginia to New Orleans.¹⁸⁵ Nineteen blacks mutinied, killing a slave dealer on board and wounding the captain.¹⁸⁶ They forced the crew to sail into the British port of Nassau.¹⁸⁷ Britain had abolished slavery in all of its colonies in 1833.¹⁸⁸ The British authorities held the nineteen mutineers, but freed the rest of the blacks.¹⁸⁹ The United States government argued for the return of the slaves as legal Virginia property, based on the *Amistad* decision.¹⁹⁰ The case was not decided in the courts.¹⁹¹ Rather, after extensive diplomatic skirmishing, the matter was finally submitted to arbitration.¹⁹² Since the blacks had been freed,¹⁹³ the question was whether restitution was owed for loss of property.¹⁹⁴ Twelve years later, in 1853, the arbitrator of the Anglo-American Claims Commission awarded the United States \$110,330.¹⁹⁵ This result was consistent with the holding of the *Amistad*, which rested on the illegality of the slave trade under the law of Spain.¹⁹⁶ Since slavery was legal in Virginia, the slaves were the property of the slave-owners, and the owners were therefore entitled to compensation for their loss.

Ultimately, both the *Amistad* and the *Creole* decisions were based not on whether the slaves had a natural right to be free, but on the more narrow question of whether slavery was legal under positive law.¹⁹⁷ In *Benito Cereno*, however, Melville based his story neither on the *Amistad* nor the *Creole* cases, though he was surely familiar with both,¹⁹⁸ but on the slave mutiny aboard the Spanish ship, the *Tryal*.¹⁹⁹ When the *Tryal* mutiny occurred in 1805, neither

184. See COVER, *supra* note 125, at 114-16.

185. Edward D. Jarvey & C. Harold Huber, *The Creole Affair*, 65 J. NEGRO HIST. 76 (1980).

186. Kaplan, *supra* note 36, at 15-16.

187. *Id.*

188. Clark, *supra* note 152, at 394 n.67.

189. Kaplan, *supra* note 36, at 15-16.

190. SUNDQUIST, *supra* note 21, at 116.

191. COVER, *supra* note 125, at 114.

192. *Id.* at 112-14.

193. Of the nineteen mutineers initially detained, two died in prison and the other seventeen were later released on orders from London. Jarvey & Huber, *supra* note 185, at 205.

194. SUNDQUIST, *supra* note 21, at 117.

195. Jarvey & Huber, *supra* note 185, at 208.

196. *United States v. Amistad*, 40 U.S. 518, 593 (1841).

197. KARCHER, *supra* note 88, at 211.

198. *Id.* at 200; Kaplan, *supra* note 36, at 16; NEWMAN, *supra* note 8, at 103.

199. OSAGIE, *supra* note 36, at 46-47.

Britain, the United States, nor Spain had declared the slave trade illegal through their enacted laws.²⁰⁰ Nineteenth-century judges were reluctant to declare a natural right of freedom absent a condemnation of the slave trade under positive law.²⁰¹

B. The Fugitive Slave Laws

While Melville was writing *Benito Cereno*, the conflict between natural law and positive law was played out most dramatically in the United States in the fugitive slave cases.²⁰² The fugitive slave laws required the rendition of slaves who escaped to the North to their "owners."²⁰³ Ironically, the source of these laws was the Fugitive Slave Clause of the United States Constitution.²⁰⁴ Although the Clause contained no specific authorization for congressional implementation,²⁰⁵ Congress acted, through positive law, to enforce the Fugitive Slave Clause through the Fugitive Slave Acts of 1793 and 1850.²⁰⁶ These laws punished the victims of slavery and those who aided their escape rather than the slavemasters.²⁰⁷

Like the legal proceedings in *Benito Cereno*, the legal proceedings authorized by the Fugitive Slave Acts would be summary, one-sided, and lacking due process. Under the 1793 Act, the owner or his agent was "empowered to seize or arrest such fugitive" and take him before a federal judge or local magistrate.²⁰⁸ The judge or magistrate would issue a certificate authorizing the removal of the fugitive to the state from which he fled "upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit" that the captured slave was the property of the person claiming him.²⁰⁹ The Act did not provide state procedural or substantive safeguards, such as trial by

200. The United States banned the importation of slaves in 1807. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (1807). Britain also abolished the slave trade in 1807. See RICE, *supra* note 36, at 228. Spain officially declared the slave trade illegal in 1820. See *Gedney v. L'Amistad*, 10 F. Cas. 141, 146 (D. Conn. 1840).

201. See COVER, *supra* note 125, at 60, 119-23.

202. See, e.g., *id.* at 119-23.

203. Fugitive Slave Act, ch. 7, 1 Stat. 302 (1793) (repealed 1864); Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

204. U.S. CONST. art. IV, § 2, cl. 3, *amended* by U.S. CONST. amend. XIV.

205. *Id.* See COVER, *supra* note 125, at 163.

206. Fugitive Slave Act, ch. 7, 1 Stat. 302 (1793) (repealed 1864); Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

207. *Id.*

208. Fugitive Slave Act, ch. 7, § 3, 1 Stat. 302 (1793) (repealed 1864).

209. *Id.* at 303-04.

jury, the right of confrontation, or the right to present evidence, despite the efforts of anti-slavery lawyers.²¹⁰

Anti-slavery lawyers argued that the 1793 Act was unconstitutional because the Constitution vested no power in the federal government to act on the issue.²¹¹ The Supreme Court explicitly rejected this position when it upheld the constitutionality of the 1793 Act in *Prigg v. Pennsylvania*.²¹²

The seven separate opinions in *Prigg* underscored the conflicting views within the Supreme Court.²¹³ The Justices were unanimous only in concluding that the federal government had the power to enforce the Fugitive Slave Clause and that the Pennsylvania statute was unconstitutional.²¹⁴ Justice Story, who delivered the Court's opinion,²¹⁵ had frequently voiced his opposition to slavery.²¹⁶ He had passionately condemned the evils of the slave trade in *La Jeune Eugenie*²¹⁷ and had written the Court's opinion in the *Amistad* case.²¹⁸ His reasoning in *Prigg*, however, was based on positive law, not morality,²¹⁹ and on the importance of the Fugitive Slave Clause to

210. COVER, *supra* note 125, at 162.

211. *Id.* at 162-63. Anti-slavery lawyers argued that there was no specific reference to congressional enforcement power in section 2 of Article IV as was present in sections 1, 3, and 4. *Id.*

212. 41 U.S. 539, 618-22 (1842). In *Prigg*, the agent of a slaveowner was convicted of violating the Pennsylvania Personal Liberties Law, a criminal anti-kidnapping statute. *Id.* at 608-09. The Pennsylvania law was "[a]n Act to give effect to the provisions of the constitution of the United States, relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping." Act of Mar. 25, 1826, ch. L, 1826 Pa. Laws 150 (1826). Other northern states, like Massachusetts and New York, had similar statutes. Holden-Smith, *supra* note 121, at 1120-21. The Pennsylvania statute forbade the forcible removal of blacks or mulattoes from the state. 1826 Pa. Laws 150, ch. L, § 1. *See also* Holden-Smith, *supra* note 121, at 1121. It was designed to protect free blacks living in Pennsylvania and to provide certain procedures for the return of fugitive slaves. *Id.* at 1120-21. The Personal Liberties Law required that anyone removing a black from the state as a fugitive first had to get a certificate of removal from a state judge, justice of the peace, or alderman. 1826 Pa. Laws 151, ch. L, § 3. *See also* Holden-Smith, *supra* note 121, at 1121-22. Additional procedural safeguards included the repeal of an earlier statutory provision that authorized self-help in the seizure of an alleged fugitive. 1826 Pa. Laws 154, 155, ch. L, § 11. *See also* Holden-Smith, *supra* note 121, at 1121. The procedures also prohibited the issuance of a warrant to an agent of a claimant unless the claimant testified under oath or affirmation and produced the claimant's affidavit. 1826 Pa. Laws 151, 152, ch. L, § 4. *See also* Holden-Smith, *supra* note 121, at 1121.

213. *Prigg*, 41 U.S. at 608, 626, 633, 636, 650, 658.

214. *Id.*

215. *Id.* at 608.

216. COVER, *supra* note 125, at 239-40.

217. *See* United States v. La Jeune Eugenie, 26 F. Cas. 832, 832 (C.C.D. Mass. 1822). *See also* COVER, *supra* note 125, at 101.

218. United States v. Amistad, 40 U.S. 518, 586 (1841).

219. COVER, *supra* note 125, at 170-71.

the compromises necessary for the formation of the Union.²²⁰ Story described the Clause as “so vital to the preservation of . . . [the South’s] domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed.”²²¹

The 1850 Fugitive Slave Act, part of the Compromise of 1850,²²² was even more summary, harsh, and one-sided in the procedures it authorized. Under Section 6, persons who claimed ownership of fugitives could assert their claim either by obtaining a warrant from a federal judge or commissioner or by seizing and arresting the fugitive, without process, and bringing him before the judge or commissioner.²²³ The commissioner would hear the case “in a summary manner.”²²⁴ The standard of proof was minimal; a “deposition or affidavit, in writing . . . or . . . other satisfactory testimony” constituted “satisfactory proof.”²²⁵ The judge or commissioners could then grant a certificate authorizing the removal of the fugitive to the State or Territory from which he had escaped.²²⁶ The one-sided nature of this proceeding was underscored by the Act’s bar on testimony from the escaped slave: “In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence. . . .”²²⁷ The Act further undermined the impartiality of the judicial officer by awarding commissioners \$10 if they issued a certificate but only \$5 if they did not.²²⁸ The Act put the authority of the federal government behind the slave catchers.²²⁹

220. Holden-Smith, *supra* note 121, at 1129.

221. *Prigg v. Pennsylvania*, 41 U.S. 539, 611 (1842). Some commentators have criticized Story’s decision in *Prigg* as evidence that his desire to expand federal power outweighed his concerns about the immorality of slavery and its actual victims. See Finkelman, *supra* note 132, at 251; Holden-Smith, *supra* note 121, at 1091. Other commentators have been more charitable. See, e.g., NEWMYER, *supra* note 132, at 377-78 (interpreting the opinion as an exercise of judicial responsibility to uphold positive law); SWISHER, *supra* note 164, at 541 (asserting that Story felt obliged to uphold the Act because it was a law within Congress’s constitutional authority); Nelson, *supra* note 150, at 539 (“Story’s opinion rested on an instrumentalist concern for national unity . . .”). Nelson defines instrumentalism as “a self-conscious attempt to use law as a means toward the attainment of some end.” *Id.* at 515.

222. See, e.g., LEVY, *supra* note 36, at 85.

223. Fugitive Slave Act, ch. 60, § 6, 9 Stat. at 463 (1850) (repealed 1864).

224. *Id.*

225. *Id.*

226. *Id.* § 4, 9 Stat. at 462.

227. *Id.* § 6, 9 Stat. at 463.

228. *Id.* § 8, 9 Stat. at 464.

229. See, e.g., LEVY, *supra* note 36, at 85 (“[The Act] was a law of flint, providing federal officials for its effective enforcement.”).

The fugitive slave cases created a moral dilemma for northern judges who personally opposed slavery, raising again the basic conflict between natural and positive law.²³⁰ Whether they felt that in enforcing positive laws, their consciences, like Captain Delano's, were clean is unknown.²³¹ Nevertheless, many judges who believed slavery to be contrary to natural law felt their responsibility was to enforce the positive law in fugitive slave cases,²³² as in cases involving slave mutinies.²³³ For example, Justice John McLean, an Associate Justice of the Supreme Court sitting on circuit, wrote:

With the *abstract principles of slavery*, courts called to administer this law have nothing to do. It is for the people, who are sovereign, and their representatives, in making constitutions, and in the enactment of laws, to consider the laws of nature, and the immutable principles of right. This is a field which judges can not [sic] explore They look to the law, and to the law only. A disregard of this, by the judicial powers, would undermine and overturn the social compact.²³⁴

Robert M. Cover identified three strategies used by judges facing this moral dilemma when deciding fugitive slave cases: "(1) elevation of the formal stakes, (2) retreat to a mechanical formalism, and (3) ascription of responsibility elsewhere."²³⁵ For a judge who personally abhorred slavery, the decision to uphold enslavement in a fugitive slave case became significantly easier if he could convince himself that such personal beliefs were subordinate to a higher "fidelity to law."²³⁶ Elevating that duty increased the ease of his decision.²³⁷ Taking a "mechanistic view of judicial obligation" enabled a judge to disassociate himself from responsibility for an outcome that he found personally loathsome.²³⁸ Furthermore, by relying on the "separation of powers" principle, a judge could pointedly ascribe responsibility for the outcome of a case to another branch of government, most often Congress, through its constitutional power to enforce the Fugitive Slave Clause of Article IV.²³⁹

230. See, e.g., COVER, *supra* note 125, at 197-200. Cover describes the underlying conflict facing the judges as the "moral-formal" dilemma. *Id.* at 199.

231. MELVILLE, *supra* note 6, at 67.

232. See, e.g., COVER, *supra* note 125, at 121-23.

233. See *supra* Part II.A.

234. *Miller v. McQuerry*, 17 F. Cas. 335, 339 (C.C.D. Ohio 1853) (emphasis added).

235. COVER, *supra* note 125, at 229.

236. *Id.* at 229-30.

237. *Id.*

238. *Id.* at 234.

239. *Id.* at 236.

One such judge was Lemuel Shaw, Herman Melville's father-in-law.²⁴⁰ One of the most important jurists of the nineteenth century, Shaw served as Chief Judge of the Supreme Judicial Court of Massachusetts from 1830 to 1860.²⁴¹ Unquestionably, Shaw was personally opposed to slavery.²⁴² He called it "one continued series of tremendous crimes,"²⁴³ but he counseled moderation.²⁴⁴ Since slavery affected the security and union of the nation, he opposed immediate emancipation and hoped for a "safe and gradual abolition" by the slave states themselves.²⁴⁵

In cases involving the liberty of an alleged slave, Shaw initially read the law narrowly in order to distinguish cases involving fugitive slaves from cases where the slaves' owners brought them voluntarily into Massachusetts,²⁴⁶ the so-called "transit" cases.²⁴⁷ His decision in *Commonwealth v. Ames* acknowledged that a fugitive slave who escaped to Massachusetts must be returned to his owner under federal law, but held:

240. See, e.g., MICHAEL PAUL ROGIN, *SUBVERSIVE GENEALOGY: THE POLITICS AND ART OF HERMAN MELVILLE* 36 (1983).

241. E.g., LEVY, *supra* note 36, at 3, 7 ("[Shaw] would become Massachusetts' greatest Chief Justice, and one of the most massive and influential figures in the history of American judiciary."). *Id.* at 7. See also ROGIN, *supra* note 240, at 36; Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1917 n.4 ("Shaw may well have been the most influential judge in the nation during the thirty years from 1830 to 1860."). One commentator attributes the pioneering role of Massachusetts in changing the northern attitude toward slave transit cases in part to the prestige and ability of Chief Justice Shaw. PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 101 (1981).

242. E.g., ROGIN, *supra* note 240, at 99.

243. LEVY, *supra* note 36, at 59 (quoting LEMUEL SHAW, *A DISCOURSE DELIVERED BEFORE THE OFFICERS AND MEMBERS OF THE HUMANE SOCIETY OF MASSACHUSETTS* 11 (1811)).

244. E.g., FINKELMAN, *supra* note 241, at 107-08 ("Abolitionists, in 1836, were generally regarded as social outcasts and troublemakers. The staid and formal Chief Justice Shaw, while opposed to slavery, was not an abolitionist and disliked their radical tendencies.").

245. LEVY, *supra* note 36, at 60 (quoting Lemuel Shaw, *Slavery and the Missouri Question*, 10 N. AM. REV. & MISC. J. 137, 145 (1820)). Shaw's vision, however, was somewhat limited. In *Roberts v. City of Boston*, 59 Mass. 198 (1849), Shaw wrote an opinion authorizing the continued racial segregation of the Boston school system. *Roberts*, 59 Mass. at 210. He based his decision on the plenary authority of the school committee to make such decisions and rejected the argument that the maintenance of separate schools deepened and perpetuated prejudice in public opinion. *Id.* at 208-09. The decision did not stand for long, as the Massachusetts legislature prohibited segregated schools in 1855. LEVY, *supra* note 36, at 116. See also Finkelman, *supra* note 64, at 341. His decision did, however, carry significant weight outside of the Commonwealth. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (echoing Shaw's reasoning); LEVY, *supra* note 36, at 116-17 (noting that California, New York, Arkansas, Missouri, Louisiana, West Virginia, Kansas, Oklahoma, South Carolina, and Oregon courts "relied upon the *Roberts* case as a precedent for upholding segregated education").

246. See, e.g., *Commonwealth v. Ames*, 35 Mass. 193 (1836).

247. See FINKELMAN, *supra* note 241, at 104.

[A]n owner of a slave in another state where slavery is warranted by law, voluntarily bringing such slave into this state, has no authority to detain him against his will, or to carry him out of the State against his consent, for the purpose of being held in slavery.²⁴⁸

Shaw clearly applied positive law in later decisions on fugitive slave cases.²⁴⁹ For example, he upheld the constitutionality of the 1850 Fugitive Slave Act in the *Thomas Sims's Case*.²⁵⁰ The outcome in *Sims's* clearly offended Shaw's anti-slavery beliefs. To establish that he essentially had no choice in the outcome, Shaw's decision, consistent with the three patterns discerned by Cover, assigned responsibility for the outcome to both Congress and the higher courts, downplayed his authority under a mechanistic formal theory, and elevated the formal stakes."

Shaw emphasized his duty to keep to his limited judicial role and placed responsibility with Congress when he stressed the "deep sense of the responsibility which must rest on a judicial tribunal,

248. 35 Mass. at 224. See also FINKELMAN, *supra* note 241, at 112-13. In *Ames*, a child slave was brought by the wife of the owner of the child on a temporary trip from New Orleans to Boston. *Ames*, 35 Mass. at 206. Massachusetts law supported freedom of a slave brought permanently into the state, but it remained unclear as to whether the law supported freedom for a slave brought only for temporary purposes to the state. *Id.*

Shaw commenced his analysis by noting that the free-and-equal clause of Article I of the 1780 Declaration of Rights in the state constitution had abolished slavery in Massachusetts. *Id.* at 210. Yet he acknowledged that even though slavery was "contrary to natural right, to the principles of justice, humanity and sound policy," it was not contrary to the law of nations. *Id.* at 215. It had, in fact, been recognized in the Constitution and by half of the states. That meant the Massachusetts courts could not treat as void laws upholding slavery in those states where it was lawful.

By looking to the law of England and assuming Massachusetts law was analogous, Shaw cited the reasoning of Lord Mansfield in *Somerset v. Stewart*. (1772) 98 Eng. Rep. 499 (KB). In *Somerset*, the court considered the extraterritoriality effect of the laws of Virginia, which sanctioned slavery, in England, a country which prohibited slavery. The court concluded that an American slaveholder could not remove a fugitive slave from England against the slave's will, in essence suggesting that the slave became free when setting foot on free soil. The court reasoned:

[T]he state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and the time itself from which it was created, is erased from memory: it's so odious, that nothing can be suffered to support it but positive law.

Id. at 510.

249. *E.g.*, COVER, *supra* note 125, at 251.

250. *Thomas Sims's Case*, 61 Mass. 285, 318-19 (1851). In contrast, in *In re Booth & Rycraft*, the Wisconsin Supreme Court held that the 1850 Fugitive Slave Act was unconstitutional as the enactment of the law was not within Congress's power. 3 Wisc. 157, 191-92 (1854). The Supreme Court reversed the *In re Booth & Rycraft* decision in *Ableman v. Booth*. 62 U.S. 506, 526 (1859).

when called upon to deliberate upon the constitutionality of any legal enactment adopted by the highest legislative body of the union."²⁵¹ Although Shaw correctly observed that a judge may not ignore the law to follow his personal inclinations,²⁵² Judge Shaw deliberately avoided interpreting parts of the new act in his *Sims's* decision.²⁵³ The constitutionality of the 1850 Act and the language differences between the two Fugitive Slave Acts had yet to be considered by the Supreme Court. Shaw declined to examine whether the new act was unconstitutional for lack of trial by jury on the grounds that the question had already been answered by the Supreme Court's *Prigg v. Pennsylvania* decision which upheld the constitutionality of the 1793 Act.²⁵⁴

Shaw further attempted to mitigate his responsibility by stressing his personal abhorrence to slavery and the slave trade while indicating his lack of choice in the outcome.²⁵⁵ He suggested that his role was to mechanically apply the law:

By the received law of nations, . . . however odious we may consider slavery and the slave trade, however abhorrent to the dictates of humanity and the plainest principles of justice and natural right, yet each nation has a right . . . to judge for itself, and to allow or prohibit slavery by its own laws, at its own will; and that whenever slavery is thus established by positive law within the limits of such state, all other nations and people are bound to respect it, and cannot rightfully interfere . . .²⁵⁶

Finally, Shaw raised the formal stakes involved in the case by implicating an issue of greater importance to him in 1851: the formation and continued viability of the Union.²⁵⁷ He framed the

251. *Sims's Case*, 61 Mass. at 294.

252. LEVY, *supra* note 36, at 329. Shaw counseled:

[A] bad law . . . should be corrected only by legislative action, but so long as it remains in force, it is to be respected as the law, and because it is the law, not grudgingly and reluctantly, but with honesty and sincerity, because any departure from this fundamental rule of conduct, would put in jeopardy every interest and every institution which is worth saving.

253. With regard to whether Congress could appoint federal commissioners to hear cases under Article III, Shaw acknowledged that the question would be entitled to "grave consideration" if he was the first to consider the question. He concluded, however, that "we are not entitled to consider this a new question; we must consider it settled and determined by authorities, which it would be a dereliction of official duty, and a disregard of judicial responsibility, to overlook." *Sims's Case*, 61 Mass. at 310.

254. *Id.* at 301.

255. *Id.* at 312.

256. *Id.* Other judges made similar statements of judicial helplessness before the law in other slave cases. See generally COVER, *supra* note 125, at 226-56.

257. *Sims's Case*, 61 Mass. at 319.

Sims's case in the context of the circumstances under which the Constitution was created, reasoning that the compromise reached by the Fugitive Slave Clause of Article IV was an "essential element in the formation of the United States."²⁵⁸ Shaw's noted biographer, Leonard W. Levy, described him as "obsessed with [this] fiction."²⁵⁹ In the wake of the passions following the 1850 Compromise, however, the need to preserve the Union became a sacred mission.²⁶⁰ The mission rested on the belief that the United States was not an ordinary government but, in guaranteeing the supremacy of the law, the "hope of mankind."²⁶¹ Shaw's decision also rested on the fear of civil war.²⁶² He believed he was affirming the rule of law over the violence that threatened to tear the country apart.²⁶³ In the *Sims's* case, this meant that Shaw was willing to subordinate concerns about the immorality of slavery to what he considered a higher good, and to mechanically follow the enacted law. Like the mutinous slaves in *Benito Cereno*,²⁶⁴ fugitive slaves would not be permitted to appeal to a more fundamental natural law in affirming their right to be free. The law, instead of protecting the slaves, was used against them.

III. TRAFFICKING IN HUMAN BEINGS TODAY

Judicial rationalizations of the slave trade and legalized slavery ended on December 6, 1865, upon ratification of the Thirteenth Amendment to the United States Constitution.²⁶⁵ Yet the crisis of trafficking in human beings remains today. Melville's *Benito Cereno* offers lessons in how to deal with this crisis.²⁶⁶ First, a powerful statement must condemn trafficking, support individual human rights, and affirm the natural right of persons to be free. This

258. *Id.* Shaw concluded that the union the Constitution intended to establish was "[e]ssentially necessary to the peace, happiness and highest prosperity of all the states." *Id.* Painting the picture of a "constant border war" between the free and the slave states, Shaw described the Constitution as a "solemn compact" between the independent sovereign states — a sort of treaty. *Id.* at 297. Shaw wrote, "[b]ut if no binding treaty could be made on the subject of slavery, . . . acknowledged rights [would be] in constant danger of being drawn into conflict between neighboring states, leading to a war likely to be perpetual . . ." *Id.* at 317.

259. LEVY, *supra* note 36, at 99.

260. *E.g.*, Thomas, *supra* note 12, at 27.

261. *Id.*

262. *See id.*

263. Thomas *Sims's* Case, 61 Mass. 285, 311-12, 317 (1851).

264. MELVILLE, *supra* note 6, at 92-104.

265. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

266. *See generally* MELVILLE, *supra* note 6.

affirmation must arouse the public's moral indignation and prevent the kind of complicity in a morally abhorrent system that allowed Captain Amasa Delano to say that "[his] conscience [was] clean."²⁶⁷ Second, based on this moral condemnation of trafficking, laws that vigorously punish the traffickers, not the victims of trafficking, must be enacted. Finally, prosecutors and courts must aggressively enforce these laws despite powerful opposition from organized crime and others enriched by trafficking, corrupt officials, or traditional practices that subjugate women and girls, the primary victims of trafficking.

An international moral condemnation of slavery and human trafficking is essential to its eradication. Though Chief Justice John Marshall acknowledged in 1825 that the slave trade was contrary to the law of nature since "every man has a natural right to the fruits of his own labour,"²⁶⁸ he nevertheless concluded that the slave trade was not contrary to the law of nations.²⁶⁹ International law now affirms the natural right of people to be free. In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights.²⁷⁰ Article 4 states that "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."²⁷¹ In addition, the Rome statute of the

267. *Id.* at 67.

268. *The Antelope*, 23 U.S. 66, 120 (1825).

269. *Id.*

270. Universal Declaration, *supra* note 34. Other international law efforts have also existed. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/RES/34/180 (1980), *available at* <http://www.un.org/womenwatch/daw/cedaw/text/econvention.html> (Article 6 of the Convention proclaims that "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women"); The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3 (the Convention expanded the definition of slavery to include other practices, such as debt bondage, serfdom, certain servile forms of marriage, and the exploitation of children); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 317(IV) (Dec. 2, 1949), *available at* <http://www.unhcr.ch/html/menu3/b/33.htm>; Convention Concerning Forced or Compulsory Labour (No. 29) June 28, 1930, 39 U.N.T.S. 55, *available at* <http://www1.umn.edu/humanarts/instree/nOilo29.htm> (Article 2.1 states that "'forced or compulsory labour' shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."); The League of Nations, Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 L.N.T.S. 253, *available at* <http://www.yale.edu/lawweb/avalon/league/lea001.htm> ("The High Contracting Parties undertake all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves.");

271. Universal Declaration, *supra* note 34, at art. 4.

International Criminal Court prohibits crimes against humanity, including enslavement.²⁷²

A general condemnation, however, must be supported by targeted legislation. In 2000, the United Nations undertook a major initiative to combat human trafficking by adopting the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children²⁷³ as an annex to the United Nations Convention Against Transnational Organized Crime.²⁷⁴ In addition to the U.N. Protocol, the United States Congress enacted a major legislative initiative to oppose trafficking — the Trafficking Victims Protection Act,²⁷⁵ part of the larger Victims of Trafficking and Violence Protection Act of 2000.²⁷⁶ Both the United Nations' and American efforts represent a positive and essential step in attacking the problem of trafficking. Still, aggressive enforcement of the laws is not the norm internationally, and the impact of anti-trafficking regulation has yet to be widely felt.

The impetus for the United Nations action was the enormous growth of transnational organized crime and the recognition that this problem could only be solved through close international cooperation.²⁷⁷ The General Assembly adopted the Convention Against Organized Crime on November 15, 2000, by resolution, and it entered into force on September 29, 2003, ninety days after it received the necessary forty ratifications.²⁷⁸ The Convention has been described as "[t]he first serious attempt by the international community to invoke the weapon of international law in its battle against transnational organized crime."²⁷⁹ According to Article 1, "[t]he purpose of this Convention is to promote cooperation to prevent

272. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (2002), available at www.un.org/law/ecc/statute/rome.fra.htm.

273. U.N. Protocol, *supra* note 13, at pmbl.

274. G.A. Res. 55/25, U.N. Doc. A/55/383 (2000) [hereinafter Crime Convention].

275. 22 U.S.C. §§ 7101-7110 (2005).

276. Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended at 22 U.S.C. §§ 7101-10 (2000)). The Victims of Trafficking and Violence Protection Act was amended by the TVPRA. *See supra* note 25.

277. *E.g.*, Ambassador Luigi Lauriola, Chairman, Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, Address at the Millennium Assembly of the United Nations General Assembly (November 2000), available at http://www.unodc.org/pdf/crime/convention/crime_cicp_convention_lauriola.pdf ("The political will of the participants, driven by newspaper headlines and public opinion, gave decisive impulse to the search for a global response to organized crime.").

278. *See* www.unodc.org/unodc/en/crime_cicp_signatures.html. At that time the Convention had amassed 147 signatories. The Convention had been open for signatures from December 12, 2000 to December 12, 2002. As of August 23, 2005, 107 countries are parties to the Convention.

279. Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUMAN RIGHTS Q. 975, 976 (2001).

and combat transnational organized crime more effectively.”²⁸⁰ The Convention is a legally binding instrument which commits each ratifying state to take a series of measures against transnational organized crime through its own domestic legislation and to cooperate with other signatories in the areas of law-enforcement, extradition, and technical assistance and training.²⁸¹ For example, the Convention provides that “[e]ach State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group.”²⁸² The Convention also takes proactive measures against money laundering,²⁸³ measures to criminalize official corruption,²⁸⁴ and measures to confiscate the assets of traffickers.²⁸⁵ Other provisions of the Convention relate to cooperation among states as to matters such as extradition,²⁸⁶

280. Crime Convention, *supra* note 274, at art. 1. Although the Convention was largely a response to organized crime’s role in trafficking, the drafters were aware that organized traffickers do not always operate in large syndicates, but also consist of small groups, including the husband, boyfriend, parent, or other family member of the trafficking victim. Accordingly, the Convention defines “organized criminal group” as a “structured group of three or more persons.” *Id.* at art. 2(c).

281. *Id.* at arts. 5-30.

282. *Id.* at art. 10(1).

283. *Id.* at art. 6. Article 6 states:

Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offenses, when committed intentionally:

(a)(I) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

....

284. *Id.* at art. 8.

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

....

285. *Id.* at art. 12.

State Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

286. *Id.* at art. 16.

mutual legal assistance,²⁸⁷ joint investigations,²⁸⁸ and other aspects of law enforcement.²⁸⁹

Areas of transnational organized crime of particular concern to U.N. member states are addressed in separate protocols or treaties.²⁹⁰ Most important is the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, which entered into force on December 25, 2003.²⁹¹ The stated purposes of the Trafficking Protocol are: "(a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among party states to meet these objectives."²⁹² Human rights nongovernmental organizations (NGOs) and intergovernmental organizations (IGOs) had some influence in the drafting process, the result being that certain Articles are directed towards protecting

287. *Id.* at art. 18.

288. *Id.* at art. 19.

289. *Id.* at arts. 27, 28.

290. In addition to the U.N. Protocol, the Convention has two other Protocols, the Protocol Against the Smuggling of Migrants by Land, Sea, and Air, which entered into force on January 28, 2004, *see* <http://www.un.org/News/Press/docs/2004/soccp280.doc.htm>, and the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition. The Firearms Protocol entered into force on July 3, 2005, with fifty-two signatories, *see* http://www.unodc.org/undoc/en/crime_cicp_signatures_firearms.html. States must ratify the Convention before ratifying any of its Protocols. Crime Convention, *supra* note 274, at art. 37(2).

291. U.N. Protocol, *supra* note 13. As of September 22, 2005, the following ninety-two States have ratified the Protocol: Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Belarus, Belgium, Belize, Benin, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Canada, Cape Verde, Chili, Columbia, Costa Rica, Croatia, Cyprus, Denmark, Djibouti, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, France, Gambia, Grenada, Guatemala, Guinea, Guyana, Jamaica, Kenya, Kiribati, Kyrgyzstan, Laos, Latvia, Lesotho, Liberia, Libya, Lithuania, Madagascar, Malawi, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Monaco, Myanmar, Namibia, New Zealand, Nicaragua, Nigeria, Niger, Norway, Oman, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Senegal, Serbia and Montenegro, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Tajikistan, The Former Yugoslav Republic of Macedonia, Tunisia, Turkey, Turkmenistan, Ukraine, Uruguay, Venezuela, and Zambia. *Id.*

In ratifying the Protocol, ten countries did so with a reservation that they are not bound by paragraph 2 of Article 15, concerning the settlement of disputes between parties. *Id.* Under this paragraph, a dispute between state signatories would first be submitted to arbitration and, if not resolved, to the International Court of Justice. *Id.*

The United States has yet to ratify the Protocol. *Id.* President Bush has submitted it to the Senate. 2004 TIP REPORT, *supra* note 16, at 260.

292. U.N. Protocol, *supra* note 13, at art. 2. The Protocol recognizes that "effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination." *Id.* at pmb1.

the human rights of trafficked persons.²⁹³ The Protocol, however, was drafted by the United Nations Crime Commission, a law enforcement, not a human rights, body.²⁹⁴ Accordingly, its primary impetus and focus is combating organized crime rather than supporting the victims of trafficking.

Drafting the "trafficking in persons" definition²⁹⁵ was the most controversial part of the negotiations because of the conflict among states over whether all adult prostitution, even if voluntary or legal, should be classified as trafficking.²⁹⁶ At the root of the conflict was the different legal treatment of adult sex work among the individual states and conflicting views as to whether a person could "consent" to prostitution.²⁹⁷

Under one view, prostitution is a legitimate profession, whereby a female can seek sex work as a form of empowerment and a method of achieving workplace equality, female self-determination, and economic prosperity.²⁹⁸ The opposition to this view is seen as paternalistic and overprotective, incorporating Western, white, middle-class bias towards women in developing countries.²⁹⁹ Under

293. Potts, *supra* note 15, at 238 ("NGOs played a key role in shaping the goals of the trafficking protocol in Vienna."). See also Kara Abramson, *Beyond Consent, Towards Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 480-81 n.45 (2003).

294. The United Nations Crime Commission is concerned with international action to combat national, transnational, and organized crime; economic crime and money laundering; promoting the role of criminal law in protecting the environment; crime prevention in urban areas (including juvenile crime and violence); and improving the efficiency and fairness of criminal justice administration systems. ANN D. JORDAN, INT'L HUMAN RIGHTS LAW GROUP, THE ANNOTATED GUIDE TO THE COMPLETE UN TRAFFICKING PROTOCOL 3 n.5 (2002), available at <http://www.walnet.org/csis/papers/UN-TRAFFICK.PDF>.

295. See *supra* note 13.

296. JORDAN, *supra* note 294, at 9.

297. *Id.*

298. See Abramson, *supra* note 293, at 483 ("Under this view, refusal to recognize prostitution as a legitimate profession is seen as legally sanctioned sex discrimination that denies women equal pay."); Hartsough, *supra* note 27, at 84; Inglis, *supra* note 19, at 70-71, 87-88.

299. Abramson, *supra* note 293, at 484. See also U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, U.N. Doc. E/CN.4/2000/68 (Mar. 13, 2000) (prepared by Radhika Commaraswamy) [hereinafter 2000 Report of Special Rapporteur]. In the 2000 Report, the Special Rapporteur emphasizes "the non-consensual and exploitive or servile nature of the purpose with which the definition [of trafficking] concerns itself." *Id.* ¶ 13. The 2000 Report asserts that the 1949 Convention fails to "regard women as independent actors endowed with rights and reason; rather, the Convention views them as vulnerable beings in need of protection from the 'evils of prostitution.'" *Id.* ¶ 22. Similarly, one scholar argues:

The decision to remove consent as an element of the offense comports with the emphasis of those agreements on punishing traffickers. But it also reflects a discriminatory, paternalistic view of women — one that creates its own 'innocent' victims. This view assumes not only that no one would choose to be trafficked, but also that no one would voluntarily choose prostitution.

another view, consent to prostitution is meaningless under trafficking law, either because the desperate situation of trafficked women leaves them little choice, or because they have been misled either as to the nature of the work they will be doing or to the circumstances under which they will be held.³⁰⁰ Ultimately, the drafters did not include any reference to consent in the basic definition of trafficking, but added subparagraph (b) which states that "[t]he consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used."³⁰¹ The transportation of children under eighteen years for purposes of exploitation, however, is per se trafficking in persons.³⁰²

Compromises like this, necessary in order to draft a document that would be signed and ratified by nations with widely different views on significant topics, inevitably lead to a lowest common denominator effect.³⁰³ In the Crime Convention, the nature of the legislation and the penalties imposed are left to each state to determine.³⁰⁴ In fact, Article 4(2) specifically states that "[n]othing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."³⁰⁵ In addition, the enforcement of rights is limited only to those states which agree to be bound by that enforcement.³⁰⁶ With the major enforcement of the Protocol at the State level and variations of laws from one country to another, enforcement-free zones may exist.³⁰⁷ Moreover, the lack of uniformity

Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L. L. 1, 6 n.22 (2004). For a more detailed discussion of the feminist critique and the human rights response to trafficking, see *id.* at 34-35.

300. Abramson, *supra* note 293, at 489; Gallagher, *supra* note 279, at 984-85.

301. U.N. Protocol, *supra* note 13, at art. 3(b).

302. *Id.* at art. 3(c), (d). Section 3(d) defines "Child" as "any person under eighteen years of age." *Id.* at art. 3(d).

303. See Joan Fitzpatrick, *supra* note 29, at 1147 (quoting Jose Alvarez, *Why Nations Behave*, 19 MICH. J. INT'L L. 303, 316 (1998)) ("Multilateral conventions' lowest common denominator 'solutions' [may] prove less efficacious than a hegemon's concerted efforts to enforce extraterritorially its own domestic law to the same ends.").

304. Crime Convention, *supra* note 274, at art. 34(2) ("The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group . . .").

305. *Id.* at art. 4(2).

306. See generally *id.* at art. 27(2) (addressing agreements among and cooperation with other Party States).

307. Abramson, *supra* note 293, at 496 ("Open-ended provisions allow the Trafficking Protocol's application to be molded to the individual policy objectives of state parties.").

in national legislation is likely to undermine effective cross-border cooperation.³⁰⁸ Finally, little international enforcement is likely without the existence of an international body to punish violators' participation in this criminal activity.³⁰⁹

Effective enforcement at the state level is also likely to be undermined by limited law enforcement capacity and lack of experience in the judicial sector.³¹⁰ Trafficking is not always treated as a serious crime in either developed or developing countries,³¹¹ and rates of prosecution may be low.³¹² Official corruption, fear of retaliation by organized crime figures, and tolerance of prostitution are additional obstacles.³¹³ In some countries, trafficking provides economic benefits which governments are reluctant to forego.³¹⁴ In addition, the Protocol "does not address the role of the state or government officials in committing or tolerating trafficking."³¹⁵ Even peacekeepers and humanitarian workers have been known to use the services of trafficked women or aid and abet traffickers.³¹⁶

308. Gallagher, *supra* note 279, at 979.

309. Jennifer Enck, Note, *The United Nations Convention Against Transnational Organized Crime: Is It All That It Is Cracked Up to Be?*, 30 SYRACUSE J. INT'L L. & COM. 369, 393 (2003). One commentator notes that bilateral and multilateral cooperation is critical, but cooperation is undermined by the economic gap that makes so many states vulnerable to organized crime and trafficking. See Potts, *supra* note 15, at 247.

310. Enck, *supra* note 309, at 386 ("Although a signatory to the Convention, Russia, like many developing countries, does not possess the necessary laws, or even the essential structure to create the necessary laws, which are needed to deal with organized criminal activities such as human trafficking."); Haynes, *supra* note 20, at 234 ("[N]o incentive can create the political will to *implement* legislation if such will or ability does not exist or is not prioritized."). The protection of trafficking persons is weakened by "the possibility of a corrupt, ineffective, or transitioning judicial system, obstacles with which many countries . . . are burdened . . ." *Id.* at 247.

311. Linda Smith & Mohamed Mattar, *Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges*, 28 FLETCHER F. WORLD AFF. 155, 167-68 (2004) (noting that some countries, such as Turkey, Qatar, Egypt, and Poland, still provide for light sentences in cases of trafficking in persons).

312. *Id.* at 169 (citing the State Department's 2003 TIP Report and reports by UNICEF on weak enforcement in Moldova, Thailand, the Philippines, Albania, and Japan).

313. See TVPRA, *supra* note 25, § 2(5) ("Corruption among foreign law enforcement authorities continues to undermine the efforts by governments to investigate, prosecute, and convict traffickers.").

314. LIN LEAN LIM, INT'L LABOUR ORG., *THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA* 1, 8 (1998) (explaining how the commercial sex sector has become an entrenched part of the examined countries' economies and yields a significant portion of their gross domestic products).

315. Bruch, *supra* note 299, at 21 (noting that the Protocol only penalizes individual offenders, yet "[a]dvocates have noted that much trafficking could not occur without the involvement of government officials, such as police and border control officers"). Even though the Protocol permits prosecution of individual officials, "official complicity in trafficking is often so widespread and systemic that it reflects governmental policy or acquiescence." *Id.*

316. See Jennifer Murray, Note, *Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the*

Another weakness in the Protocol is its emphasis on crime and immigration rather than human rights.³¹⁷ Thus, Article 5 uses mandatory language in requiring that "[e]ach State Party *shall adopt* such legislative and other measures as may be necessary to establish as *criminal offences* the conduct set forth in article 3 of this Protocol, when committed intentionally."³¹⁸ As to migration issues, Article 11 provides that "State Parties *shall strengthen*, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons,"³¹⁹ and Article 12 requires States to take measures "to ensure the integrity and security of travel or identity documents"³²⁰

The language in the Protocol articles relating to the protection of victims of trafficking, however, is more precatory,³²¹ in part because States feared that it might become a means of illegal immigration.³²² The Protocol provides that State Parties, "[i]n appropriate cases and to the extent possible under . . . domestic law," shall protect the identity of trafficking victims.³²³ They "*shall consider* implementing measures to provide for the physical, psychological and societal recovery" of trafficking victims, such as housing, counseling on legal rights, medical and material assistance, and educational and training opportunities.³²⁴ "Each State Party shall take appropriate measures *within its means* to provide effective protection from potential retaliation or intimidation of witnesses in criminal proceedings,"³²⁵ and finally each State "*shall consider*" adopting measures that permit victims to remain in its territory, and states shall facilitate the repatriation of victims.³²⁶ An amendment to protect trafficked persons from prosecution for status-related offenses, such as illegal migration, working without proper

Trafficking of Women in Post-Conflict Bosnia and Herzegovina, 34 COLUM. HUM. RTS. L. REV. 475, 477, 503-06 (2003); Smith & Mattar, *supra* note 311, at 171.

317. 2000 Report of the Special Rapporteur, *supra* note 299, at 7, 16 (expressing concerns about the limits of a crime-fighting approach, noting that "[o]n the issue of trafficking, Governments overwhelmingly adopt a law and order approach, with an accompanying strong anti-immigration policy. Such an approach is often at odds with the protection of human rights.").

318. U.N. Protocol, *supra* note 13, at art. 5(1) (emphasis added).

319. *Id.* at art. 11(1) (emphasis added).

320. *Id.* at art. 12(b).

321. See Gallagher, *supra* note 279, at 990 ("Part Two of the protocol, dealing with protection of the trafficked person, contains very little in the way of hard obligation"). Accord Raviv, *supra* note 17, at 668.

322. Potts, *supra* note 15, at 240.

323. U.N. Protocol, *supra* note 13, at art. 6(1) (emphasis added).

324. *Id.* at art. 6(3) (emphasis added).

325. Crime Convention, *supra* note 274, at art. 24(1).

326. U.N. Protocol, *supra* note 13, at arts. 7(1), 8(4) (emphasis added).

documentation, or prostitution was not included. The Committee was undoubtedly concerned that states would not want to have their criminal sanctions weakened by a "trafficking defense."³²⁷

Although the United States has yet to ratify the Trafficking Protocol,³²⁸ it has enacted its own expansive legislation,³²⁹ which has the potential of being model legislation for other countries. In its findings, Congress acknowledges that "[a]s the 21st century begins, the degrading institution of slavery continues throughout the world."³³⁰ The TVPA frankly describes the causes of trafficking from the "low status of women in many parts of the world,"³³¹ to the "weak penalties for convicted traffickers" in the United States,³³² to the official indifference, corruption, and even participation in trafficking in other countries,³³³ and to the failure of existing laws to protect victims of trafficking who are often "punished more harshly than the traffickers themselves."³³⁴ Trafficking is described as "an evil requiring concerted and vigorous action by countries of origin, transit or destination, and by international organizations."³³⁵ Congress seeks to combat trafficking through the three Ps: prevention, protection, and prosecution.³³⁶

Prevention focuses largely on international efforts, which include "facilitat[ing] cooperation among countries of origin, transit, and destination."³³⁷ The TVPA requires the President to establish an Interagency Task Force to monitor and combat trafficking, chaired by the Secretary of State.³³⁸ The Secretary is charged with submitting

327. *Id.*

328. See *supra* note 291 (indicating that President Bush has submitted the Protocol to the Senate for advice and consent).

329. See TVPA, *supra* note 13.

330. 22 U.S.C. § 7101(b)(1) (2000).

331. *Id.* § 7101(b)(2).

332. *Id.* § 7101(b)(15).

333. *Id.* § 7101(b)(16).

334. *Id.* § 7101(b)(17).

335. *Id.* § 7101(b)(21).

336. For example, 22 U.S.C. § 7104 (2000) deals with the prevention of trafficking; 22 U.S.C. § 7105 (2000) deals with the protection and assistance for victims of trafficking; and 22 U.S.C. § 7109 (2000) deals with strengthening prosecution and punishment of traffickers. In this, the TVPA mirrors the goals of the Protocol. The Protocol's preamble declares, "effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking." U.N. Protocol, *supra* note 13, at pmb1.

337. 22 U.S.C. § 7103(d)(4) (2000).

338. *Id.* §§ 7103(a), (c). The Task Force was established on February 13, 2002. Exec. Order No. 13,257, 67 Fed. Reg. 7259 (Feb. 13, 2002). The TVPRA amended section 105(d) of the Trafficking Act by adding a section which requires the Attorney General to submit a report to Congress including information on such items as "the number of persons who received

an annual trafficking report to Congress which includes a list of the countries whose governments fully comply with the statutory minimum standards (Tier 1), those whose governments do not yet fully comply but are making "efforts to bring themselves into compliance" (Tier 2), and those who "do not fully comply . . . and are not making significant efforts to bring themselves into compliance" (Tier 3).³³⁹ A Tier 2 Special Watch List was established by the 2003 Reauthorization Act for countries that require special scrutiny.³⁴⁰ The TVPA states that the United States will not provide "nonhumanitarian, nontrade-related foreign assistance" to any country that "does not comply with minimum standards for the elimination of trafficking; and . . . is not making significant efforts to bring itself into compliance."³⁴¹ Minimum standards mean the country "should prohibit severe forms of trafficking and punish [such] acts";³⁴² "prescribe punishment commensurate with that for grave crimes"³⁴³ which are sufficient to deter such heinous crimes; and "make serious and sustained efforts to eliminate severe forms of trafficking in persons."³⁴⁴ Additionally, prevention includes

benefits . . . under section 107(b),"the number of persons "granted continued presence in the United States," "the number of persons who have applied for, been granted, or were denied a [T] visa," and "the number of persons . . . charged or convicted [under specified sections] of title 18, United States Code . . . and the sentences imposed." TVPRA, *supra* note 25, § 6(a)(1) (quoting additions §§ 105(d)(7)(A)-(D)). Subsections (E)-(G) were also added by this Act.

339. 22 U.S.C. § 7107(b)(1) (2000).

340. *Id.* The TVPRA amended section (b) of the TVPA by adding a Special Watch List in section 6(e) for countries which the Secretary of State determines require special scrutiny. *See* TVPRA, *supra* note 25, § 6(e)(3). In particular, the Watch List is focused on Tier 2 countries where:

(I) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; (II) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecutions and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials; or (III) the determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.

22 U.S.C. § 7107(b)(3)(A)(iii) (2000).

341. *Id.* § 7107(a).

342. *Id.* § 7106(a)(1).

343. *Id.* § 7106(a)(2).

344. *Id.* § 7106(a)(4). Indicia of whether the country shows serious and sustained efforts include "[w]hether the government of the country vigorously investigates and prosecutes acts of severe forms of trafficking in persons and convicts and sentences such acts"; "whether the government of the country protects victims of severe forms of trafficking in person and encourages their assistance in the investigation and prosecution of such trafficking"; "whether the government of the country has adopted measures to . . . inform and educate the public"; and "whether the government of the country cooperates with other governments in the investigation and prosecution of severe forms of trafficking in persons." *Id.* §§ 7106(b)(1)-(4).

“[e]conomic alternatives to prevent and deter trafficking,”³⁴⁵ and public awareness campaigns.³⁴⁶

The second theme of the TVPA is protection and assistance for victims of trafficking. The law requires the Secretary of State and the Administrator of the United States Agency for International Development (USAID) to establish programs “in foreign countries to assist in the safe integration, reintegration, or resettlement” of trafficked persons.³⁴⁷ More importantly, in the United States, the TVPA provides that “an alien who is a victim of a severe form of trafficking in persons, or an alien classified [with a nonimmigrant status] shall”³⁴⁸ have the same eligibility for benefits as an alien admitted to the United States under refugee status.³⁴⁹

The TVPA also amends the Immigration and Nationality Act³⁵⁰ by creating a new non-immigration visa, the temporary residency or “T visa.”³⁵¹ Benefits may also be extended to family members who accompany or follow to join the trafficking victim.³⁵² T visa holders may remain in the United States for three years and may then apply for lawful permanent residency status provided they have assisted in the prosecution of their traffickers, or persons under fifteen years of age and would suffer “extreme hardship” upon removal.³⁵³

Finally, the TVPA deals with the prosecution of traffickers, increasing the sentences for existing crimes, adding new crimes, and requiring restitution for trafficking offenses.³⁵⁴ The Act doubles the sentence for holding people in involuntary servitude from ten to twenty years, with life sentences possible if death or other

345. *Id.* § 7104(a) (“Such initiatives may include — (1) microcredit lending programs . . . ; (2) programs to promote women’s participation in economic decisionmaking; (3) programs to keep . . . girls, in . . . school[]; (4) development of educational curricula regarding the dangers of trafficking; and (5) grants to nongovernmental organizations to . . . advance the . . . roles . . . of women in their countries.”).

346. *Id.* § 7104(b). The TVPRA supplemented the prevention efforts through border interdiction programs, and measures to combat international sex tourism. *Id.* §§ 7104(c), (e).

347. *Id.* § 7105(a)(1).

348. *Id.* § 7105(b)(1)(A).

349. *Id.* (Eligibility includes services such as counseling, medical services, legal assistance, food, housing, and victim restitution.).

350. Pub. L. No. 103-416, 108 Stat. 4314 (codified as amended in scattered sections of 8 U.S.C.).

351. See Bo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1052 n.54 (2002).

352. 8 C.F.R. § 1214.2 (2005).

353. *Id.* § 214.11(b)(3).

354. 22 U.S.C. § 7109(b) (2000) (amending Chapter 77 of Title 18 of the United States Code and the sentencing guidelines).

aggravating factors are present.³⁵⁵ Additionally, two new crimes are created: trafficking with respect to peonage, slavery, involuntary servitude, or forced labor³⁵⁶ and sex trafficking of children or by force, fraud, or coercion.³⁵⁷ Under both, penalties include imprisonment of up to twenty years, or, if death or aggravating factors are present, life imprisonment.³⁵⁸ In addition, mandatory restitution for the full amount of the victim's losses shall be ordered.³⁵⁹ Moreover, the law applies criminal forfeiture to the crime of trafficking in persons.³⁶⁰ Finally, the TVPRA increased enforcement possibilities by providing a private right of action³⁶¹ and by making human trafficking crimes predicate offenses for RICO charges.³⁶²

Without question, the enactment of the TVPA means progress in the fight against trafficking.³⁶³ Like the U.N. Protocol, this legislation is based on the moral condemnation of trafficking practices and on the basic right of individuals to freedom. Progress has been made both in protecting trafficking victims within the United States, and on influencing other nations to enact laws against trafficking in their home countries.

Some elements of the Act, however, appear to undermine its effect. Both the certification of continued presence and the granting of T visas are dependent on the person's cooperation with the Justice Department. To be eligible for a certification of continued

355. 18 U.S.C §§ 1590, 1591 (2004).

356. *Id.* § 1590.

357. *Id.* § 1591.

358. *Id.* §§ 1590, 1591(b)(1).

359. *Id.* § 1593(b)(1).

360. *Id.* § 1594(c)(1).

361. See TVPRA, *supra* note 25, § 4(a) (creating a new section, 18 U.S.C. § 1595, which provides for damages and attorneys fees). This is an important addition as it will increase the number of suits brought against traffickers. Moreover, since the burden of proof in a civil suit is by a preponderance of the evidence rather than a criminal trial's beyond a reasonable doubt, there is greater likelihood of success. For a discussion of the benefits of a private right of action, see Hyland, *supra* note 26, at 51-52.

362. See TVPRA *supra*, note 25, § 5 (amending 18 U.S.C. § 1961).

363. In a 2003 address to the United Nations General Assembly, President George Bush urged members "to do their part" and:

[S]how new energy in fighting back an old evil. 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.

President George W. Bush, Address to the United Nations General Assembly (Sept. 23, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html>.

As a further step in combating sex tourism, Congress enacted the PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003). Pub. L. No. 108-21, 117 Stat. 650 (2003). It permits penalizing Americans who travel abroad and sexually abuse minors, without having to prove prior intent to commit illegal crimes. *Id.*

presence, a person must meet the definition of “victim of a severe form of trafficking,”³⁶⁴ which emphasizes trafficking in commercial sex,³⁶⁵ and must be “willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons,” and have either made an application for a T visa or been determined to be a person whose “continued presence in the United States the Attorney General is ensuring in order to effectuate prosecution of traffickers in persons.”³⁶⁶ Even then, the certification continues only “so long as the Attorney General determines that the continued presence of such person is necessary” to prosecute the traffickers.³⁶⁷ By its terms, the purpose of this provision is purely law enforcement; therefore, a trafficking victim may not seek continued presence on her own behalf.³⁶⁸ In addition, persons whose traffickers are not the subject of a criminal investigation would not qualify, and priorities and available resources limit the number of criminal investigations.³⁶⁹

Consistent with Congress’s concern for law enforcement, the T visa is limited to victims of severe forms of trafficking who have “complied with any reasonable request for assistance in the investigation or prosecution of acts of such trafficking” unless that person is under fifteen years of age, and would “suffer extreme

364. 22 U.S.C. §§ 7102(13), 7105(b) (2005).

365. *Id.* § 7102(8). “[S]evere forms of trafficking in persons” is defined in two ways: “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 “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” *Id.* §§ 7102(8)(A), (B). One commentator has questioned the excessive focus on the evils of sex work in the definition over persons trafficked into other work. See Abramson, *supra* note 293, at 495 (noting that sex work qualifies for special protection even though it does not amount to indentured servitude, bonded labor, or slavery, but non-sex work must satisfy one of these criteria to qualify). Accord Theresa Barone, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 TEMP. INT’L & COMP. L.J. 579, 592 (2003) (noting that the definition of “involuntary servitude” is based on pre-existing Supreme Court definitions, so nothing is explicitly added to the protection of victims apart from sex slavery and trafficking of minors).

366. 22 U.S.C. § 7105(b)(1)(E)(i)(II)(bb) (2005).

367. *Id.* § 7105(b)(1)(E)(ii).

368. Cooper, *supra* note 351, at 1052.

369. In considering the law enforcement of the U.N. Protocol, for example, the United Nations High Commissioner for Human Rights wrote that “[i]t is important . . . that victim protection must be considered separately from witness protection, as not all victims of trafficking will be selected by investigating and prosecuting agencies to act as witnesses in criminal proceedings.” Informal Note by the U.N. High Commissioner for Human Rights, U.N. GAOR, 4th Sess., at 5, U.N. Doc. A/AC.254/16 (July 9, 1999). The original House bill of the TVPA, H.R. 3244, 106th Cong. (2000), had broader application, permitting a trafficked person to remain in the country as long as that person was “a victim of trafficking or a material witness.” TVPA, *supra* note 13, § 7(c)(4). See also Hyland, *supra* note 26, at 64-65.

hardship involving unusual and severe harm upon removal.”³⁷⁰ Moreover, there is a limit of 5000 T visas per year,³⁷¹ based on congressional concern over fraudulent claims by persons asserting to be trafficking victims.³⁷²

Even more discouraging than the limit on the number of T visas that can be granted is the low number of T visas that have actually been granted.³⁷³ In Fiscal Year 2003, 601 applications for T visas were received; of those, 297 were approved, 30 were denied, and the rest remained pending at the close of the fiscal year.³⁷⁴ From the enactment of the Trafficking Act in 2000 through Fiscal Year 2003, only about 450 persons have received either continuing presence or T visa benefits.³⁷⁵ This number is quite low considering that the State Department most conservatively estimated that 14,500 to 17,500 persons are trafficked into the United States *each year*.³⁷⁶ Eligibility for T visas also requires that the person would “suffer extreme hardship involving unusual and severe harm upon removal.”³⁷⁷

A further question under the TVPA is the efficacy of sanctions in effecting change. Congress appropriately chose to leave the sanctions within the President’s discretion.³⁷⁸ Frank E. Loy, Under Secretary

370. 8 C.F.R. §§ 214.11(b)(1)-(4).

371. *Id.* § 214.11(m).

372. 146 CONG. REC. H7628 (2000) (statements of Rep. Watt & Rep. Lofgren).

373. 2004 ASSESSMENT, *supra* note 18, at 21.

374. *Id.*

375. *Id.* at 22.

376. *Id.* at 5.

377. 8 C.F.R. § 214.11(b)(4) (2003). Factors for determining such hardship or harm include, but are not limited to: the “age and personal circumstances”; “[s]erious physical or mental illness . . . that necessitates medical or psychological attention not reasonably available in the foreign country,”; “[t]he nature and extent of the physical and psychological consequences of severe forms of trafficking in persons”; “[t]he impact of the loss of access to the United States courts and the criminal justice system for purposes relating to the incident of severe forms of trafficking in persons or other crimes perpetrated against the applicant”; “[t]he reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant would be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons”; “[t]he likelihood of re-victimization and the need, ability, or willingness of foreign authorities to protect the applicant” “[t]he likelihood that the trafficker in persons . . . would severely harm the applicant,”; and “[t]he likelihood that the applicant’s individual safety would be seriously threatened by the existence of civil unrest or armed conflict.” *Id.* §§ 214.11(i)(1)(i)-(viii).

378. 22 U.S.C. § 7107(d) (2005). The statute gives the President discretion to waive sanctions when it is in the national interest of the United States to do so or when it is necessary to avoid significant adverse effects on vulnerable populations, including women and children. *Id.* §§ 7107(d)(4), (5).

Both the original House and Senate versions of the TVPA included sanctions, but they differed as to whether the sanctions should be mandatory or within the President’s discretion. Proponents of mandatory sanctions — “shame sanctions” — argued that governments needed an incentive to meet a threshold of reasonableness. Sabrina Feve & Christina Finzel, *Trafficking of People*, 38 HARV. J. ON LEGIS. 279, 283 (2001). This was the

of State for Global Affairs, described the benefits of discretionary over mandatory sanctions:

Economic sanctions . . . imposed on countries would not punish the principal perpetrators — organized crime syndicates — but governments and people; [i]n the face of a sanctions regime[,] governments may seek to downplay the seriousness of the problem of trafficking to avoid either the direct or political consequences of sanctions, thus chilling the growing phenomenon of international collaboration; and [i]f a sanctions-regime is developed, governments and local populations could come to view the important work of local activists and NGO's to raise the profile of the problem of trafficking as a threat and cease collaboration with these important grassroots efforts.³⁷⁹

It is not clear that even the President's discretionary power to impose sanctions is effective in combating trafficking. Only Tier 3 countries, which in the 2003 Report consisted of fifteen countries,³⁸⁰ face sanctions.³⁸¹ According to John R. Miller, Director of the Office to Monitor and Combat Trafficking in Persons, three months before the deadline for anti-slavery efforts, there was a "flurry of activity" by ten of the fifteen countries.³⁸² President Bush upgraded those ten to Tier 2 on September 10, 2003, leaving only Burma, Cuba, Liberia, North Korea, and the Sudan in Tier 3.³⁸³ The impact of, at most, discretionary sanctions on the policies of these five countries is questionable given their relationships with the United States. Though six new countries were added to the Tier 3 list in the 2004

position taken in the House bill. *Id.* The Senate version of the bill gave the President discretion in imposing sanctions. *Id.* The Conference Committee adopted the Senate position and ultimately both the House and Senate agreed to that version. *Id.*

379. Feve & Finzel, *supra* note 378, at 289 (quoting *International Trafficking in Women and Children: Prosecution, Testimonies, and Prevention: Hearing Before the Subcomm. on Near Eastern and South Asian Affairs of the Senate Comm. on Foreign Relations*, 106th Cong. (2000)).

380. Belize, Bosnia and Herzegovnia, Burma, Cuba, Dominican Republic, Georgia, Greece, Haiti, Kazakhstan, Liberia, North Korea, Sudan, Suriname, Turkey, and Uzbekistan. 2003 TIP REPORT, *supra* note 25, at 21.

381. *Id.* at 13.

382. John R. Miller, Op-Ed., *Slavery in 2004*, WASH. POST, Jan. 1, 2004, at A25.

383. Presidential Determination with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, 68 Fed. Reg. 53,871 (Sept. 15, 2003), available at www.state.gov/g/tip/rls/prsr/23962.htm.

Report,³⁸⁴ by September 2004 four of these countries had been upgraded to the Tier 2 Special Watch List.³⁸⁵

The TVPRA modified the original three-tier system by adding a Tier 2 Special Watch List.³⁸⁶ Countries on the Special Watch List are “countries that the Secretary of State determines requires [sic] special scrutiny during the following year” and are subject to an interim assessment submitted to Congress.³⁸⁷ The creation of the Special Watch List suggests a reluctance to assign a country to Tier 3 status, thereby making that country possibly liable to the imposition of sanctions. Yet it also suggests a concern that a number of countries cannot accurately be described as making progress as required under Tier 2. Twenty-seven countries are currently on the Special Watch List.³⁸⁸ The effectiveness of this modification remains to be seen.

As to the success of the Act internally, some victims within the United States have clearly benefitted from the protections. As of March 15, 2004, the Department of Health and Human Services had certified 491 victims of trafficking, enabling them to receive the same services as refugees.³⁸⁹

The number of criminal prosecutions, however, remains low. In fiscal years 2001, 2002, and 2003, the Department of Justice initiated prosecutions of 110 traffickers and secured 78 convictions and guilty pleas.³⁹⁰ On an annual basis these figures are modest. In Fiscal Year 2003, for example, a total of twelve trafficking prosecution cases were filed, thirty-one defendants were charged, and a total of twenty-six convictions were secured.³⁹¹

384. These countries are: Bangladesh, Sierra Leone, and Venezuela (in Tier 2 in the 2003 Report) and Ecuador, Equatorial Guinea, and Guyana (not included in the 2003 Report). 2004 TIP REPORT, *supra* note 16, at 39. In the 2004 Report, Bangladesh, Guyana, Ecuador, and Sierra Leone had been upgraded. *Id.*

385. Presidential Determination with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons, 69 Fed. Reg. 56,155 (Sept. 20, 2004), *available at* <http://www.state.gov/g/tip/rls/prsrl/36127.htm>. In 2005, Sierra Leone remained on the Tier 2 Watch List, Bangladesh and Guyana were further upgraded to Tier 2, and Ecuador was returned to Tier 3. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 42 (2005) [hereinafter 2005 TIP REPORT].

386. Pub. L. No. 108-193, § 6(e), 117 Stat. 2875 (2003) (amending section 110(b) of the Trafficking Act, 22 U.S.C. § 7107(b)).

387. *Id.* § 7107(b)(3)(A).

388. 2005 TIP REPORT, *supra* note 385, at 42.

389. U.S. DEP'T OF STATE, FACT SHEET ON RECENT DEVELOPMENTS IN U.S. GOV'T EFFORTS TO END HUMAN TRAFFICKING (Mar. 18, 2004), *available at* www.state.gov/g/tip/rls/fs/28548.htm.

390. 2004 TIP REPORT, *supra* note 16, at 258. *See also* 2004 ASSESSMENT, *supra* note 18, at 25.

391. 2004 ASSESSMENT, *supra* note 18, at 27.

One large prosecution under the Trafficking Act successfully resulted in a guilty verdict against Kil Soo Lee, the owner of a garment factory in American Samoa.³⁹² Lee was charged with illegally confining and using as forced labor over 200 Vietnamese and Chinese garment workers.³⁹³ Yet, cases are typically only brought against an individual defendant, such as Lee, or a group of up to four defendants — hardly organized crime syndicates. Considering the tens of thousands of trafficking victims in the United States and its territories, these numbers are very small indeed.³⁹⁴

Though enforcement of the law is critical, it does little to combat the economic, social, and political conditions in countries of origin that create the environment traffickers exploit. Some trafficking victims, unlike the victims of the eighteenth century slave trade, may initially become involved because of their desire for a better life. Countries of origin are typically poor, with cultural practices that subjugate women, and provide unequal economic and educational opportunities for women and girls.³⁹⁵ As one author has noted, “[p]overty, illiteracy, economic crises, and regional and civil conflicts all have a disproportionate effect on women, and combined with low social status, make them more vulnerable to trafficking.”³⁹⁶ Economic desperation is a major cause of trafficking.³⁹⁷ In the economic dislocation brought about by globalization and a transfer to a market economy, women disproportionately suffer from unemployment.³⁹⁸ Even when employed, women are frequently

392. *United States v. Kil Soo Lee*, 159 F. Supp. 2d 1241 (D. Haw. 2001); John Ashcroft, Att’y General, Prepared Remarks Regarding Human Trafficking (Jan. 29, 2004), available at <http://www.usdoj.gov/archive/ag/speeches/2004/12904aghumantrafficking.htm> [hereinafter Ashcroft Remarks].

393. Ashcroft Remarks, *supra* note 392.

394. The U.S. Government concedes that “in relation to the estimated magnitude of the problem, the number of cases remains low.” U.S. DEPT OF JUSTICE, ASSESSMENT OF U.S. ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 11 (2003), available at http://www.usdoj.gov/crt/crim/wetf/us_assessment.pdf.

395. See, e.g., *Prepared Statement of Ruchira Gupta, Consultant on Violence Against Women, UNICEF, and Field Producer of Emmy-Winning Documentary, The Selling of Innocence, Before the Senate Foreign Relations Comm. Near Eastern and South Asian Affairs Subcomm.*, Federal News Service, Feb. 22, 2000 (“[T]he root causes of trafficking often lie in unequal treatment of women and girl-children, discrimination against minorities, and economic policies which fail to secure universal access to education and legal protection.”). See also Abramson, *supra*, note 293, at 491-92; Hartsough, *supra* note 27, at 78; Raghu, *supra* note 32, at 146.

396. Hyland, *supra* note 26, at 35.

397. E.g., Ryf, *supra* note 16, at 62.

398. See, e.g., Corrigan, *supra* note 32, at 157 (“[T]rafficking generally originates in impoverished areas that lack viable economic opportunities for women.”); Enck, *supra* note 309, at 387-88; Haynes, *supra* note 20, at 256 (“Trafficking in women is fueled by poverty,

denied equal wages or equally lucrative jobs.³⁹⁹ Added to these economic factors are traditional values and cultural practices which devalue women and girls,⁴⁰⁰ treat children like possessions,⁴⁰¹ and promote the sexual and economic exploitation of women and girls.⁴⁰² Finally, along with economic or social crises, the country may be in political turmoil, engaged in racial or ethnic oppression, or at war.⁴⁰³ The most vulnerable may face limited options and have little information about the horrors that await.⁴⁰⁴

Upon arrival in the destination country, however, the promises of a better life are revealed to be false. Women are often recruited by promises of better employment opportunities through jobs as waitresses, nannies, or models, or by false promises of marriage, only to be stripped of their travel documents and forced into prostitution or sweatshop labor.⁴⁰⁵ Workers are forced to pay back exorbitant 'debts' owed for travel documents and transportation costs.⁴⁰⁶ The trafficking victims are often helpless to escape their slavery or slavery-like conditions and controlled by violence or

and women in transitioning and developing countries are especially vulnerable."); Murray, *supra* note 316, at 500-01; RICHARD, *supra* note 16, at 43.

399. See, e.g., Joshi, *supra* note 27, at 33-34; Murray, *supra* note 316, at 491; Abigail Schwartz, *Sex Trafficking in Cambodia*, 17 COLUM. J. ASIAN L. 371, 413, 419 (2004).

400. See, e.g., Corrigan, *supra* note 32, at 208 (noting the "unequal status of women in many countries around the world, which includes higher levels of poverty and unemployment for women, and discriminatory treatment of women as property and sexual objects"); RICHARD, *supra* note 16, at 1 (commenting on the "unequal status of women and children in the source and transit countries, including harmful stereotypes of women as property, commodities, servants, and sexual objects").

401. See, e.g., Joshi, *supra* note 27, at 35 ("Since many countries view daughters as economic burdens, very poor and sometimes desperate parents will sell their daughters to traffickers."); Schwartz, *supra* note 399, at 404 (discussing the Cambodian tradition of "treating children like possessions").

402. See, e.g., Murray, *supra* note 316, at 491 ("The gendered nature of trafficking derives from laws and customs that have universally and historically promoted the sexual and economic exploitation of women and girls."). See also Haynes, *supra* note 20, at 252.

403. E.g., 2003 TIP REPORT, *supra* note 25, at 8-9; Haynes, *supra* note 20, at 226; King, *supra* note 26, at 299; Raviv, *supra* note 17, at 661; Ryf, *supra* note 16, at 49.

404. The negative consequences of trafficking do not trickle back to rural areas and at-risk populations because victims are afraid or ashamed to return home, and the impression that dominates is that of the "success stories." 2003 TIP REPORT, *supra* note 25, at 7-8.

405. E.g., Feve & Finzel, *supra* note 378, at 280; Hartsough, *supra* note 27, at 81-82.

406. Joshi, *supra* note 27, at 47. "Debt bondage" is defined as:

[T]he status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services and not respectively limited and defined.

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3. See also 22 U.S.C. § 7102(4) (2005).

threat of violence.⁴⁰⁷ Victims face physical and psychological abuse, a lack of laws to protect them, governmental indifference or even hostility to their situation, personal isolation, and powerlessness.⁴⁰⁸

In light of the difficulty of prosecuting organized crime targets, the prevention of trafficking must receive renewed attention. Vigorous and sustained efforts must be made to improve the living conditions of women and children, especially girls, in countries of origin. One aspect of this effort must be to increase the participation of women in democratic institutions where they customarily have been denied access to political power. In addition, raising the educational level of women can have a transformative effect on a society. This may result in greater economic opportunities for women and improved social development through longer life expectancy, lower child mortality, and greater control of resources.⁴⁰⁹ Greater economic assistance should be directed specifically to women through micro-credit and other programs to generate small businesses. Vocational training should be further developed. Public awareness programs in source countries, through radio, television, newspapers, and magazines, should be expanded to expose the truth about trafficking and to warn of its risks.⁴¹⁰

CONCLUSION

In *Benito Cereno*, Herman Melville tells a story in which human trafficking and enslavement were taken as a matter of

407. See, e.g., 22 U.S.C. § 7101(b)(6) (2005). See also Gold, *supra* note 25, at 118-20; Hartsough, *supra* note 27, at 80-82; Potts, *supra* note 15, at 229-30; Ryf, *supra* note 16, at 45.

408. See, e.g., 22 U.S.C. § 7101(b)(17) (2005) ("Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves."); Feve & Finzel, *supra* note 378, at 282 ("This treatment criminalizes the victims and fosters the misperception that trafficking is analogous to illegal immigration or undocumented labor."); Raviv, *supra* note 17, at 663 ("Victims are usually kept in appalling conditions, they enjoy no freedom of movement, they are constantly threatened and abused, their living area is small and dirty, their access to medical care is very limited if it exists at all."); Ryf, *supra* note 16, at 51-52 ("When authorities discover victims they often suffer greater punishments than their traffickers. The immigrants are treated as illegal aliens and are fined, imprisoned, and deported for the prostitution and other illegal activities they have committed."). See also Hartsough, *supra* note 27, at 97 (quoting *The Sex Trade: Trafficking on Women and Children in Europe and the United States: Hearing Before the Comm'n on Sec. and Cooperation in Europe*, 106th Cong. 1 (1999) (opening statement by Christopher H. Smith, Chairman, CSCE)) ("Ironically, it is the women who are trafficked who end up being arrested in brothel raids, locked up, and then deported as illegal immigrants, while their perpetrators rarely suffer repercussions for their actions.").

409. See, e.g., Schwartz, *supra* note 399, at 428-30.

410. See, e.g., RICHARD, *supra* note 16, at 43-44; Abramson, *supra* note 293, at 498; Hyland, *supra* note 26, at 55; Schwartz, *supra* note 399, at 422.

course⁴¹¹ and laws protected not the victims of slavery, but the slave masters' right to their property. When Melville wrote *Benito Cereno* in 1855, slavery was legal under positive law in a number of states, the federal government had enacted a statute which required American citizens to return fugitive slaves to their masters, and the Supreme Court of the United States upheld that statute. The novella shows the injustice in the very existence of slavery and the failure of the law to support a moral position opposing slavery.

Today, the tension between natural and positive law no longer exists. There are both a moral statement opposing human trafficking and international and national laws opposing it. The United Nations Universal Declaration of Human Rights and other international conventions affirm that moral opposition. Both the U.N. Protocol and the TVPA have sent the message that human trafficking is immoral and illegal, and that the law will now punish the traffickers and offer protection to the victims. The existence of these laws is essential. Thus far, however, they have not been enforced as aggressively as necessary against either individual defendants or, more importantly, the organized crime operations that the Crime Convention was enacted to attack. Given the great number of persons who have been trafficked throughout the world and into the United States, successful convictions of two or three defendants at a time will not make significant inroads on the problem. Governments must focus their efforts on major trafficking syndicates. On a second front, governments in wealthier destination countries should intensify their efforts to deal with the preventive aspects of trafficking, focusing on economic and political conditions in countries of origin which make women and girls vulnerable to the false promises of traffickers.

411. MELVILLE, *supra* note 6, at 39 (Amaso Delano describes the Spanish ship as "carrying Negro slaves, amongst other valuable freight.").