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Janie A. Chuang, Washington College of Law

*Rescuing Trafficking from Ideological Capture:  
Anti-Prostitution Reform and its Influence on U.S.  
Anti-Trafficking Law and Policy*

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RESCUING TRAFFICKING FROM IDEOLOGICAL  
CAPTURE: ANTI-PROSTITUTION REFORM AND ITS  
INFLUENCE ON U.S. ANTI-TRAFFICKING LAW AND  
POLICY

*Janie A. Chuang*

INTRODUCTION

In the decade since it became a priority on the U.S. national agenda, the issue of human trafficking has spawned enduring controversy. Although new legal definitions of trafficking have been codified in international and U.S. laws since 2000, what conduct qualifies as “trafficking” remains hotly contested. Despite shared moral outrage over the plight of trafficked persons, debates over whether trafficking encompasses voluntary prostitution is an issue that continues to rend the anti-trafficking advocacy community. In many respects, the trafficking debate has become as intractable as debates over abortion and other contentious social issues. Attempts to equate trafficking with slavery invite equal parts disdain and favor — that analogy often rejected for its insensitive and legally inaccurate conflation with trans-Atlantic slavery, yet simultaneously embraced for capturing the moral urgency of addressing this human rights problem. The trafficking movement itself has been attacked by those who believe that it is built on specious statistics concerning the magnitude of the problem, and contrary to human rights goals because it draws attention away from migrants’ rights and efforts to combat slavery in all its contemporary forms.

U.S. law and policy has fueled controversy over anti-trafficking strategies, both at home and abroad. In 2000, the United States led negotiations over a new international law on trafficking, the U.N. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (UN Trafficking Protocol).<sup>1</sup> At the same time, the United States developed a comprehensive domestic law on trafficking, the U.S. Trafficking Victims Protection Act of 2000 (“TVPA”).<sup>2</sup> Both instruments

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<sup>1</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. GAOR, 55<sup>th</sup> Sess., U.N. Doc. A/55/383 (Nov. 15, 2005) [hereinafter U.N. Trafficking Protocol].

<sup>2</sup> Trafficking Victims Protection Act of 2000, Pub.L.No. 106-386 § 2A, 114 Stat. 1464 (2000) [hereinafter TVPA], as supplemented by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L.No. 108-193, 117 Stat. 2875 [hereinafter 2003

define trafficking as the movement or recruitment of men, women, and children, using force, fraud, or coercion for purpose of subjection to involuntary servitude or slavery in a wide variety of sectors. These legal definitions embodied a concerted effort to move away from traditional views limiting trafficking to women and girls trafficked for sexual exploitation, and towards a broader understanding of the phenomenon as also entailing practices involving the non-sexual exploitation of women, men, and children, which are believed to comprise the greater proportion of trafficking activity world-wide.

Since these laws were developed, however, anti-trafficking laws and policies — both within the United States and abroad — have remained focused on sex trafficking and prostitution, often conflating the two practices. This focus reflects the potent influence of prostitution reform debates on the anti-trafficking movement. Those debates have long embroiled anti-trafficking advocates and policymakers in a struggle over whether, on one hand, all prostitution is inherently coercive and therefore a form of trafficking, or, on the other, the trafficking label should be applied only to instances of *forced* prostitution. Since 2001, the United States has adopted the former position. That position marks the ascendance of “neo-abolitionists,” made up of an unlikely alliance of feminists and evangelical Christians, who have successfully used the anti-trafficking movement to pursue abolition of all prostitution around the world.

This Article examines the prostitution reform debates on U.S. anti-trafficking policy, with a focus on assessing their effects in the international arena. In Part I, the Article describes the prostitution reform debates and their influence on efforts to develop international and U.S. anti-trafficking laws and policies. The discussion spotlights how the prostitution reform debates have impeded broader efforts by advocates to prioritize protection of trafficked persons’ human rights in the face of States’ emphasis on an aggressive criminal justice response to trafficking. Part II describes the ways in which the anti-prostitution side of the reform debates – referred to in this Article as the “neo-abolitionist” position – has gained dominance during the formative years of global anti-trafficking law and policy development, effectively transforming the anti-trafficking movement into a anti-prostitution campaign. The discussion traces how the neo-abolitionists have successfully promoted their anti-prostitution agenda worldwide through targeted legal reforms that condition U.S. financial assistance to governments, NGOs, and government contractors on recipients’

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TVPRA], the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) [hereinafter 2005 TVPRA], and the Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. \_\_\_\_\_, \_\_\_\_ Stat. \_\_\_\_ (2008) [hereinafter 2008 TVPRA] (codified at 22 U.S.C. §7101).

commitment to adopting an anti-prostitution stance. The discussion furthermore illustrates how the neo-abolitionists have shaped common understandings of the problem of human trafficking through deployment of a reductive narrative of trafficking that simplistically depicts trafficking as involving women and girls forced into sexual slavery by social deviants. This Article argues that this power to control the meaning of trafficking is perhaps the greatest of neo-abolitionist gains, through its global influence over how anti-trafficking interventions are constructed and implemented on the ground.

In Part III, the Article critically assesses the consequences of the neo-abolitionists' rise to power in the trafficking field. The discussion highlights how neo-abolitionist legal reforms and the reductive narrative promote criminal justice responses that target prostitution, and leave unquestioned exploitative labor practices and migrant abuse that characterize the vast majority of trafficking cases. In so doing, neo-abolitionism neglects the pervasive labor migration problem resulting from globalizing trends that drive lower-income women and men into patterns of risky migration and exploitative informal sector employment. Moreover, by invoking comparisons to slavery and capitalizing on stereotypes of innocent, naïve Third World women, neo-abolitionist discursive practices sustain a crusader impulse that resists a self-critical evaluation and assessment of neo-abolitionist policymaking on the ground. In turn, this impulse has allowed ideology to overshadow social science data that call into question the effectiveness of neo-abolitionist strategies in advancing even an anti-prostitution — much less an anti-trafficking — agenda. The Article concludes by underscoring the need to resist becoming mired in ideological debates over prostitution and to focus instead on the actual impact of interventions on potential and actual trafficked persons.

## I. PROSTITUTION REFORM DEBATES AND THE ANTI-TRAFFICKING MOVEMENT

### A. *The Problem of Human Trafficking*

Although trafficking is not a new phenomenon, it has been only within the last decade that countries have developed comprehensive anti-trafficking laws at the international and national levels. During the mid-1990s, a confluence of factors brought attention to the problem of trafficking — most notably, the rise in the women's human rights movement, increased international labor migration in response to globalization,

feminization of poverty and hence, of migration, and growing recognition of the role of organized crime in the clandestine movement of peoples. Increasing numbers of men, women, and children were being trafficked into exploitation in a wide range of economic sectors including, e.g., agriculture, construction, domestic work, and the sex industry.

As Saskia Sassen explains, trafficking is anchored in particular features of the current globalization of economies that feed emigration push and immigration pull factors.<sup>3</sup> On the push side, trade liberalization, structural adjustment policies, among other trends, have limited job opportunities and social services available in poorer countries – their availability further limited by gender, class, race discriminatory practices.<sup>4</sup> On the pull side, destination countries' unrelenting demand for cheap migrant labor, combined with advances in information technology access, have fed the expectation that jobs abroad for poor, unskilled laborers are plentiful.<sup>5</sup> But as individuals are migrating further, farther, and in far greater numbers than ever before,<sup>6</sup> the opportunities for lawful migration have dramatically diminished as favored destination countries tighten their borders.<sup>7</sup> Offers by third parties to facilitate migration are all the more attractive to those desperate to migrate. Traffickers fish in this stream of migration, profiting off the tension between, on the one hand, the necessity to migrate, and on the other, increased restrictions on lawful migration.<sup>8</sup> With tightened borders, the risks and costs of smuggling operations rise, causing smugglers – who facilitate clandestine migration for profit – to engage in trafficking in order to reap additional profits from the exploitation of the migrants' labor post-migration.<sup>9</sup> [insert cite to HRW analysis: crackdown on refugee/asylum regimes --> more smuggling --> more trafficking]

During the 1990s, it quickly became evident that the United States was a major destination country for all forms of human trafficking, yet outdated criminal laws made it difficult for U.S. prosecutors to [obtain] trafficking convictions.<sup>10</sup> Eager to address this global problem, in March

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<sup>3</sup> Saskia Sassen, *Women's Burden: Counter-Geographies of Globalization and the Feminization of Survival*, 71 NORDIC J. INT'L L. 255, [257] (2002).

<sup>4</sup> [insert citation to Ghosh]

<sup>5</sup> [insert citations to Ghosh, Trafficking-Migration Nexus report by Anti-Slavery International]

<sup>6</sup> [insert citation to current IOM migration statistics]

<sup>7</sup> [cross-reference Trafficking-Migration Nexus; Sassen]

<sup>8</sup> [cross-reference Sassen]

<sup>9</sup> [insert citation to Migrant Smuggling Protocol definition of smuggling; insert citation to study re: smugglers becoming traffickers]

<sup>10</sup> The existing criminal law prohibition against involuntary servitude did not factor in the psychological (as opposed to physical) coercion that accounted for why many

1998, President Clinton issued a Presidential Directive outlining a comprehensive and integrated policy framework based on the “3P’s” – the prosecution of trafficking, prevention of trafficking, and protection of trafficked persons<sup>11</sup> – to guide U.S. anti-trafficking initiatives at home and abroad. Meanwhile, at the international level, it was clear that existing international law on trafficking, which dealt only with trafficking for sexual purposes,<sup>12</sup> was inadequate to address modern manifestations of trafficking, including the trafficking of men, women, and children trafficked into non-sexual exploitation.<sup>13</sup>

International human rights advocates – this author included – advocated for the development of a new international on trafficking. Whereas existing international law approached trafficking as a problem of sexual violence against women and girls, modern manifestations of trafficking – i.e., also encompassing trafficking of persons into non-sexual exploitation – captured its essential nature as a phenomenon deeply rooted in migrant abuse and labor exploitation. Rights advocates believed that a new international anti-trafficking law trafficking was necessary to redefine trafficking as a broader phenomenon involving the recruitment and/or movement of (adult) persons, using force, fraud, or coercion, for the purpose of subjecting a person to exploitation (sexual or non-sexual) – for children, the element of force, fraud, or coercion would not be required, given children’s inability to consent.<sup>14</sup> Moreover, a new international law

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trafficked persons were unable to leave their exploitative working conditions. [cite to involuntary servitude definition]

<sup>11</sup> [cite the Presidential directive – pull citation from Michigan article]

<sup>12</sup> See Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 [hereinafter “1949 Convention”].

<sup>13</sup> Coverage of trafficking issues had traditionally fallen within the purview of the U.N. human rights agency, though, truth be told, subject to mechanisms that had produced scattershot reporting on the issue. See Anne Gallagher, *Human Rights and Human Trafficking: A Quagmire?* 49 VA. J. INT’L L. 789, 792-93 (2009) [hereinafter Gallagher, *Quagmire*]. Moreover, while trafficking was explicitly prohibited in two human rights treaties, the Convention on the Rights of the Child (“CRC”), and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), neither treaty elaborated on the nature of states’ obligations, and the treaties’ respective expert committees produced little substantive guidance. See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, arts 35 (States Parties to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”); arts 32 and 34 (children to be protected from all forms of economic exploitation, sexual exploitation and sexual abuse); Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (prohibiting trafficking and exploitation of the prostitution of women). See also Gallagher, *Quagmire*, at 792-93, 824-25.

<sup>14</sup>

on trafficking would provide the necessary infrastructure to ensure cooperation among governments with respect to protection of trafficked persons, prosecution of traffickers, and prevention of the underlying causes of the phenomenon.

By 1998, the Clinton Administration was leading negotiations over a new international law on trafficking – the Trafficking Protocol to the then-draft U.N. Convention Against Transnational Organised Crime – while simultaneously working with Congress to develop a domestic anti-trafficking law. Rights advocates were deeply troubled, however, by the fact that the first international anti-trafficking instrument to be drafted in a half-decade was to take the form of a crime control treaty. While rights advocates recognized that criminal prosecution of traffickers was a first line prevention strategy for combating trafficking, they were nonetheless concerned that the criminal justice approach could provide a politically convenient means for governments to justify immigration restrictions under the guise of protecting trafficked persons. Rather than being positioned to articulate an affirmative approach to dealing with the phenomenon of trafficking, human rights advocates were forced to work within the crime control paradigm, attempting to inject a human rights perspective wherever possible.

Human rights advocates thus approached both the international and U.S. anti-trafficking law negotiations aiming to demonstrate how the success of criminal prosecutions was inextricably linked to protections of trafficked persons' human rights. Given the clandestine nature of the trafficking phenomenon, victim testimony is crucial to the success of these prosecutions. But it is best procured through robust protection of and support for trafficked persons, including witness protection, social services including legal and medical assistance, and housing, and protections against involuntary repatriation.<sup>15</sup> Even this limited platform proved difficult for rights advocates to advance, however, due to the highly charged debates over prostitution reform, as described below, that sent the negotiations [careening] off on a tangent.

### *B. Two Ideological Approaches: the Prostitution Reform Debates*

Negotiations over the international and U.S. anti-trafficking laws were quickly overtaken by warring feminist factions that battled over the whether the trafficking definition should encompass voluntary prostitution. U.S.-based radical feminists, still smarting from their failed war on pornography and prostitution during the 1980s and early 1990s, had inserted

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<sup>15</sup> [cite to UN negotiations documents – high commissioner's informal note, and SRVAW's position paper]

themselves into the negotiations, viewing the development of anti-trafficking laws as a rare opportunity to criminalize prostitution as a matter of international and U.S. federal law. In response, sex worker groups attended the negotiations with the goal of staving off radical feminist gains, fully realizing that the environment would likely be hostile to any efforts to affirmatively advocate for the treatment of sex as work entitled to labor law protection.

To illustrate how the prostitution reform debates intersected with the development of international and U.S. anti-trafficking law and policy, this section first briefly sketches – in necessarily broad strokes not intended to capture all of their nuances – the views of each side of the debate. The discussion then describes how anti-trafficking law and policy became the vehicle by which these reform activists continue to battle over the reigns of influence over prostitution policy worldwide.

### 1. “Abolitionists”

On one side of the prostitution reform debates are self-described “abolitionists,” who take the position that all prostitution is inherently exploitative and degrading to women, and, in effect amounts to rape or sexual slavery. Often referred to as “radical feminists” or “structuralists,” leading feminist thinkers in this camp include Catherine MacKinnon, Kathleen Barry, and Sheila Jeffreys. “Abolitionist” feminists recognize no distinction between “forced” and “voluntary” prostitution. In their view, choice and consent are not possible because prostitution is an institution of male dominance and results from the *absence* of meaningful choices.<sup>16</sup> Women who (believe they) choose prostitution suffer from a “false consciousness,” or the inability to recognize their own oppression.<sup>17</sup> Whether or not there is (false) consent, prostitution always involves a violation of a human being.

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<sup>16</sup> Catherine MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 28 (1993); KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY: THE GLOBAL EXPLOITATION OF WOMEN* \_\_\_ (1995).

<sup>17</sup> The origin of the term “false consciousness” has been attributed to Marxist philosopher Antonio Gramsci, who used “false consciousness” to refer to a phenomenon “in which the oppressed come to identify with their oppressors, internalize their views, and thus appear to consent to their subordination.” Richard Delgado, *Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 674 (1993) (quoting ANTONIO GRAMSCI, *LETTERS FROM PRISON* (Lynne Lawler ed. & trans., 1973). Some commentators prefer the phrase “internalized oppression” over “false consciousness,” because the latter term “simultaneously emphasizes the importance of internal constraints on identity and avoids the suggestion that ‘true consciousness’ is possible.” Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1703 N.173 (1997).

These feminists strategically embrace the label “abolitionist” in a conscious effort to invoke an analogy to the nineteenth century campaigns to abolish the trans-Atlantic slave trade. The “abolitionist” reference also revives early nineteenth-century feminists’ efforts to eradicate “white slavery,”<sup>18</sup> which initially referred to the system of licensed prostitution that existed throughout much of Europe and parts of the United States.<sup>19</sup> Perceiving prostitution as an international problem, these early feminists focused their attention and rhetoric on the international “traffic” of women and girls. Fueled by Victorian attitudes towards women’s sexuality and concerns over the link between prostitution and disfavored racial minorities, the movement targeted the “export” or “trafficking” of “white” women from Europe and North America for the purposes of prostitution by foreign or immigrant men in the colonial nether regions in Asia, Africa, and South America.<sup>20</sup> Though the “white slavery” phenomenon was far smaller and insignificant than originally depicted,<sup>21</sup> the movement yielded a series of international laws on “white slavery” and “trafficking” beginning in 1904<sup>22</sup> and culminating in the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

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<sup>18</sup> For a fascinating and thorough exploration of these analogies, see Karen Bravo, *Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 2 B. U. INT’L L. J. 207 (2007).

<sup>19</sup> The anti-white-slavery movement initially did not seek to prohibit prostitution, but rather targeted state licensing of prostitution that existed throughout much of Europe and parts of the United States. Ethan Nadelmann, *Global Prohibition Regimes: the Evolution of Norms in International Society*, 44 INT’L ORG. 479, 513-14 (1990). The “white slavery abolitionists,” of whom Josephine Butler is most renowned, felt that “government-licensed prostitution institutionalized oppression and corruption of women and was not successful in stemming the spread of venereal disease.” But “white slavery” soon became synonymous with all prostitution, licensed and unlicensed, and what began as a feminist movement against state regulation and licensing of prostitution ultimately became a broader social purity campaign to abolish prostitution *writ large*. *Id.* at 515.

<sup>20</sup> Dianne Otto, *Lost in Translation*, in INTERNATIONAL LAW AND ITS OTHERS 318, 324 (Anne Orford, ed., 2006); Laura Reanda, *Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action*, 13 HUM. RTS. Q. 202, 207-211 (1991).

<sup>21</sup> Some have described the “white slavery phenomenon” as a “moral panic,” more hype than reality, motivated by Victorian discomfort with women’s sexuality and racist concerns about the perceived links between prostitution and disfavored minorities. See Nadelmann, *supra* note 19, at 514-15; Mary Ann Irwin, “White Slavery” as Metaphor: *Anatomy of a Moral Panic*, 5 EX POST FACTO: THE HISTORY JOURNAL \_\_\_\_ (1996).

<sup>22</sup> These early treaties included the following: International Agreement for the Suppression of the White Slave Traffic (1904); International Convention for the Suppression of the White Slave Traffic (1910); Protocol Amending the 1904 and 1910 Agreement (1948); International Convention for the Suppression of Traffic in Women and Children (1921); International Convention for the Suppression of Traffic in Women of Full Age (1933); and Protocol Amending the 1921 and 1933 Agreements (1947).

(“1949 Convention”).<sup>23</sup> As Diane Otto explains, “[b]y constructing the problem as one of slavery rather than prostitution, these instruments projected the idea that European women could not conceivably ‘consent’ to sex work, especially not with foreign clients.”<sup>24</sup> But while the rhetoric equating prostitution with trafficking and slavery made it into international law, the 1949 Convention ultimately had little impact. Few States were signatories, and, in any event, the treaty lacked an effective monitoring mechanism to ensure State compliance.<sup>25</sup>

Modern-day abolitionist feminists and their religious allies have resurrected the abolitionist rhetoric and campaign, targeting prostitution at a global level. As Jeffreys explains, prostitution is unequivocally damaging to all women because of the fact that if one woman is a prostitute, all women can be treated as prostitutes.<sup>26</sup> Because “voluntary” prostitution, in this view, is an ontological impossibility, the failure of States to prohibit prostitution *writ large* violates women’s rights to sexual autonomy.<sup>27</sup> As victims of male patriarchy, women prostitutes should not be penalized themselves, but pimps, brothel owners and managers, clients, and any third parties who assist women to travel and work in the sex industry should be prosecuted for rape and/or trafficking.

States vary enormously in the way in which they characterize and address prostitution. There are generally four different regulatory modes specific to prostitution regimes, including: (1) complete (“prohibitionist”)

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<sup>23</sup> Article 1 of the 1949 Convention requires States Parties to “punish any person who, to gratify the passions of another:

(1) [p]rocures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

(2) [e]xploits the prostitution of another person, even with the consent of that person.

Article 2 obliges States Parties also to punish any person who:

(1) [k]eeps or manages, or knowingly finances or takes part in the financing of a brothel;

(2) [k]nowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.

See 1949 Convention, *supra* note 12, art. 1.

<sup>24</sup> Otto, *supra* note 20, at 324-25.

<sup>25</sup> Reanda, *supra* note 20, at 210. As Reanda explains, as of March 1988, the 1949 Convention had only 55 States parties, and a follow-up mechanism – which ultimately proved ineffectual – was not established until the mid-1970s. *Id.*, at 210-216. Abolitionist feminists adopted the strategy in the 1980s to mid-1990s of pushing for broader ratification of the 1949 Convention. Although this advocacy strategy succeeded in making the prostitution issue visible, many governments refused to ratify the 1949 Convention out of reluctance to alter their domestic legal systems to comply with its prohibitionist stance. Halley, et al, *supra* note \_\_\_, at 355.

<sup>26</sup> SHEILA JEFFREYS, *THE IDEA OF PROSTITUTION* \_\_\_ (1997).

<sup>27</sup> [cite abolitionist literature]

criminalization; (2) partial (“toleration”) criminalization (3) decriminalization; or (4) legalization of prostitution.<sup>28</sup> The criminalization paradigm views prostitution as a social evil that should be subject to penal measures, though approaches vary as to whether prostitutes themselves are targeted. “Prohibitionist” approaches target all actors (e.g., brothel owners, pimps, johns, prostitutes), whereas “toleration” excludes the prostitute from penal measures otherwise applicable to all other actors. Decriminalization views prostitution as a personal choice between consenting adults, leaves the relationships between prostitutes and pimps, brothel owners, clients, etc. outside the criminal framework, and punishes only non-consensual acts under generally applicable criminal law (e.g., rape, assault). Legalization also seeks to address prostitution outside criminal law, opting for regulation through zoning, licensing, and at times, mandatory health checks.<sup>29</sup>

Abolitionist feminists favor the “toleration” approach to prostitution on grounds that prostitutes are victims and should be exempt from penal sanctions. With respect to the relationship between prostitution and trafficking, abolitionist feminists prefer a definition of “trafficking” that encompasses all (coerced and voluntary) prostitution, thereby criminalizing prostitution as a form of trafficking.

## 2. “Non-Abolitionists” [find better label!]

On the other side of the prostitution reform debate are advocates who share an opposition to the abolitionist agenda, whether for moral or pragmatic reasons, but are otherwise difficult to categorize other than as “non-abolitionists.” Though non-abolitionists often are labeled as “pro-prostitution” by the radical feminists,<sup>30</sup> the reality is that the non-abolitionists have varying levels of comfort/discomfort with the notion of sex as work. Feminists falling into the “non-abolitionist” camp adopt an approach to prostitution/sex work that is consistent with liberal, libertarian,

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<sup>28</sup> UNCHR, ‘Report of the Special Rapporteur on Violence against Women’ (29 February 2000) UN Doc E/CN.4/2000/68 para 21; Janet Halley, Prabha Kotiswaran, Hila Shamir, Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L & GENDER 335, 338-340 (2006).

<sup>29</sup> [insert citation]

<sup>30</sup> As abolitionist Dorchen Leidholdt explains, the “pro-prostitution lobby” is “a network of sex industry enterprises and their front-people bent on legitimizing prostitution as women’s work. Some...are well intentioned. They believe that legitimizing prostitution as a profession will improve the conditions of prostitutes’ lives. Many, however, have a financial or sexual stake in maintaining prostitution.” Dorchen Leidholdt, *Prostitution: a Violation of Women’s Human Rights*, 1 CARDOZO WOMEN’S L.J. 133 (1993).

or materialist feminist discourse.<sup>31</sup> They are united in objecting to the assignment of a “false consciousness” to those who express consent, and believe in the *possibility* of a woman choosing to engage in prostitution. Those at one end of the non-abolitionist spectrum embrace the “pro-prostitution,” or preferably “pro-sex-work,” label based on grounds that sex work is liberatory and the ultimate expression of women’s right to sexual self-determination and equality. Others suggest that the sex-as-liberatory position describes only a very small minority of cases, but nonetheless believe that women can and do choose prostitution from among a set of (albeit constrained) options.

Non-abolitionists are unified, however, in their rejection of criminalization approaches to prostitution. In their view, prohibitionism subjects sex workers to the exploitation that follows from being criminalized and marginalized by working in the informal sector. Even a “toleration” approach at best deprives prostitutes/sex workers of a livelihood by potentially driving customers and bosses away, and, at worse, compromising a prostitute/sex worker’s safety by forcing her to bargain in the shadows and subjecting her to state-sponsored violence or rape by the police.

Non-abolitionists differ, however, over whether decriminalization or legalization is the better approach. For some, legalization has the advantage of formally recognizing prostitution as a valid livelihood option. For others, however, legalization carries the potential for over-regulation by the State, resulting in prostitutes being marginalized in red-light districts and stigmatized as disease-carriers. In this sense, decriminalization is favorable, particularly among some sex worker advocacy groups, because it brings prostitution out from under the thumb of the State. At the same time, decriminalization falls short of official State acceptance of prostitution as a livelihood option, which may be more palatable for non-abolitionists who are uncomfortable with the sex-as-work perspective. [JAC note: need to address abolitionists’ argument that, if prostitution were legalized, welfare reform would force women into prostitution]

With respect to non-abolitionist engagement with the trafficking movement, non-abolitionist feminists insist on a distinction between trafficking and prostitution, with the “trafficking” label applying only to those cases involving forced prostitution.<sup>32</sup> Non-abolitionists agree that where trafficking exists, it should be punished. But absent coercion, force, or fraud, adult sex workers’ agency should be acknowledged and respected.

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<sup>31</sup> Gabrielle Simm, *Negotiating the United Nations Trafficking Protocol: Feminist Debates*, AUSTRALIAN YB INT’L L. 135, 137-42 (200\_\_\_).

<sup>32</sup> Given a child’s inability to consent as a matter of law, the forced vs. voluntary distinction would not apply to child prostitution.

C. [How Prostitution Reform Advocacy Intersected With Anti-Trafficking]

Negotiations over new international and U.S. laws on trafficking soon became the battleground for the prostitution reform debates. International human rights advocates, who had come to the U.N. Trafficking Protocol negotiations with the goal of injecting a rights perspective into this crime control treaty quickly became embroiled in the highly divisive prostitution reform debates.<sup>33</sup> As discussed below, in both international and U.S. fora, negotiations focused on the trafficking definition, specifically whether it ought to encompass all forms of prostitution, leaving less time than necessary for rights advocates to push for substantive rights protections for trafficked persons.

1. UN Trafficking Protocol Negotiations

The prostitution reform battles centered on the definition of trafficking to be included in the Protocol – specifically, whether the trafficking definition would encompass non-coerced, adult migrant prostitution. “Trafficking” is an umbrella concept that encompasses a wide range of fact scenarios sharing three key elements: (1) the recruitment, movement, or harboring of a person, (2) by use of force, fraud, or coercion, (3) for the purpose of placing that person in an exploitative situation. The prostitution reform debates centered on two aspects of the trafficking definition: (1) whether to include an explicit force/fraud/coercion requirement, and (2) whether the listed end purposes of trafficking should include voluntary prostitution. One group of States, supported by abolitionist NGOs referring to themselves as the “International Human Rights Network,” argued that a coercion requirement would legitimize prostitution by creating a false distinction between “forced” and “voluntary” prostitution; they thus also sought to include in the trafficking definition “use in prostitution” as a separate end-purpose.<sup>34</sup> In contrast, another group of States, supported by a group of non-abolitionist NGOs known as the “International Human Rights Caucus” and all but one of the U.N. bodies that intervened in the negotiations,<sup>35</sup> argued in favor of requiring coercion

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<sup>33</sup> See Gallagher HRQ, at 1002. Gabrielle Simm, *Negotiating the United Nations Trafficking Protocol: Feminist Debates*, 23 AUST. YB. INT’L L. 135, 146-154 (200\_\_); Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT’L L. J. 473, 483-492 (2003)

<sup>34</sup> [describe int’l human rights network]

<sup>35</sup> These included the UN Office of the High Commissioner for Human Rights (UNOHCHR), the International Labor Organization (ILO), and the UN Children’s Fund (UNICEF). The UN Working Group on Contemporary Forms of Slavery supported the

and against including non-coerced prostitution as an end-purpose.<sup>36</sup>

After much debate, the States agreed on the following definition of trafficking:

(a)...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, or deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) the consent of a victim of trafficking to the intended exploitation set forth in subparagraph (a) shall be irrelevant where any of the means set forth in subparagraph (a) have been used.<sup>37</sup>

The definition reflects a tenuous compromise on the prostitution debate. Two aspects of the trafficking definition allowed the abolitionists and non-abolitionists to all claim victory: (1) the purported irrelevance of consent, and (2) the inclusion of the undefined terms “exploitation of the prostitution of others and other forms of sexual exploitation.” The abolitionists, on the one hand, lauded the inclusion of language concerning the irrelevance of consent, arguing that that this language, along with language concerning abuse of the victim’s vulnerability brings all migration for prostitution into the ambit of the trafficking definition. The non-abolitionists, on the other hand, interpreted the coercion requirement as excluding consensual migration for prostitution from the scope of the trafficking definition. Contrary to abolitionist claims,<sup>38</sup> they argued, the fact that subparagraph (b) describes “consent” as “irrelevant” does not bring consensual migration within the definition of trafficking but rather serves to prevent traffickers from using victims’ “consent” as a defense to the crime.<sup>39</sup>

The abolitionists heralded the inclusion of the (undefined) terms

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abolitionist view.

<sup>36</sup> [Describe the int’l human rights caucus – Human Rights Caucus, Recommendations and Commentary, informal submission to the June 2000 session of the Ad-Hoc Committee; International Human Rights Law Group, The proposed definition of “Trafficking,” Statement of the June 2000 session of the Ad-Hoc Committee, 7 June 2000.]

<sup>37</sup> Palermo Protocol, *supra* note \_\_\_, art.3.

<sup>38</sup> COALITION AGAINST TRAFFICKING IN WOMEN, GUIDE TO THE NEW U.N. TRAFFICKING PROTOCOL 4 (2001) [hereinafter “CATW Guide”].

<sup>39</sup> Gallagher HRQ, *supra* note \_\_\_, at 985.

“exploitation of the prostitution of others” and “other forms of sexual exploitation” as signifying the indivisibility of trafficking and exploitation of prostitution.<sup>40</sup> In contrast, non-abolitionists took heart that the terms “exploitation of prostitution of others” and “other forms of sexual exploitation” were purposely left undefined, leaving the legal treatment of prostitution to be addressed on a state-by-state basis, as explained in the Interpretative Notes to the Protocol:

The *travaux préparatoires* should indicate that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the Protocol which is therefore *without prejudice to how States Parties address prostitution in their domestic laws*.<sup>41</sup>

Ultimately, the abolitionists did not succeed in achieving a clear statement supporting abolition of prostitution *writ large* as a matter of international law.<sup>42</sup>

But the biggest losers in the prostitution debates were the trafficked persons and rights advocates who had come to Vienna with the goal of including in the treaty substantive rights protections for trafficked persons, including, e.g., the right to social services and support, and the right to residency status in the country of destination.<sup>43</sup> Instead, time and effort international human rights organizations and the UN human rights organs could have devoted to advancing the human rights agenda were diverted to trying to avoid the prostitution wars or, when forced into taking part, to defend against partisan attacks.<sup>44</sup>

For example, notwithstanding their conscious effort to remain

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<sup>40</sup> CATW Guide, *supra* note 38, at 5.

<sup>41</sup> Interpretative Notes for the Official Records (*travaux préparatoires*) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, ¶64, U.N. Doc. A/55/383/Add.1 (*emphasis added*).

<sup>42</sup> Radical feminists nonetheless have taken advantage of the language concerning the irrelevance of consent to support their reading of the UN Trafficking Protocol as supportive of the abolitionist position. See, e.g., *Brief of Amicus Curiae, The Coalition Against Trafficking in Women*, in *Dart v. Craigslist, Inc.*, Case No. 09 CV 1385 (N.D. Illinois) (filed August 6, 2009), available at <http://http://action.web.ca/home/catw/readingroom.shtml?x=126762>

<sup>43</sup> See, e.g., [Cite to Radhika position paper and UN High Commissioner’s informal note]

<sup>44</sup> Though one could agree on the issue of rights protection while taking divergent positions on the trafficking definition, the International Human Rights Network refused the International Human Rights Caucus’s invitation to join forces to advocate for substantive rights protections. Melissa Ditmore and Marjan Wijers, *The Negotiations on the UN Protocol on Trafficking in Persons*, 4 NEMESIS 79, 85-86 (2003).

neutral on the prostitution reform issue, those representing the International Labor Organization (“ILO”) and the UN Office of the High Commissioner for Human Rights (“OHCHR”) (including this author), were quickly labeled as “pro-prostitution” and allies of the sex industry by abolitionist groups for their refusal to endorse the abolitionist agenda.<sup>45</sup> Such labeling is emblematic of the way in which the various non-abolitionist perspectives invariably are collapsed into one. A number of human rights advocates are deeply ambivalent on the prostitution-as-violence vs. prostitution-as-work debate, uncomfortable with the rapid growth of the sex industry while at the same time, supportive of defending the human rights of those in the sex industry to not be subjected to the abuses so many suffer, including violence from state actors. Far from being “pro-prostitution,” many reject the abolitionist agenda on pragmatic grounds. For example, some argue that efforts to eradicate prostitution drive the industry further underground and ultimately endanger the prostitutes/sex workers. They argue that the construction of prostitution as rape is morally and politically dangerous because it sends a message that prostitutes are publicly available to be raped – a bias not uncommonly held by law enforcement officials, judges, and prosecutors. Moreover, even where anti-prostitution measures ostensibly protect the prostitute/sex worker, societal bias against prostitutes more often than not infuses their “victimhood” with a measure of guilt or unworthiness such that the prostitutes/sex workers end up penalized in practice.

While the ILO and OHCHR, among other human rights advocates, agreed with the non-abolitionist NGO lobby with respect to maintaining a distinction between trafficking and voluntary prostitution, they did not share the sex worker groups’ goal of using the anti-trafficking law to establish affirmative rights for those in the sex industry. Indeed, from the start, sex worker groups were highly skeptical that anti-trafficking legislation could advance their goal of removing sex-work specific offenses from criminal law and applying worker’s rights protections to sex workers.<sup>46</sup> As the Network of Sex Work Projects (“NSWP”) publicly stated in opposing the UN Trafficking Protocol, anti-trafficking measures historically

“have been more concerned with protecting women’s ‘purity’ than with ensuring the human rights of those in the sex industry. This approach limits the protection afforded by these instruments to those who can prove that they did not consent to work in the sex industry.

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<sup>45</sup> CATW, for example, criticizes OHCHR and the ILO for favoring a definition of trafficking that included the requirement of force or slavery-like conditions, and for objecting to inclusion, on grounds of vagueness and imprecision in international law, of the term “sexual exploitation” in the trafficking definition. CATW Guide, *supra* note 38, at 6.

<sup>46</sup> Jo Doezeema, *Now You See Her, Now You Don’t: Sex Workers at the UN Trafficking Protocol Negotiation*, 14 SOCIAL LEGAL STUDIES 61, 76 (2005).

It also ignores the abusive conditions within the sex industry, often facilitated by national laws that place (migrant) sex workers outside the range of rights granted to others as citizens and workers.<sup>47</sup>

Concerned, however, that without the input of sex worker organizations, the new trafficking law could harm sex workers, sex worker groups attempted to influence the International Human Rights Caucus behind the scenes. Ultimately, however, as foreshadowed by the NSWP statement, the Trafficking Protocol “offers nothing to sex workers whose human rights are abused, but who fall outside of the narrowly constructed category of ‘trafficking victim.’”<sup>48</sup>

In fact, the Trafficking Protocol does not offer much even to trafficking victims, in large part, in this author’s view, due to the definitional debates consuming such a large proportion of the drafting sessions that relatively little time was left for the drafters to consider the rights protections enumerated later in the draft treaty.<sup>49</sup> The prostitution reform debates permitted States to avoid mandatory protections for trafficked persons. Thus, rather than calling upon States Parties to support and protect trafficked persons as a matter of hard obligation, the UN Trafficking Protocol urges States Parties to *endeavor* and *consider* such measures “in appropriate cases and to the extent possible under domestic law.”<sup>50</sup> Rights advocates’ efforts to include a provision protecting trafficked persons from prosecution for trafficking-related offenses, or offenses committed as a result of their having been trafficked – e.g., illegal immigration, prostitution – was soundly defeated. Rights advocates were, however, able to secure a savings clause reminding States Parties of the continuing application of international human rights, humanitarian, and refugee law to trafficked persons.<sup>51</sup>

## 2. U.S. Trafficking Victims Protection Act of 2000

Unsuccessful in their efforts to abolish prostitution as a matter of international law, the abolitionist groups – which were largely U.S.-based – turned their attention to ongoing efforts by Congress to develop a comprehensive U.S. domestic law on trafficking. The feminist groups that had led the abolitionist fight during the UN Trafficking Protocol

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<sup>47</sup> *Id.* at 76, citing the NSWP Commentary on the Draft Protocol to Combat International Trafficking in Women and Children Supplementary to the Draft Convention on Transnational Organized Crime (19-29 January 1999).

<sup>48</sup> *Id.* at 80.

<sup>49</sup> [find source to back this up]

<sup>50</sup> UN Trafficking Protocol, *supra* note \_\_\_\_, art. 6.

<sup>51</sup> UN Trafficking Protocol, *supra* note \_\_\_\_, art. 14.

negotiations found new allies in neoconservatives and evangelical leaders.<sup>52</sup> This evangelical and feminist coalition (the “neo-abolitionists”), which together had launched a failed war on pornography in the 1980s, now sought to establish the global abolition of prostitution as a key element of U.S. foreign policy.

During the Protocol negotiations, the Clinton Administration had led efforts to exclude non-coerced sex work from the trafficking definition,<sup>53</sup> notwithstanding intense domestic pressure from conservative and religious groups as well as abolitionist feminists.<sup>54</sup> The neo-abolitionists were far more effective on U.S. soil, working closely with Congressman Christopher Smith (R-NJ) to sponsor an anti-trafficking bill that was later enacted into law as the Trafficking Victims Protection Act of 2000 (TVPA).<sup>55</sup> Consistent with neo-abolitionist preferences, Smith’s initial bill focused only on the trafficking of women and children into the sex industry.<sup>56</sup> As Srikantiah notes, “[t]he image that permeated the legislative record reflected the abolitionist/conservative perspective, centering on the female ‘innocent victims’ of sex trafficking whose participation was ‘involuntary’ and who would ‘face retribution or other serious harm upon return.’”<sup>57</sup> A competing bill favored by the Clinton Administration incorporated a broader definition of trafficking that, consistent with the UN Trafficking Protocol, addressed trafficking of men, women, and children, for both sexual and non-sexual purposes.<sup>58</sup> Under pressure to adopt the more expansive view,

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<sup>52</sup> Key actors in the collation included feminist organizations Coalition Against Trafficking in Women (CATW) and Equality Now, neoconservative Michael Horowitz of the Hudson Institute and evangelical leader Chuck Colson. Defending this odd alliance, Laura Lederer, anti-pornography activist and later a Bush administration anti-trafficking official, explained that the religious organizations had brought “a fresh perspective and biblical mandate to the women’s movement” and that the alliance had strengthened women’s groups who “would not be getting attention internationally otherwise.” Anna-Louise Crago, *Unholy Collaboration*, RABBLE (May 21, 2003).

<sup>53</sup> Gallagher, *supra* note \_\_\_\_, at 985n.63.

<sup>54</sup> In a series of op-eds in U.S. newspapers, these groups attacked First Lady Hillary Clinton – the titular head of the Clinton Administration’s Inter-Agency Council on Women, which was responsible for coordinating U.S. anti-trafficking policy – for being “pro-prostitution,” using this issue against the Clinton administration in election year political battles. See William J. Bennett & Charles W. Colson, *The Clintons Shrug at Sex Trafficking*, [insert article cites]

<sup>55</sup> [cite to TVPA]

<sup>56</sup> Freedom from Sexual Trafficking Act of 1999, H.R. 1356, 106th Cong. (1999).

<sup>57</sup> Jayasrhi Srikantiah, *Perfect Victims and Real Survivors: the Iconic Victim in Domestic Human Trafficking Law*, 87 BOSTON U. L.R. 157, 170-172 (2007).

<sup>58</sup> Comprehensive Antitrafficking in Persons Act of 1999, introduced by Representative Sam Gedge (D-Conn) in the House on October 27, 1999; Senator Paul Wellstone introduced an identical bill in the Senate on Nov. 2, 1999. H.R. 3154, 106th Cong. (1999); S. 1842, 106th Cong. (1999).

Representative Smith, working with Senator Sam Brownback (R-Kan.), expanded the trafficking definition in this bill.<sup>59</sup>

The TVPA defines “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.<sup>60</sup>

The TVPA separately defines “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”<sup>61</sup> Without the force/fraud/coercion element required for *severe* forms of trafficking, this definition encompasses non-coerced migrant prostitution. Although including “sex trafficking” in the TVPA was a victory for the neo-abolitionists, non-abolitionists took comfort in the fact that the statute limited application of its key operational terms to *severe* forms of trafficking.<sup>62</sup> Non-abolitionists worried, however – and rightly so, as discussed below – that “sex trafficking” could become operational in future efforts to revise and expand the TVPA.

The TVPA does contain, however, a provision that would ultimately become a powerful vehicle for the neo-abolitionists to promote their anti-prostitution worldwide, however. The TVPA includes a unilateral economic sanctions regime designed to “encourage” other countries to cooperate with U.S. anti-trafficking efforts – a measure the Clinton Administration opposed as contrary to the UN Trafficking Protocol’s goal of fostering international cooperation.<sup>63</sup> The President is authorized to deny non-humanitarian, non-trade-related foreign assistance to any government not making significant efforts to comply with U.S.-defined “minimum standards for eliminating trafficking” (U.S. minimum standards); sanctioned

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<sup>59</sup> Trafficking Victims Protection Act, H.R. 3244, 106th Cong. (1999), S.2449, 106th Cong. (2000).

<sup>60</sup> Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 § 103(8), 114 Stat. 1464 (2000) [hereinafter “TVPA”].

<sup>61</sup> [Insert citation to “sex trafficking” term in TVPA]

<sup>62</sup> Following Clinton’s 3Ps framework, for severe forms of trafficking, the TVPA enhances the tools available to prosecute traffickers, criminalizing trafficking and trafficking-related acts. It also provides protections to trafficked persons who provide “reasonable” cooperation with law enforcement, including the possibility of temporary or even permanent residency status, and eligibility for federal public assistance benefits. [Insert citations to relevant TVPA provisions.]

<sup>63</sup> For in-depth discussion and critique of the U.S. anti-trafficking sanctions regime, see Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437 (2006).

governments also face U.S. opposition to such assistance from international financial institutions and multilateral development banks, such as the International Monetary Fund and the World Bank. Each year, the U.S. State Department ranks countries according to their level of compliance with the U.S. minimum standards, with those in the lowest tier ranking at risk of U.S. unilateral sanctions.

Since its creation, the U.S. anti-trafficking sanctions regime has had tremendous influence on how countries worldwide have developed and implemented their anti-trafficking laws. Most notably, the sanctions regime became a prime vehicle for promoting an anti-prostitution agenda worldwide, particularly coupled with broad-ranging neo-abolitionist legal reforms and policies adopted during the Bush Administration, as discussed below.

## II. THE RISE OF NEO-ABOLITIONISM

The exit of the Clinton Administration brought an opportunity for the neo-abolitionists to recalibrate U.S. anti-trafficking policy. The neo-abolitionist lobby ultimately found a powerful ally in the Bush Administration, which came to champion the anti-prostitution cause at home and abroad. Responding to his faith-based constituency, the Bush Administration took on anti-trafficking as a key humanitarian initiative. In National Security Presidential Directive 22, issued on December 16, 2002, President Bush made the neo-abolitionist position official U.S. policy. NSPD-22 states that U.S. anti-trafficking policy:

is based on an abolitionist approach to trafficking in persons, and our efforts must involve a comprehensive attack on such trafficking, which is a modern day form of slavery. In this regard, the United States Government opposes prostitution and any related activities, including pimping, pandering, or maintaining brothels, as contributing to the phenomenon of trafficking in persons. These activities are inherently harmful and dehumanizing. The United States Government's position is that these activities should not be regulated as a legitimate form of work for any human being.<sup>64</sup>

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<sup>64</sup> THE WHITE HOUSE, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE/NSPD-22 2-3(December 16, 2002) (unclassified version). President Bush went on to publicize his Administration's war on trafficking in international fora. In his September 2003 annual "Address to the United Nations," President Bush devoted the last third of his speech to global sex trafficking. [cite to Bush speech to UN]. See Gretchen Soderlund, *Running from the Rescuers*, 17 NWSA JOURNAL 64, 77; DeStefano, *supra* note \_\_\_, at 103. Linking the issue to his broader moral agenda, President Bush singled out human trafficking, especially sex trafficking, as "a special evil in the abuse and exploitation of the most vulnerable." [cite to UN Speech]

Neo-abolitionist feminists applauded NSPD-22 as “especially crucial in fighting trafficking in women and children because over the past decade there have been attempts to de-link trafficking from prostitution, and even to legitimize prostitution...”<sup>65</sup>

In the service of the abolitionist agenda, law and policy initiatives during the Bush Administration effected a war on prostitution at home and abroad. Having successfully lobbied for a neo-abolitionist to direct the U.S. State Department Office to Monitor and Combat Trafficking in Persons (GTIP Office),<sup>66</sup> the office responsible for coordinating U.S. anti-trafficking policy, the neo-abolitionists had key support in the government bureaucracy to implement the anti-prostitution agenda worldwide. The year 2003 being the first year that non-compliant countries risked anti-trafficking sanctions for failure to comply with U.S. minimum standards,<sup>67</sup> the U.S. government’s new anti-prostitution policy factored into perceptions – if not the reality – of what would be required by other countries in order to avoid sanctions.<sup>68</sup> The State Department posted on its website a “Fact Sheet: The Link between Prostitution and Sex Trafficking” (“Fact Sheet”),<sup>69</sup> stating that “where prostitution has been legalized or tolerated, there is an increase in the demand for sex slaves and the number of victimized foreign women – many likely victims of human trafficking.”<sup>70</sup> Prominent display of the

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<sup>65</sup> Donna Hughes, *Trafficking of Women and Children in East Asia and Beyond: A Review of U.S. Policy*, testimony before the Subcommittee of East Asian and Pacific Affairs, U.S. Senate Foreign Relations Committee (April 9, 2003).

<sup>66</sup> In 2002, the neo-abolitionists successfully campaigned to oust the then-GTIP Director, Nancy Ely-Raphael, and replace her with former U.S. Representative John Miller (R-Seattle). Setting the stage for Ely-Raphael’s ouster, in congressional testimony, the neo-abolitionists criticized GTIP’s failure to consider demand for prostitution in the 2002 Trafficking in Persons Report, and Ely-Raphael specifically for being “extremely naïve” and “gross[ly] lack[ing in] political will in believing that the connection between legalized prostitution and trafficking was only ‘anecdotal.’” See Donna Hughes, *The 2002 Trafficking in Persons Report: Lost Opportunity for Progress*, before the House Committee on International Relations, Hearing on “Foreign Government Complicity in Human Trafficking: A Review of the State Department’s 2002 Trafficking in Persons Report,” June 19, 2002 [hereinafter Hughes 2002 House testimony].

<sup>67</sup> The TVPA provided that while the U.S. State Department would issue its country rankings in 2001 and 2002, sanctions would not attach until the year 2003, to allow countries a “grace period” to bring laws and policies into compliance with U.S. minimum standards on trafficking. Chuang, *supra* note 63, at 454.

<sup>68</sup> While abolition of prostitution was not technically one of the U.S. minimum standards under the TVPA, the sanctions regime nonetheless exerted pressure to conform to U.S. preferences. See Chuang, *supra* note \_\_\_\_, at \_\_\_\_ (discussing the U.S. model anti-trafficking legislation).

<sup>69</sup> BUREAU OF PUBLIC AFFAIRS, U.S. DEP’T OF STATE, FACT SHEET: THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING (2004), [insert website reference.]

<sup>70</sup> *Id.*

“Fact Sheet” on the State Department website alongside the U.S. State Department’s “Model Law to Combat Trafficking in Persons” – encouraging countries to adopt a definition of trafficking that encompasses non-coerced prostitution<sup>71</sup> – certainly signaled to other countries the U.S. government’s interest in eradicating prostitution worldwide.

The U.S. government’s aim to eradicate prostitution *writ large* under the banner of anti-trafficking measures soon manifested in more explicit laws and regulations introduced and largely adopted in the 2003, 2005, and 2008 Reauthorizations of the TVPA.<sup>72</sup> Three initiatives in particular merit close attention, each foreshadowed in earlier neo-abolitionist congressional testimony articulating an agenda for U.S. anti-trafficking policymaking<sup>73</sup>: (1) anti-prostitution restrictions on federal grants administration, (2) anti-prostitution restrictions on U.S. military personnel and government contractors, and (3) measures to end demand for prostitution and to federalize prostitution-related crimes. Through the first two measures, the neo-abolitionists have remapped the trafficking field using the threat of withdrawal of U.S. funds to pressure foreign governments, civil society organizations, and private sector actors to adopt anti-prostitution measures. Though the third measure ultimately did not survive legislatively, that it made it into the House version of the 2008 Reauthorization bill marks the tremendous inroads the neo-abolitionists made in pursuit of their anti-prostitution agenda.

But perhaps the most significant neo-abolitionist gains lie not in these legal reforms, but in their success in controlling the trafficking discourse and promoting for mainstream consumption a reductive understanding of the very nature of the trafficking phenomenon. Contrary to the U.S. and international legal definitions of trafficking, the neo-abolitionists have succeeded in characterizing trafficking as primarily about,

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<sup>71</sup> OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, MODEL LAW TO COMBAT TRAFFICKING IN PERSONS (March 12, 2003) (on file with author); see also OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, LEGAL BUILDING BLOCKS TO COMBAT TRAFFICKING IN PERSONS (February 2004) (on file with author).

<sup>72</sup> Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 stat. 2875 [hereinafter 2003 TVPRA]; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) [hereinafter 2005 TVPRA].

<sup>73</sup> In testimony before the U.S. Senate Foreign Relations Committee in April 2003, Donna Hughes of CATW articulated the following priorities: (1) the need for HIV/AIDS outreach workers to oppose and report prostitution, (2) the need to re-link trafficking to prostitution, (3) the need to address U.S. military personnel feeding the demand for prostitution, and (4) the need to address trafficking of U.S. citizens for prostitution within the United States. Donna Hughes, *Trafficking of Women and Children in East Asia and Beyond: A Review of U.S. Policy*, testimony before the Subcommittee of East Asian and Pacific Affairs, U.S. Senate Foreign Relations Committee (April 9, 2003).

if not limited to, prostitution (both “forced” and “voluntary”). Rather than a complex phenomenon driven by deep economic disparities between wealthy and poor communities and nations,<sup>74</sup> and inadequate labor and migration frameworks to manage their consequences, trafficking instead is a moral problem involving ignorant if not innocent women and children sexually brutalized by evil (male) traffickers.

The following discussion describes the neo-abolitionist legal reforms and reductive narrative deployed to heighten the urgency and stakes of their anti-prostitution campaign. Deeming the problem a “modern form of slavery,” the neo-abolitionists have successfully transformed the “anti-trafficking” movement into a modern, worldwide moral crusade against prostitution.

### A. *Anti-Prostitution Legal Reforms*

Shortly after the TVPA was passed, Congressman Smith and the neo-abolitionists made clear their desire for more substantive application of the “sex trafficking” term than provided in the TVPA.<sup>75</sup> Over the next eight years, the neo-abolitionists advanced this agenda through legal reforms targeting funding of activities that might be construed as supportive of prostitution, and facilitating the criminalization of traffickers, pimps, and johns, discussed below.

#### 1. Anti-prostitution restrictions on grants administration

The neo-abolitionists first targeted federal funding for anti-trafficking and HIV/AIDS outreach organizations, advocating that such funding be contingent on these organizations adopting an anti-prostitution stance.<sup>76</sup> The 2003 Trafficking Victims Protection Reauthorization Act thus prohibits the use of U.S. funds for (1) programs that “promote, support, or advocate the legalization or practice of prostitution”; and (2) any

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<sup>74</sup> [cite to snapshot article]

<sup>75</sup> See, e.g., *Implementation of the Trafficking Victims Protection Act: Hearing Before the H. Comm. On Int’l Relations*, 107th Cong. 3-5 (2001). [insert citations to neo-abolitionist statements to this effect]

<sup>76</sup> The Bush Administration’s fight against prostitution dovetailed with its efforts to dismantle public health efforts that supported women’s reproductive rights and condom use to prevent pregnancy and the spread of HIV/AIDS. Soderlund, *supra* note \_\_\_\_, at 79. Having reinstated the Mexico City Policy (“Global Gag Rule”) banning foreign NGOs from receiving federal funding if they perform or promote abortions generally, curbing prostitution was the next logical step in the Bush Administration and its faith-based constituency’s desire to police non-procreative sex on a global level. See Memorandum, Restoration of the Mexico City Policy, 66 Fed.Reg. 17,303, 17,309 (Mar. 28, 2001)

organization “that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution.”<sup>77</sup> Similar anti-prostitution grants restrictions were applied to HIV/AIDS funding under the U.S. Leadership Against Global HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Global AIDS Act”). The Global AIDS Act requires that “[n]o funds...may be used to promote or advocate the legalization or practice of prostitution or sex trafficking”, and that “[n]o funds...may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.”<sup>78</sup>

Recipients of HIV/AIDS funds thus are required to adopt a policy explicitly opposing prostitution and sex trafficking, and to sign what advocates have come to refer as the “anti-prostitution pledge” to that effect.<sup>79</sup> On the other hand, entities applying for anti-trafficking funds that do not have a policy on prostitution technically are not required to adopt one, though this nuance is clarified only in the congressional record, not publicly for potential funding applicants.<sup>80</sup> Moreover, what types of

**Comment [JC1]:** Wasn't this provision added at the last minute? check with david abramowitz on the hill.

<sup>77</sup> 2003 TVPRA, *supra* note 72, at § 7(7). The restriction does not apply to assistance to trafficked persons “while they are being trafficked or after they are out of the situation that resulted from such victims being trafficked.” NGOs can still provide services to people trafficked into prostitution, but they are prohibited from providing support to any victim who after escaping, returns to prostitution. H.R. REP. NO. 108-264(I), 108th Cong., 1st Sess. 2003, as *reprinted* in 2004 U.S.C.C.A.N. 2408, 2419, Section-by-Section Analysis and Discussion, § 7, ¶ (7). Because the rule covers both organizations and programs, it restricts an organization’s use of its private funding.

<sup>78</sup> United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub.L.Mp. 108-25, 117 Stat. 71 (2003), §§ 301(e), (f) [hereinafter Global AIDS Act]. Notably, there was no pre-enactment hearing on the restrictions, and Congress did not consider evidence on the rationales the Government subsequently proffered for the pledge requirement. *See* H.R. Rep. No. 108-60 at 28-31, in 2003 U.S.C.C.A.N. 712, 718.

<sup>79</sup> Global AIDS Act, *supra* note 78, sec. 301(f). Following the D.C. Circuit decision in [DKT case], the USAID clarified that a recipient of HIV/AIDS funding can maintain an affiliation with separate organizations that do not have an anti-prostitution policy, provided that the affiliate maintains “adequate separation” so as not to “threaten the integrity of the Government’s programs and its message opposing prostitution and sex trafficking.” Adequate separation requires, among other factors, both physical and financial separation between recipient and affiliate. *See* USAID Acquisition and Assistance Policy Directive (AAPD), AAPD 05-04 Amendment 1 (issued July 23, 2007). **[Note: new regs issued last week – find them!] [Note that separation requirements are more stringent than required for faith-based groups – see Brennan Center analysis]**

<sup>80</sup> According to a colloquy between TVPRA sponsors Congressmen Tom Lantos and Chris Smith, an organization that does *not* have a policy on prostitution can simply state that it “does not promote, support, or advocate [the legalization or practice of prostitution] since it has no policy regarding this issue.” Proceedings and Debates of the 108th Congress, First Session, Nov 4., 2003, 149 Cong.Rec. H10281-01 (colloquy between Representatives Lantos and Smith).

programs “promote, support, or advocate the legalization or practice of prostitution” remains undefined – e.g., whether a grantee could hold a conference where the legalization of prostitution is debated, or the potential negative impacts of criminalization are assessed, could both be deemed “promoting” prostitution.<sup>81</sup>

The anti-prostitution funding restrictions have met strong resistance from civil society organizations, particularly public health organizations, for arguably violating the First Amendment<sup>82</sup> and undermining HIV/AIDS prevention efforts on the ground.<sup>83</sup> The First Amendment challenges were brought on grounds that the sweeping scope of the pledge restricts organizations’ privately-funded speech regarding the most effective ways to engage high-risk groups in HIV prevention.<sup>84</sup> According to these advocates – who do *not* take a position on prostitution – adopting an anti-prostitution stance compromises programming because gaining access to stigmatized and vulnerable populations such as sex workers/prostitutes requires a “non-

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<sup>81</sup> Testimony of Ann Jordan, Director, Initiative Against Trafficking in Persons, Global Rights, before the House Subcommittee on Border, Maritime and Global Counterterrorism, Hearing on “Crossing the Border: Immigrants in Detention and Victims of Trafficking, Part II” (March 20, 2007).

<sup>82</sup> Whereas the funding restrictions originally were applied only to foreign NGOs, a controversial legal opinion issued by the DOJ Office of Legal Counsel in September 2004 supported application of the restrictions to even U.S.-based NGOs working abroad. See Letter from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Dept of Justice, to Alex Azar, II, General Counsel, Department of Health and Human Services, regarding Trafficking Victims Protection Reauthorization Act of 2003 (“TVPRA”) and United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“AIDS Act”) (September 20, 2004). The decision spawned two lawsuits by non-governmental organizations, claiming that the funding restrictions violate First Amendment bans on compelled speech, viewpoint discrimination and the imposition of “unconstitutional conditions” on grantees’ privately funded speech. See *DKT Int’l, Inc. v. United States Agency for Int’l Dev.*, Civil Action No. 05-01604 (D.D.C. 2005) [hereinafter *DKT litigation*]; *Alliance for Open Soc’y, Inc. v. United States Agency for Int’l Dev.*, Civil Action No. 05-cv-8209 (S.D.N.Y. 2005) [hereinafter *OSI litigation*]. [Update with cites to court decisions + circuit court cites; describe outcomes.] Abolitionist feminists filed *amicus* briefs on the side of the U.S. government. [cite to CATW/Equality Now brief]

<sup>83</sup> For example, the Brazilian government returned a \$40 million grant on grounds that the restrictions would curtail its highly successful HIV/AIDS prevention program by undermining its ability to conduct effective outreach to and programs with sex workers/prostitutes if their NGO partners were forced to state their explicit opposition to prostitution. See Michael M. Phillips and Matt Moffett, *Brazil Refuses U.S. Aids Funds, Rejects Conditions*, WALL ST. J., May 2, 2005, at A3.

<sup>84</sup> See Brennan Center for Justice, *Alliance for Open Society International v. USAID: Questions and Answers About the August 8, 2008 Ruling Granting InterAction and Global Health Council a Preliminary Injunction*, available at <http://www.brennancenter.org/page/-/Justice/Pledge%20Decision%202008%20Q%20and%20A.Final.pdf>.

judgmental” attitude on the part of the service providers.<sup>85</sup> In defense of the funding restrictions, however, neo-abolitionists argue that, while promoting condom use in the sex industry has reduced and limited the spread of AIDS among those in the sex industry, “[i]t is unacceptable to provide medical services and condoms to enslaved people and ignore the slavery.”<sup>86</sup> Moreover, notwithstanding arguments to the contrary by the World Health Organization, for example,<sup>87</sup> neo-abolitionists “adamantly reject the notion that it is impossible to do effective HIV/AIDS-prevention work among prostituted people while condemning...prostitution.”<sup>88</sup>

## 2. Anti-prostitution restrictions on U.S. government contractors

The neo-abolitionists also saw an opportunity to extend funding restrictions to the private sector in efforts by human rights advocates to hold U.S. government contractors accountable for involvement in trafficking. Following allegations that U.S. military leaders in Korea and U.S. government contractors in Bosnia-Herzegovina<sup>89</sup> were involved in

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<sup>85</sup> UNAIDS Case Study, *Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India and Bangladesh* 28 (November 2000) (concluding that “[t]raining to diminish moralistic and judgmental attitudes among staff proved to be successful” and that developing meaningful relationships with target groups was key issue, requiring time and empathy”); Centers for Disease Control and Prevention, *HIV Prevention Strategic Plan through 2005* 23 (January 2001) (warning that stigmatization of vulnerable groups profoundly affects prevention efforts worldwide because of its pernicious effects – i.e., stigmatized people are threatened with shunning and physical harm, and therefore avoid seeking HIV/AIDS testing, information, and other related services). [JAC to get copies]

<sup>86</sup> This sentiment was shared by G-TIP Director John Miller, who wrote in editorial that “well intentioned people seeking to limit the spread of AIDS in at-risk populations, especially in the commercial sex industry, often ignore a larger challenge: helping to free the slaves of that industry.” John R. Miller, *Fight AIDS Of Course, But Also Fight Prostitution*, THE SEATTLE TIMES (May 20, 2004).

<sup>87</sup> [Insert citation to neo-abolitionist criticism of WHO policy.]

<sup>88</sup> See Memorandum of Law of Apne AAP and Eighteen Other Organizations as *Amici Curiae*, in *Alliance for Open Society Int’l, et al v. United States Agency for International Development*, [get formal case cite] (S.D.N.Y) (December 9, 2005), at 1. Amici were comprised of anti-prostitution organizations, none of which appear to specialize in public health services. Compare with Amicus Brief on Behalf of AIDS Action and 25 Other Public Health Organizations and Public Health Experts in Support of Plaintiffs-Appellees, in *Alliance for Open Society Int’l, et al v. United States Agency for International Development*, [get formal case cite] (2d Cir) (December 21, 2006).

<sup>89</sup> [Cite to DoD IG Korea Report; Cite to House Committee on IR hearing on UN and the Sex Slave Trade in Bosnia (April 24, 2002);] See HUMAN RIGHTS WATCH, *HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION* (2002)

trafficking-related activities,<sup>90</sup> the Bush Administration established a “zero-tolerance policy” towards U.S. government employees and personnel working abroad who engage in trafficking. As Human Rights Watch exposed in a 2001 report, none of the eight U.S. government contractors (four working for the Defense Department and four working for the State Department) in Bosnia and Herzegovina alleged to have been involved in the purchase of trafficked women faced criminal penalties upon returning to the United States. Human Rights advocates thus sought to amend the Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”) to expand U.S. jurisdiction to cover any U.S. government contractor involvement in trafficking-related activities. MEJA provided U.S. federal jurisdiction over civilian contractors accompanying the Armed Forces to cover felony level offenses that would apply under federal law if the offences had occurred within U.S. territories.<sup>91</sup> But because MEJA only applied to contractors with a nexus to the Department of Defense, human rights advocates sought to amend the MEJA to contractors tied to *any* U.S. government agency – e.g., State Department – in order to close the jurisdictional gap.<sup>92</sup> An amendment to this effect, proposed by Representative Christopher Smith, was defeated, however, by the Justice Department [out of concern over the amendment’s ramifications for accountability of CIA agents in the Abu Ghraib abuses.]<sup>93</sup>

However little political will existed with respect to holding contractors accountable for purchasing human beings, there was plenty supporting efforts to hold military personnel liable for purchasing commercial sex acts.<sup>94</sup> A September 2004 Armed Services Committee hearing – which was to be the first by this Committee to address human trafficking and government contractor impunity – instead focused entirely on the “demand side” of trafficking, marshaling efforts to end service members’ patronizing of prostitutes.<sup>95</sup> Under a 2005 Executive Order amending the U.S. Manual for Courts-Martial, U.S. service members who

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<sup>90</sup> [get ahold of Ben Johnston (whistleblower) complaint against Dyncorp; see Martina’s testimony on the hill; Hopes Betrayed; IG report re: anecdotal evidence that contractors were involved in trafficking).

<sup>91</sup> Prior to passage of the MEJA, civilians accompanying the Armed Forces overseas who committed crimes fell into a jurisdiction gap – the host country often either refused or was unable to exercise criminal jurisdiction, while U.S. law only permitted exercise of military jurisdiction over civilians to times of war.

<sup>92</sup> Martina Vandenberg, *Out of Bondage*, 28 LEGAL TIMES \_\_\_\_ (February 14, 2005).

<sup>93</sup> [cite to Smith bill; find documentation of DOJ’s rationale for rejecting amendment]

<sup>94</sup> Vandenberg, *supra* note 92.

<sup>95</sup> [cite to Armed Services Committee 2004 hearing]

patronize a prostitute face dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.<sup>96</sup> [confirm that MCM does *not* address trafficking]

In an effort to up the ante for government contractors, advocates sought to include language in the 2003 TVPRA to hold U.S. government contractors accountable – through risk of contract termination – for engaging in trafficking or using forced labor through mandatory clauses to be included in U.S. government contracts. Once again, the neo-abolitionist influence is clear. The contract clause, finalized in January 2009, requires U.S. government contracts to contain clauses authorizing termination by the U.S. government if the contractor or subcontractor (or their employees) engages in severe forms of trafficking, *procures a commercial sex act*, or uses forced labor during performance of the contract.<sup>97</sup> Those who do not comply risk removal of employees, subcontractor termination, suspension of contract payments, termination of their contracts, and suspension or debarment.<sup>98</sup>

The contractor community's attention has since been focused on the implications of the commercial sex provision.<sup>99</sup> A number of industry representatives and civil society organizations objected to the government contract clauses for expecting employers to monitor their employees' activities after work hours, particularly with respect to prostitution activities, which are not otherwise punishable under U.S. federal law and may not be proscribed by the domestic laws of the host country.<sup>100</sup> In

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<sup>96</sup> Executive Order 13387 (Oct 14, 2005) amends the Manual for Courts-Martial (MCM) to criminalize patronizing a prostitute, making such acts punishable by dishonorable discharge, confinement for one year, grade reduction, and forfeiture of all pay and allowances. Exec. Order No. 13,387, 70 Fed. Reg. 60,697, 60,701 (Oct. 18, 2005).

<sup>97</sup> 2003 TVPRA, *supra* note 72, §3(b) (emphasis added). Note that an earlier interim rule prohibited contractors, subcontractors, or contractor employees from activities that “support or promote” activities prohibited in the final rule, but this provision was removed at the behest of academic and research institutions, which noted that the restriction would interfere with scholarly social and behavioral research on such topics as the prevalence of sexually transmitted diseases among those in the sex industry. Federal Acquisition Regulation; FAR Case 2005-012, Combating Trafficking in Persons (Interim rule with request for comments), FEDERAL REGISTER, Vol. 71, No. 75 (April 19, 2006) at 20302 [hereinafter “FAR Interim Rule”]; Letter from Council on Governmental Relations (an organization of research universities) to Gloria Sochon, General Services Administration, regarding FAC 2005-09, FAR Case 2005-012, Combating Trafficking in Persons (June 19, 2006).

<sup>98</sup> FAR Revised Interim Rule, *supra* note \_\_\_\_, at 46342 (remedies).

<sup>99</sup> See Martina E. Vandenberg and Damien Specht, *It's Not Just About Prostitution: FAR Compliance and Human Trafficking*, 4 INT'L J. PEACE OPERATIONS 18 (2009).

<sup>100</sup> See, e.g., Letter from Sarah Mendelson, Center for Strategic and International Studies, to Laurieanne Duarte, General Services Administration, October 16, 2007; See

defense, the U.S. government asserted that the actions of private contractor employees “reflect upon the Government’s integrity and ethics,”<sup>101</sup> and that employee violations of this nature are more likely to occur after working hours.<sup>102</sup> Moreover, the “zero-tolerance policy” opposes prostitution writ large as contributing to trafficking, and Congress intended to reduce the demand for all commercial sex acts, lawful and unlawful.<sup>103</sup>

Though anti-trafficking advocates welcomed efforts to target government contractor involvement in trafficking, the broadening of proscribed activities to include the purchase of commercial sex acts raised concerns that the clauses would “spoil the soup” by deflecting attention from trafficking and forced labor. As it stands, the final regulations, while touting the U.S. government’s “zero tolerance” policy, the absence of viable enforcement measures risks zero compliance.<sup>104</sup> The contractor community has largely focused on the implications of the commercial sex provisions of the FAR clauses, masking the more salient risk of non-sexual forced labor, a phenomenon that the U.S. government has had difficulty addressing on its

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Letter from American Bar Association, Section of Public Contract Law to Laurieanne Duarte, General Services Administration Regulatory Secretariat, October 16, 2007, at 10.

<sup>101</sup> FAR Final Rule, *supra* note \_\_\_\_ at 2742.

<sup>102</sup> It also refused to limit the requirement to “illegal” or “unlawful” commercial sex acts, arguing that “[c]ommercial sex venues are one of the prime areas in which trafficking victims are exploited, and customers are very often unable to tell the difference between an individual who has been trafficked and one who has not.” FAR Revised Interim Rule, *supra* note \_\_\_\_, at 46337.

<sup>103</sup> *Id.* In the FAR Final Rule, the U.S. government noted that “contractors and their employees need to understand that procuring commercial sex acts is an unacceptable behavior that carries penalties.” FAR Final Rule, *supra* note \_\_\_\_, at 2477.

<sup>104</sup> CSIS Letter, *supra* note 100. The rule stops short of authorizing audits of contractors to prompt contractors into compliance, or even of requiring a company to certify compliance with the prohibition. Tenley A. Carp, *The FAR and DFARS Ban on Human Trafficking – Heavy on Rhetoric, Light on Enforcement*, THE GOVERNMENT CONTRACTOR, Vol. 49, No. 2 (January 17, 2007). The final rule significantly softened the employers’ obligation articulated in an earlier Interim Rule, which required contractors proactively to establish policies and procedures to combat human trafficking, to develop a human trafficking awareness program for employees, and to obtain written notification from employees indicating they understand said policies and procedures. *See* FAR Interim Rule, *supra* note \_\_\_\_, at 20303. Moreover, whereas the former Rule required trafficking allegations be reported to the Combatant Commander, the final Rule requires only reporting to the Contracting Officer, who, unlike a Combatant Commander, might not wield sufficient power to ensure accountability for violations. [Cite DFARS rule.] Indeed, recent reports indicate that the policy has yet to influence the U.S. government’s own field operations, as at least in one instance, a contractor officer was unaware of the prohibitions on trafficking and prostitution and did not know how to respond to a contractor reporting a violation. [get complete citation for Martina Vandenberg article; also cite to the two whistleblower cases re: FAR clause not being enforced – e.g., Gordon v. Armour Group]

own military bases in Iraq, for example.<sup>105</sup>

### 3. Targeting “sex trafficking”

In addition to attempting to deter engagement in or support for prostitution through the threat of withdrawal of U.S. federal funding, the neo-abolitionists also pursued broader and more aggressive criminalization of prostitution-related activities at home and abroad. Viewing prostitution as a problem of supply and demand,<sup>106</sup> the neo-abolitionists sought to criminalize demand, modeling their approach on Swedish laws targeting the sex industry by criminalizing clients’ purchase of sex. The neo-abolitionists also sought to [make prostitution a federal crime] and to correct what they perceived to be discriminatory provision of social services under the TVPA, which entitled only foreign (as opposed to U.S.) victims of trafficking to social services equivalent to those provided to refugees.<sup>107</sup>

The 2005 TVPRA allocates resources to “end demand” for sex trafficking with a focus on “domestic trafficking in persons.” These resources are directed towards research, analysis, and dissemination of best practices for addressing sex trafficking and commercial sex acts.<sup>108</sup> The 2005 TVPRA establishes a \$25 million grant program for state and local law enforcement agencies to establish programs to educate, investigate and prosecute persons who engage in the purchase of commercial sex acts.<sup>109</sup> It also appropriates \$20 million (over 2006-07) to establish a grant program for NGOs to provide assistance to citizens and permanent resident victims of sex trafficking and severe forms of trafficking, giving priority to applicants with experience “in the delivery of services to persons who have been subjected to sexual abuse or commercial sexual exploitation.”<sup>110</sup> In an

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<sup>105</sup> Government contractors on U.S. military bases in Iraq routinely confiscate passports of laborers from Nepal, India, Pakistan, Bangladesh, Sri Lanka, and the Philippines,<sup>105</sup> and their subcontractors lure workers to Iraq through deceptive offers regarding the conditions and location of the employment, and provide substandard living conditions for the laborers. [insert citation to DoD memo]; As reported in a Chicago Tribune series by Cam Simpson in October 2005, a Kellogg, Brown, and Root subcontractor, which had been awarded \$12 billion in DoD contracts, had used some 200 subcontractors who routinely confiscated workers’ passports, deceived the workers about their contract terms and safety, and threatened workers with withdrawal of food and water in order to force them to enter Iraq. [Cite Cam Simpson piece. Mention Cohen Milstein lawsuit against Halliburton, et al...]

<sup>106</sup> [Cite to statements from Raymond/Crouse re: ending demand]

<sup>107</sup> Donna Hughes, *Enslaved in the U.S.A.: American victims need our help*, NATIONAL REVIEW ONLINE (July 30, 2007).

<sup>108</sup> 2005 TVPRA §201(a); §201(b).

<sup>109</sup> 2005 TVPRA §204.

<sup>110</sup> 2005 TVPRA §202(a),(b).

effort to influence other countries' activities, the 2008 TVPRA includes as a sanctions regime factor the issue of whether the country has made "serious and sustained" efforts to reduce the demand for commercial sex acts and sex tourism.<sup>111</sup>

Though the neo-abolitionists made significant inroads in their campaign to end demand for prostitution, their efforts to transform "sex trafficking" into a federal crime did not ultimately succeed. They got remarkably close, however, having successfully lobbied for passage of a House bill to that effect.<sup>112</sup> In support, the neo-abolitionists argued that the federal government should be prosecuting *all* sex trafficking, not just the severe forms of trafficking, and, moreover, that criminalizing sex trafficking would make it easier to prosecute traffickers because it would rid prosecutors of the burden of having to prove force, fraud, or coercion.<sup>113</sup> The proposed legislation drew vehement objections, however, from anti-trafficking advocates, the DOJ, local law enforcement agencies, and the Heritage Foundation, on grounds that shifting prosecutorial responsibility for local and state levels to the DOJ would amount to an "unconstitutional federalization of local crime"; divert precious resources away from the DOJ's core mission of prosecuting crimes involving force, fraud, or coercion and child victim; and "trivialize the seriousness of actual human trafficking by equating it with run-of-the-mill sex crimes."<sup>114</sup>

Having not succeeded in federalizing prostitution-related crimes, the neo-abolitionists have shifted their efforts to the state level, successfully incorporating definitions of trafficking that encompass prostitution.<sup>115</sup> The

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<sup>111</sup> 2005 TVPRA §104(b)(1)(A).

<sup>112</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act, H.R. 3887 (December 2007). H.R. 3887 passed the U.S. House of Representatives by a vote of 405 to 2. H.R. 3887 revised the Mann Act – which criminalizes the transportation of persons across state lines for the purpose of prostitution – to replace the interstate transportation requirement with activities "affecting" interstate or foreign commerce. H.R. 3887, § 221(f)(1).

<sup>113</sup> Statement of Jessica Neuwirth, President of Equality Now, to the New York City Council (June 11, 2008); see also Donna M. Hughes, *Wilberforce Can Free Again: Protecting trafficking victims*, NATIONAL REVIEW ONLINE (March 12, 2008).

<sup>114</sup> Brian Walsh and Andrew M. Grossman, *Heritage Foundation Legal Memorandum: Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, at 1 (February 14, 2008); Letter from the Fraternal Order of Police, Grand Lodge, to Honorable Patrick J. Leahy, Chairman, Committee on the Judiciary and Honorable Arlen Specter, Ranking Member, Committee on the Judiciary (December 6, 2007); Department of Justice, *H.R. 3887: The William Wilberforce Trafficking in Persons Reauthorization Act of 2007, Comments Reflecting Managers' Amendment*, at 2 (undated) (on file with author); Letter from U.S. Department of Justice, Office of Legislative Affairs, to The Honorable John Conyers, Jr., Chairman, Committee on the Judiciary (November 9, 2007);

<sup>115</sup> [need to research this point – see MD law and draft DC laws on trafficking]

neo-abolitionist legal reform strategy has also been remarkably successful in signaling and exporting to the rest of the world the U.S. government's anti-prostitution stance. As explored in detail in Part III, below, these reforms have had tremendous impacts on the ground.

### *B. The Reductive Narrative*

While neo-abolitionists have been remarkably successful in pursuing legal reforms to advance their anti-prostitution agenda, perhaps the even more powerful influence lies in their ability to shape anti-trafficking discourse. Discourse is a way of exercising power.<sup>116</sup> Discourses form regularities that emerge and become systematized in and through articulation and reiteration of particular norms – not because they are logical or true, but because of this regularity.<sup>117</sup> Taking advantage of its power to control anti-trafficking discourse within the United States, the neo-abolitionists have embedded in the public consciousness a reductive narrative of trafficking that transforms the problem of trafficking from a complex human rights problem rooted in the failure of migration and labor frameworks to respond to globalizing trends, to a moral problem and crime of sexual violence against women and girls best addressed through an aggressive criminal justice response.

The discussion below explores the genesis and deployment of this reductive narrative of trafficking. It demonstrates how the neo-abolitionist narrative ignores the multiplicity of trafficking forms to focus solely on sex trafficking, and then conflates (sex) trafficking with prostitution. Through these two rhetorical moves, neo-abolitionist discourse redefines the putative victim population to exclude the non-sexual trafficking cases – now believed to comprise over half of the total trafficking cases worldwide – while including a population (i.e., all prostitutes) of which only a fraction would qualify as trafficked under international or U.S. law. Moreover, by identifying the source of the harm of trafficking as individual criminals and social deviants, the reductive narrative elides the complex structural, social, and economic problems that feed the trafficking phenomenon. In so doing, the narrative circumscribes the range and content of anti-trafficking interventions proffered, focusing on aggressive criminal justice responses that [operate in a vacuum]. It overlooks, if not discounts, the need for better migration and labor frameworks or socio-economic policies to counter the

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<sup>116</sup> Jacqueline Berman, *(Un)popular Strangers and Crises (Un)Bounded: Discourses on Sex-trafficking, the European Political Community and the Panicked State of the Modern State*, 9 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 37, 47 (2003).

<sup>117</sup> *Id.* at 47-48.

negative effects of globalizing trends that drive people to undertake risky migration projects in the first instance. The reductive narrative takes on the cast of a moral crusade, deriving moral urgency for its cause by strategically utilizing (inaccurate) comparisons to slavery and dramatic statistics regarding the scope of the trafficking problem.

#### 1. Modern form of slavery: sex trafficking and prostitution

The influence of neo-abolitionist discourse can be traced back to Representative Chris Smith's original anti-trafficking bill, which was presented to legislators and the American public as a necessary response to the "50,000 innocent women and young children...thrust into the international sex trade industry with no way out" each year.<sup>118</sup> Though the 50,000 figure actually also encompassed trafficking of [men], women and children into the U.S. for sweatshop labor, domestic work, and agricultural labor,<sup>119</sup> the misleading claim that all of these migrants were sex slaves and women and children "was useful in rallying public support for victims of migrant abuse in a climate generally hostile to undocumented workers in America's factories and fields."<sup>120</sup> As sociologist Elizabeth Bernstein explains, the neo-abolitionist feminists strategically framed the harms of prostitution and trafficking as "politically neutral questions of humanitarian concern about Third World women."<sup>121</sup> In the wake of anti-prostitution feminists' failed domestic pornography and prostitution wars in the early 1980s and 1990s, focusing on Third World women was "pivotal" in successfully waging the war against the commercial sex industry at home and abroad. Accordingly, Congressional testimony in the lead-up to the TVPA played on the imagery of women and children forced into "sexual slavery," utilizing graphic images of women and girls locked in literal cages, raped, and deprived of food.<sup>122</sup> Victims were portrayed as "no more than unwilling goods exchanged between unscrupulous men," bodily commodities exchanged on a market.<sup>123</sup> The imagery used in this new campaign against "modern-day slavery" was reminiscent of that used in the early 1900s in the feminist/conservative crusade against White Slavery – i.e., of innocent women lured, deceived, and seduced into prostitution by evil, wanton men.<sup>124</sup>

<sup>118</sup> Smith 2000 – [get congressional testimony citation.]

<sup>119</sup> [Cite Amy O'Neill's CIA brief]

<sup>120</sup> Wendy Chapkis, *Soft Glove, Punishing Fist*, in [complete citation!], at 54.

<sup>121</sup> [Cite to Bernstein – with internal citation to Jessica Neuwirth interview]

<sup>122</sup> [Cite to Jayashri's article]

<sup>123</sup> Chapkis, *supra* note 120, at 60.

<sup>124</sup> Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism"*, 18 DIFFERENCES: A JOURNAL OF FEMINIST CULTURAL STUDIES 128, 130 (2007); William

The inordinate focus on sex trafficking belies the reality that, according to a growing consensus that at least half, if not more, of those trafficked are trafficked for non-sexual exploitation.<sup>125</sup> Yet U.S. enforcement and implementation efforts, media attention, and NGO practice have treated trafficking for forced prostitution as the paradigmatic instance of “modern-day slavery.”<sup>126</sup> A comparison of the number of prosecutions during the period 1996-2001 (pre-TVPA) against the period 2001-2005 (post-TVPA), reveals an 870% increase in cases involving trafficking for sexual exploitation, and only a 109% increase in non-sexual trafficking cases.<sup>127</sup> Media reporting on sex trafficking is hugely disproportionate to the reporting on labor trafficking,<sup>128</sup> as evidenced by the attention garnered by Nicholas Kristof’s high-profile and controversial New York Times series on sex slavery in Cambodia<sup>129</sup> and India<sup>130</sup> and Peter Landesman’s New York Times Magazine exposé on sex slavery in the United States.<sup>131</sup> The vast majority of documentaries and films on trafficking focus on trafficking into the sex industry.<sup>132</sup>

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MacDonald, *Traffic Counts, Symbols, and Agendas: A Critique of the Campaign Against Trafficking of Human Beings*, 11 INTERNATIONAL REVIEW OF VICTIMOLOGY 143, \_\_\_[review and get jumpcite] (2004).

<sup>125</sup> [Cite to Feingold study, ILO Global estimate.] See also discussion in David Feingold, *Think Again*, FOREIGN POLICY, [complete citation]; Nathan, *supra* note 128. [2009 TIP Report.]

<sup>126</sup> Bernstein, *New Abolitionism*, *supra* note 124, at 132.

<sup>127</sup> [Cite to 2006 DOJ Assessment]

<sup>128</sup> Debbie Nathan, *Oversexed*, THE NATION (Aug 11, 2005).

<sup>129</sup> Nicholas D. Kristof, *Girls for Sale*, THE NEW YORK TIMES (January 17, 2004); Nicholas D. Kristof, *Bargaining for Freedom*, THE NEW YORK TIMES (January 21, 2004); Nicholas D. Kristof, *Going Home, With Hope*, THE NEW YORK TIMES (January 24, 2004); Nicholas D. Kristof, *Loss of Innocence*, THE NEW YORK TIMES (January 28, 2004); Nicholas D. Kristof, *Stopping the Traffickers*, THE NEW YORK TIMES A17 (January 31, 2004); Nicholas D. Kristof, *Back to the Brothel*, THE NEW YORK TIMES A15 (January 22, 2005); Nicholas D. Kristof, *The Good Daughter, in a Brothel*, THE NEW YORK TIMES (December 17, 2006); Nicholas D. Kristof, *A Heroine from the Brothels*, THE NEW YORK TIMES (September 24, 2008); Nicholas D. Kristof, *Girls for Sale*, THE NEW YORK TIMES (January 17, 2009); Nicholas D. Kristof, *If This Isn’t Slavery, What Is?*, THE NEW YORK TIMES (January 3, 2009). A constant refrain in Kristof’s articles is that sex trafficking is the 21<sup>st</sup> century’s version of slavery, and that “one of the differences from 19<sup>th</sup>-century slavery is that many of these modern slaves will die of AIDS by their late 20s.”

<sup>130</sup> Nicholas D. Kristof, *Hitting Brothel Owners Where it Hurts*, THE NEW YORK TIMES (January 24, 2006); Nicholas D. Kristof, *Slavery in Our Time*, THE NEW YORK TIMES (January 22, 2006); Nicholas D. Kristof, *The 21<sup>st</sup>-Century Slave Trade*, THE NEW YORK TIMES (April 22, 2007).

<sup>131</sup> Peter Landesman, *The Girls Next Door*, THE NEW YORK TIMES MAGAZINE 30 (January 25, 2004).

<sup>132</sup> See, e.g., catalogue of “Human Trafficking and Slavery Related Movies and Documentaries” available at <http://www.children.foreignpolicyblogs.com/human->

By contrast, Chicago Tribune reporter Cam Simpson's award-winning "Pipeline to Peril" series on the trafficking of Nepalese men into U.S. military bases in Iraq for forced labor<sup>133</sup> garnered relatively little attention in mainstream media and public discourse. Cases of women and girls trafficked into forced domestic work in the United States, a phenomenon exposed by Human Rights Watch back in 2001,<sup>134</sup> only began receiving media attention within the last two years,<sup>135</sup> when non-abolitionists made it a priority agenda item in lobbying for the 2008 TVPRA. Recent caselaw reveals how those trafficked for nonsexual purposes tend to be viewed simply as exploited migrants rather than trafficked persons, the problem not one of abusive labor conditions, but of the hiring of illegal immigrants.<sup>136</sup>

Critics of the biased treatment of the different forms of trafficking attribute the disparity to the "mediagenic" nature of sex trafficking, or

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[trafficking-and-slavery-related-movies-and-documentaries/](#) (last visited August 19, 2009). Popular offerings include TRADE, Sex Slaves, and Lilya 4-ever. Of particular note is the mini-series "Human Trafficking" developed by Lifetime television – with the substantive input of feminist organization Equality Now and the faith-based International Justice Mission – and starring Mira Sorvino as an immigration agent who breaks up a sex trafficking ring. Ironically, Lifetime directed its viewers to sign petitions in support of the ending demand for prostitution, while widely publicizing the mini-series with "unabashedly seductive" ads depicting sexy young women, blindfolded and in bondage. Kate Aurthur, *Television; Lifetime's Place is in the House (and Senate)*, NEW YORK TIMES (October 16, 2005); Lifetime, "Human Trafficking" Lead Release, available at [http://www.feministcampus.org/HUMAN\\_TRAFFICKING\\_press\\_release.pdf](http://www.feministcampus.org/HUMAN_TRAFFICKING_press_release.pdf) (last visited, August 19, 2009) (announcing intent to use the miniseries as a platform to raise awareness by working with Congress to support the End Demand Act of 2005).

<sup>133</sup> Cam Simpson, *Pipeline to Peril* series, CHICAGO TRIBUNE (October 2005), available at <http://www.chicagotribune.com/news/nationworld/chi-nepal-specialpackage.0.7162366.special> (last visited August 19, 2009).

<sup>134</sup> HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES (2001).

<sup>135</sup> Frank Langfitt, *Servants: Diplomat Held Us as Suburban 'Slaves,'* NPR (March 1, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=7626754&ps=rs> (last visited August 19, 2009); Libby Lewis, *Diplomatic Abuse of Servants Hard to Prosecute*, NPR (March 1, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=7672967&ps=rs> (last visited August 19, 2009).

<sup>136</sup> Freeman Klopott, *Federal judge slams feds for not charging illegal immigrants' employers*, WASHINGTON EXAMINER (August 14, 2009) (describing the *U.S. v. Lubis* case). The defendant had harbored 20 women for eight years and farmed them out to local households for domestic work during the week, threatening to kill their families if they fled and sexually abusing two of them. The federal judge sentenced Lubis only to three years' probation and a \$2000 fine, noting how "troubled" he was that he was being asked to send Lubis to prison while the individual employers were not criminally charged for hiring illegal immigrants. [Get case citation]

simply put, the fact that “sex sells.”<sup>137</sup> The reductive narrative of trafficking as being about women and children forced into prostitution resonates because of its simple narrative structure of the bad guy (evil trafficker or deviant sex-crazed male) doing bad things (sexual violence, enslavement) to the innocent/ignorant/impoverished victim (trafficked woman or child/sex slave/prostitute). The imprisoned nanny or the forced male farm worker is not nearly so compelling an object of pity or compassion as a brothel captive. The notion that consent to cross borders illegally does *not* translate into consent to all subsequent exploitation is harder to sell than the standard sex trafficking narrative of innocence debauched. Migrants exploited in fields, farms, restaurants, homes, and factories are par for the course in the United States, their exploiters quite possibly our neighbors, colleagues, and friends. The sense of urgency and threat to “our” communities is far greater when it comes to (loose) modern sexual morays, that can coerce or lure “our” daughters, sisters, and wives into the sex industry.<sup>138</sup> This simplified version of trafficking is much easier to explain to the general populace than the complex, multi-layered, narrative concerning the destabilizing effects of globalization and the resulting transnational flow of capital, goods, and people.<sup>139</sup>

Neo-abolitionists have capitalized on this intense focus on sex trafficking to conflate sex trafficking and prostitution *writ large*, and to pursue abolition of prostitution under the banner of “trafficking.” Their success is well-evidenced by the direct linkage NSPD-22 posits between trafficking and prostitution, and the neo-abolitionist gains in anti-prostitution legal and policy reforms described above. Focusing on prostitutes’ impoverished backgrounds, histories of sexual abuse, and the exploitative conditions in the sex industry, neo-abolitionists have shaped and fed public skepticism over whether meaningful consent to prostitution is even possible. This is particularly so when it comes to Third World prostitutes, who are characterized as “perpetually underprivileged and marginalized” by all-encompassing economic and cultural oppression such

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<sup>137</sup> Sarah Karnasiewicz, *Sex Sells*, Broadsheet, Salon.com (October 26, 2005), available at <http://www.http://www.salon.com/mwt/broadsheet/2005/10/26/sexslaves/> (last visited August 19, 2009); Jennifer Block, *Sex Trafficking: Why the Faith Trade Is Interested in the Sex Trade*, CONSCIENCE (Summer-Fall 2004) (explaining that “what’s enthralled the media, the Christian right and the Bush administration is not the demanding, multi-layered narrative of migrants, but the damsels in distress, the innocents lured across borders” for prostitution).

<sup>138</sup> Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Antitrafficking in Persons Policy*, 14 TUL. J. INT’L & COMP. L. 269, \_\_\_ (2006). [find citation for this concept]

<sup>139</sup> *Id.*, at 277.

that the very possibility of choice or agency is negated.<sup>140</sup>

## 2. Ticket to freedom: militarized humanitarianism and carceral feminism

Through these rhetorical moves, the neo-abolitionist narrative delimits and collapses complex forms of women's migration – ranging from deception/abuse to informed decisions – into simply women as victims of crime. It thus precludes understanding the complex structural, social, and economic aspects of women's migration, including the possibility that 'trafficked women' may be migrant (sex) workers and or migrant women responding to labor demands in the West. That which is called trafficking when it involves sex is called international labor migration when it involves *other* kinds of work. As anthropologist Jacqueline Berman argues, the neo-abolitionist narrative elides and displaces this specific intersection of gender, immigration, economics, and globalization.<sup>141</sup>

Thus construed, trafficking is no longer the product of the disparities of wealth created by globalization, or gendered labor markets, or inadequate migration frameworks, but the result of the sexual proclivities of deviant individuals.<sup>142</sup> The logic of this representation suggests that to resolve the problem of trafficking, women should be rescued or deported back home, or prevented from traveling in the first place, and governments should pass and aggressively enforce laws to punish these deviant elements. As Bernstein notes, the criminalization paradigm recasts big business, the state, and the police as allies and saviors (rather than the enemies) of unskilled migrant workers. This construct deflects attention from the dependence of big business on cheap and malleable workers who populate the unregulated, unprotected labor sectors, and obviates any need to address the structural factors that push individuals to migrate under increasingly dangerous conditions.<sup>143</sup>

Capitalizing on the recycled tropes of "violated femininity, shattered innocence, and the victimization of 'womenandchildren,'" the neo-abolitionist campaign instead promotes, in Bernstein's terms, a "militarized humanitarianism and carceral feminism" in its pursuit of social remedies.<sup>144</sup> The neo-abolitionist approach thus feeds a border and crime control agenda by framing trafficking as a humanitarian issue that the "privileged" can combat through supporting efforts to rescue and restore its victims and to

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<sup>140</sup> Ratna Kapur, *Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern*, 78 DENVER U. L. R. 855, 866- \_\_\_\_ (2001).

<sup>141</sup> [Insert Berman cite]

<sup>142</sup> [Insert Bernstein cite]

<sup>143</sup> [Insert Bernstein cite]

<sup>144</sup> Bernstein, *New Abolitionism*, *supra* note 124, at 133, 137.

punish the depraved individuals who perpetrate the abuse.<sup>145</sup> Epitomizing this approach are the “rescue and restore” campaigns [patented/popularized] by the International Justice Mission (IJM), a faith-based organization that catapulted to prominence for its dramatic rescues of women and children from South and Southeast Asian brothels. These media-friendly “rescues,” often conducted in partnership with and displayed on Dateline, CNN, and Fox News, typically involve male IJM employees who, posing as clients, investigate brothels and work with local law enforcement to rescue underage and allegedly unwilling women and deliver them to state-sponsored or faith-based shelters for rehabilitation.<sup>146</sup> Notwithstanding multiple reports of failed rescues – where surprisingly high percentages of involuntarily “rescued” women escaped the shelters in order to return to the brothels<sup>147</sup> – the “rescue and restore” model has been enthusiastically embraced by faith-based and feminist organizations alike, and lauded and generously funded by the U.S. government.<sup>148</sup>

The diverse constituents of the feminist-conservative-Christian neo-abolitionist coalition have differing perspectives on the “freedom” these rescues bring. For some Christian right activists, “freedom” resides in a pre-feminist, traditional sexual agenda, such that a women’s place is in the home, rather in the market. From this perspective, prostitution is “an issue of conscience and morality rather than of income possibilities and labor.”<sup>149</sup> In contrast, for the liberal or moderate evangelicals, “freedom” entails embrace of women’s participation in the market, so long as the domestic sphere retains symbolic, if not actual, male headship. Thus, their response is to apply a pro-business model of orienting rescued women toward entry-level jobs in the service economy, with the goal of bringing women out of slavery and into the (legitimate) service market.<sup>150</sup>

<sup>145</sup> Bernstein, *New Abolitionism*, *supra* note 124, at 141.

<sup>146</sup> Bernstein *New Abolitionism*, *supra* note 124, at 139; [cite to Sam Power’s article in the *New Yorker*.]

<sup>147</sup> Soderlund, *supra* note \_\_\_\_ at 66; Maggie Jones, *Thailand’s Brothel Busters*, MOTHER JONES (November 1, 2003), available at <http://www.internationalreportingproject.org/stories/detail/668/> (last visited August 20, 2009). [UPDATE with reports re: failed rescues in Cambodia/Thailand last summer, sex worker protests against IJM at the UN.]

<sup>148</sup> Soderlund, *supra* note \_\_\_\_, at 81. [Also include cite to DOS/DOJ report re: IJM funding. Also cite to TIP Report spotlighting IJM’s work.]

<sup>149</sup> Soderlund, *supra* note \_\_\_\_, at 81 (citing as an example the *Concered Women of America*).

<sup>150</sup> Bernstein, *New Abolitionism*, *supra* note 124, at 140 (noting how women are taught to serve food and drinks in Western-style cafes, or sew goods for sale in the Christian conference markets); Dawn Herzog Jewell, *Red-Light Rescue: The Business of Helping the Sexually Exploited Help Themselves*, CHRISTIANITY TODAY 28-37 (January 2007) (noting that former prostitutes are already in the service industry, so “training for

The disparate constituencies of the feminist-conservative-Christian coalition are united, however, in a commitment to carceral paradigms of justice. As prominent neo-abolitionists have explained, “trafficking is not a poverty issue, it’s a law enforcement issue.”<sup>151</sup> Though “the U.N. blames social and economic disparities for fostering trafficking,” “the demand for prostitutes is the driving force behind sex trafficking.”<sup>152</sup> The source of the harm thus lies not in institutions of corporate capitalism and the state, but in individual, deviant (and increasingly, inner-city African-American) men, against whom the full power of law enforcement and criminal law must be brought to bear.<sup>153</sup> Indeed, the root cause of much of the suffering in the developing world is not due to hunger, homelessness, the lack of education or disease, but the failure of the criminal justice system to protect the poor from violence.<sup>154</sup> Traffickers should be prosecuted and incarcerated to the full extent of the law, the johns sent to “John school” to be educated about the harms of prostitution, and countries that fail to make efforts to eradicate prostitution should be named, shamed, and sanctioned. Criminal justice provides the path to salvation, while targeting demand reduces prostitution supply.

Together, the neo-abolitionist legal reforms and reductive narrative have remapped the landscape of anti-trafficking advocacy, narrowing anti-trafficking law and policy development to focus on sex trafficking and prostitution, and remapping service provision on the ground. Whether these developments are beneficial to trafficked persons is explored in detail below.

### III. ASSESSING THE INFLUENCE OF THE PROSTITUTION REFORM DEBATES ON THE ANTI-TRAFFICKING MOVEMENT

There is no doubt that neo-abolitionists have made significant

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legitimate jobs in restaurants and hotels will fit with the women’s gifts”); Phyllis Chesler and Donna M. Hughes, *Feminism in the 21<sup>st</sup> Century*, THE WASHINGTON POST B07 (February 22, 2004) (stating that “[t]wenty-first-century feminists need to become a force for literate, civil democracies” and “oppose dictatorships and totalitarian movements that crush the liberty and rights of people, especially women and girls”).

<sup>151</sup> Peter Landesman, *The Girls Next Door*, THE NEW YORK TIMES MAGAZINE 30 (January 25, 2004) (quoting Gary Haugen, IJM Executive Director, .

<sup>152</sup> Concerned Women of America, Press Release, “Human Trafficking Now Tied for World’s #2 Crime” (December 2005); *see also* Hughes 2002 House testimony, *supra* note \_\_\_\_ (“[t]he trafficking process begins with the demand for victims to be used in prostitution and other commercial sex acts.”)

<sup>153</sup> Bernstein, *New Abolitionism*, *supra* note 124, at 144.

<sup>154</sup> Noy Thrupkaew, *The Crusade Against Sex Trafficking*, THE NATION (September 16, 2009).

contributions to the anti-trafficking movement. In no small part due to their advocacy efforts, trafficking quickly became a priority issue on the U.S. national and foreign policy agendas during the Bush Administration. Their international influence, wielded in the standards applied in the sanctions regime, in turn, has motivated other countries to take seriously the problem of sex trafficking and widespread abuse within the sex industry. The neo-abolitionists' success in raising widespread awareness of the problem of sex trafficking is undeniable. And even those who object to the neo-abolitionists' reductive focus on prostitution would be hard-pressed to argue against the fact that the attention drawn to sex trafficking – however narrowly constructed – has also indirectly created space for concerns regarding non-sexual trafficking to be raised and potentially addressed.

But what are we to make of the neo-abolitionist influence on our understanding of the trafficking phenomenon, the role of U.S. and international law in combating this problem, and the strategies and interventions constructed to implement anti-trafficking law and policy? This Part assesses the impact of neo-abolitionist influence on both anti-trafficking law and policy development, and their implementation on the ground. It begins with an assessment of the ways in which the neo-abolitionist legal reforms and reductive narrative have shaped both policymakers' and the mainstream public's understanding of the problem of trafficking, and the ways in which anti-trafficking laws are developed and implemented. The discussion then turns to an examination of the real world consequences of neo-abolitionist-tailored interventions, drawing from sociological and anthropological studies of their impact on the ground.

#### *A. Impact on the Construction of the Problem of Trafficking*

As discussed above, the neo-abolitionist reductive narrative narrows the scope of the trafficking problem to one focused on trafficking of women and girls for sexual exploitation, casting the problem as one of social deviance necessitating aggressive criminal justice response, rather than the consequence of broader structural problems resulting from inadequate migration and labor frameworks to respond to massive flows of migration in our globalized economy. The focus on sex trafficking of women and girls [overlooks] the women, men, and children trafficked for non-sexual exploitation, who according to latest estimates, account for over half of all trafficking cases.<sup>155</sup>

This reductive view of trafficking not only diverts attention away from key trafficked populations, but it implicitly reinforces harmful gender

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<sup>155</sup> [Cite to 2009 TIP Report statistic.]

stereotypes. The focus on women and children in trafficking discourse is deeply rooted in assumptions about gender, particularly women's vulnerability in the migration stream. Notwithstanding the current economic reality that women are increasingly the primary income-earners for their families,<sup>156</sup> traditional gender roles in the family – i.e., men as breadwinners, and women tied to the home – render male migration more socially acceptable than for women, who are assumed to be passive, naïve, ignorant migrants. Consequently, exploited women are conceptualized as trafficked, while men subjected to the same abuse are more commonly seen as irregular migrants.

In similar vein, the discursive slippage between prostitution and trafficking sweeps any exercise of agency by the putative victim under a totalizing narrative of victimization that refuses to engage in any marking of relative control or freedom – men dominate and all prostituted women are subordinated, oppressed, and unfree.<sup>157</sup> Instead, those women – i.e., the self-proclaimed “sex workers” – who defy the dominant narrative are explained away as deviant in desiring abuse and/or, more likely, suffering from a false consciousness and thereby unaware of their oppression.<sup>158</sup>

When it comes to Third World women in particular, as Kapur explains, the ready equating of choice with wealth, and coercion with poverty, leaves no space to recognize and validate the choices women make when confronted with limited economic opportunities.<sup>159</sup> As sociologist Kamala Kempadoo argues, the universalizations and generalizations the neo-abolitionists adopt and export abroad reveal the epistemic privilege of a social group that has a racialized power to define the world and to create new meanings about social realities.<sup>160</sup> The reductive portrayal of the trafficking victim sets up a neo-imperialist power relation that presumes and establishes an essential divide between east and west, north and south – exotic, archaic, authoritarian vs. progressive, enlightened; it positions Third World women as ignorant, tradition-bound, poor, and infantilized, resembling a minor in need of guidance.<sup>161</sup> Thus incapable of exercising choice, Third World prostitutes represent the paradigmatic example of prostitution amounting to sex trafficking.

Notwithstanding its troubling essentialist tendencies, the neo-

<sup>156</sup> [Cite to Lourdes Benaria research]

<sup>157</sup> Noah D. Zatz, *Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution*, 22 SIGNS 277, \_\_\_\_ (1997).

<sup>158</sup> [Insert citations! Hughes articles; Kristof articles.]

<sup>159</sup> Kapur, *supra* note 140, at 869.

<sup>160</sup> Kamala Kempadoo, *Introduction: Globalizing Sex Worker's Rights*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION \_\_\_\_ (Kamala Kempadoo & Jo Doezema eds., 1998);

<sup>161</sup> *Id.*, at \_\_\_\_; [also insert cite to Kamala's later book.]

abolitionist narrative does offer an important critique of liberal notions of freedom and consent in the prostitution context, which presume autonomous individuals negotiating consent in the absence of background power dynamics.<sup>162</sup> That significant economic, gender, and racial inequalities severely compromise the exercise of choice in many prostitution contexts demands close attention. As sociologist Laura Agustin notes, many migrant prostitutes do not – contrary to (some) Western sex worker advocates – adopt the view that sex work is an art form or expression or is like other work.<sup>163</sup> Those who believe that a formalized industry would allow migrant sex workers to advocate on their own behalf assume an identity with sex as a profession that is unlikely for many migrants, who are more likely to view sexual employment as temporary.<sup>164</sup> As Agustin explains, there is “an inescapable, fundamental contradiction of working in a sector where illegality is the norm.”<sup>165</sup> Normalizing sex work through harm reduction strategies cannot avoid the practical obstacles to agency posed by the illegality of most migrant sex workers.

Indeed, the prostitution-as work narrative could be as totalizing and essentialist as the neo-abolitionist reductive narrative. But treating prostitution as possibly a form of work at least enables attention to the specificities of context, e.g., the fact that some working conditions are better than others.<sup>166</sup> Moreover, as Sullivan explains, the prostitution as work discursive strategy “opens up space for the formation of new identities not based on passivity, or sexual exploitation and sexual victimhood.”<sup>167</sup> Perhaps it is not sex work itself that promotes oppression, but rather, “the particular cultural and legal production of a marginalized, degraded prostitution that ensures its oppressive characteristics while acting to limit the subversive potential that might attend a decriminalized, culturally legitimized form of sex work.”<sup>168</sup> Indeed, when it comes to commodification of sex, what matters ultimately is who controls the meaning of the purchase. In this sense, perhaps sex worker unions could be an example of the “victims of commodification appropriating the chains that bind them.”<sup>169</sup>

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<sup>162</sup> Sullivan, *supra* note \_\_\_\_, at 76-77.

<sup>163</sup> Laura Agustín, *Migrants in the Mistress’s House: Other Voices in the “Trafficking” Debate*, 12 SOCIAL POLITICS 96, \_\_\_\_ (2005).

<sup>164</sup> Agustín, *supra* note \_\_\_\_, at \_\_\_\_.

<sup>165</sup> Agustín, *supra* note \_\_\_\_, at \_\_\_\_.

<sup>166</sup> Studies show tremendous variation among prostitution contexts due to different historical and cultural concepts. [Cite to Kapur, Bernstein, etc.]

<sup>167</sup> Sullivan, *supra* note \_\_\_\_, at 79.

<sup>168</sup> Zatz, *supra* note \_\_\_\_, at 291.

<sup>169</sup> Radin & Sunder [get correct full citation]. Radin and Sunder explain that context is critical. To illustrate their point, they ask, if bodily integrity is essential to

The neo-abolitionist refusal to mark the differences between rape and sex for money has discursive and practical perils. It implies that prostitutes are women who are publicly available to be raped, a position held by many law enforcement officials and judges who refuse to accept that prostitutes *can* be raped.<sup>170</sup> It also perpetuates the Madonna vs. whore stigma, or the sense that only those who unwittingly ended up in prostitution are deserving of protection.<sup>171</sup> Because all prostitution is trafficking, and thus a crime and human rights abuse, neo-abolitionist strategies prioritize prohibition and anti-proliferation of the prostitution trade, rather than the welfare and empowerment of prostitutes within the trade. And while the neo-abolitionist perspective resonates with widely-held views that sex should be market inalienable and non-commodified, it cannot, as a practical matter, escape what Margaret Radin refers to as the commodification double-bind. In other words, it is unacceptable for society to embrace commodification of sex when it is in practice the only avenue of survival for the powerless, but it is equally unacceptable for society to further oppress those who try to enter such markets for survival.<sup>172</sup> While in an ideal world, sex would not be commodified, in our non-ideal world, the choice facing some women is between letting her sell sex and letting her children go hungry.<sup>173</sup> To the dissatisfaction of those favoring harm reduction, the neo-abolitionist view would require sacrificing the latter in exchange for its ideal world of non-commodified sex.

### *B. Impact on U.S. and International Anti-trafficking Laws*

Neo-abolitionist influence on how trafficking is conceptualized also risks undermining the ability of U.S. and international laws on trafficking to serve the populations these laws were designed to protect. The reductive focus on trafficking of women and girls for sex trafficking and prostitution overlooks key trafficked populations purposely included in the legal definitions of trafficking. Moreover, analogizing trafficking to slavery

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personhood, is a rape survivor less human than others? If in an ideal world, every adult experiences sexuality as communion and interpersonal sharing, then are the voluntarily celibate lower on the scale of human flourishing?

<sup>170</sup> JULIA O'CONNELL DAVIDSON, PROSTITUTION, POWER, AND FREEDOM 122 (1998).

<sup>171</sup> [FIND CITATION check doezema, GAATW publication, etc.]

<sup>172</sup> Margaret Jane Radin and Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 12 (2005) [hereinafter RETHINKING COMMODIFICATION].

<sup>173</sup> For further discussion of the commodification of sex, see Ann Lucas, *The Currency of Sex: Prostitution, Law, and Commodification*, in RETHINKING COMMODIFICATION, *supra* note 172, at 248.

implicitly raises the threshold for trafficking, causing skepticism regarding the extent of the trafficking problem, and a failure to identify trafficked persons subjected to less extreme forms of exploitation than slavery. Both effects perpetuate inconsistency and confusion regarding the legal definitions of trafficking, and thus undermine the central goal of the UN Trafficking Protocol to foster international cooperation among states to combat this transnational crime and human rights violation.

U.S. and international anti-trafficking laws were designed to address trafficking of men, women, and children for both sexual and non-sexual exploitation. Yet neo-abolitionist pressure has resulted in uneven enforcement of these laws, domestically, with the emphasis of law enforcement activity, resource allocation, and service provision targeted at sex trafficking and prostitution. Other countries have followed suit, in being more likely to adopt domestic laws on sex trafficking than for labor trafficking, and often passing anti-prostitution laws under the guise of “trafficking” laws. Until recently, the U.S. sanctions regime implicitly condoned such uneven legislative responses to the different forms of trafficking.<sup>174</sup> In addition to disregarding key trafficked populations, this outcome undermines the UN Trafficking Protocol’s goal of ensuring consistent legal definition of trafficking from country to country to facilitate effective international cooperation to combat trafficking.<sup>175</sup>

The application of a uniform definition of trafficking is necessary not only for fostering coordinated transnational responses to trafficking cases, but also for the sake of data collection regarding this as-yet under-researched phenomenon. Statistics in the trafficking field are notoriously unreliable, unsubstantiated figures often recycled and accepted as true, as if sheer repetition guaranteed veracity.<sup>176</sup> One of the key obstacles to data

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<sup>174</sup> Chuang, *Global Sheriff*, *supra* note \_\_\_\_, at \_\_\_\_\_. The 2007, 2008, and 2009 TIP Reports have made a much more concerted effort to highlight the problem of labor trafficking, and to take countries to task for not addressing this problem. [Insert cites to TIP Reports.]

<sup>175</sup> [Insert cite to UN Protocol language; Gallagher article.]

<sup>176</sup> David Feingold, *Trafficking in Numbers: The Social Construction of Human Trafficking Data*, in *SEX, DRUGS, AND BODY COUNTS: THE POLITICS OF NUMBERS IN GLOBAL CRIME AND CONFLICT* (Peter Andreas & Kelly Greenhill, eds.) (Cornell University Press, forthcoming 2010); U.S. GOVT ACCOUNTABILITY OFFICE, *HUMAN TRAFFICKING: BETTER DATA, STRATEGY AND REPORTING NEEDED TO ENHANCE U.S. ANTI-TRAFFICKING EFFORTS ABROAD* (2006) [hereinafter GAO BETTER DATA REPORT]. As the GAO notes, the availability, reliability, and comparability of the underlying data are limited by several factors. Few countries collect data on a systematic basis, and often focus on women and children trafficked for sexual exploitation, leaving other forms of trafficking underreported. Moreover, the capacity for data collection and analysis in countries of origin is often inadequate, and in countries of destination, estimates are extrapolated from non-random, non-representative samples of reported victims. The U.S. government, for example,

collection has been the fact that countries and organizations define trafficking differently, some conflating trafficking with other phenomena, including smuggling, illegal migration, and prostitution.<sup>177</sup> Neo-abolitionist pressure on states to conflate sex trafficking and prostitution perpetuates confusion and inconsistency in this regard.

Another way in which neo-abolitionist advocacy undermines anti-trafficking legal standards is the way in which they have joined a number of other advocates, scholars, and policymakers<sup>178</sup> in inaccurately conflating trafficking and slavery. The neo-abolitionists branded the public consciousness with images of “sexual slavery” when they strategically used the term to garner support for the 2000 TVPA. Albeit an effective tool for mobilizing the masses by lending moral urgency to the cause, conflation of the phenomena has real-world negative consequences. Promoting a perception of trafficking as requiring circumstances akin to slavery risks feeding skepticism over the true extent of the trafficking phenomenon.<sup>179</sup>

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“essentially averages the various aggregate estimates of reported and unreported trafficking victims published by NGOs, governments, and international organizations, estimates that themselves are not reliable or comparable due to different definitions, methodologies, data sources, and data validation procedures.” *Id.*, at 13.

<sup>177</sup> *Id.*

<sup>178</sup> Regrettably, the neo-abolitionists are not alone in equating trafficking and slavery. See *infra* discussion accompanying notes \_\_\_\_ (insert reference to state dept’s /Lou DeBaca’s plan to change the GTIP office’s name to Office to Monitor and Combat Trafficking and Slavery).

<sup>179</sup> Inaccurate statistics regarding the trafficking problem has bred skepticism regarding the true extent, if not the very existence of, the phenomenon. Inconsistent statistics, combined with a general skepticism that such human rights violations could occur within U.S. borders, has caused mainstream media to latch onto numerical disparities. For example, a New York Times Magazine cover story describing in lurid detail the trafficking of girls into the United States for forced prostitution, generated much skepticism about the presence of trafficking within our borders. See Peter Landesman, *The Girls Next Door*, THE NEW YORK TIMES (January 25, 2004); Jack Shafer, *Sex Slaves of West 43<sup>rd</sup> Street: The New York Times Magazine gets carried away in its investigation*, SLATE (January 26, 2004) (questioning Landesman’s claim that tens of thousands of women and girls are held in forced prostitution in the United States); Jack Shafer, *Doubting Landesman: I’m not the only one questioning the Times Magazine’s sex-slave story*, SLATE (January 27, 2004) (describing skeptical reaction of reporters from Los Angeles Times and the Nation); Jack Shafer, *The Times Magazine Strikes Back*, SLATE (January 28, 2004) (responding the Times Magazine editor’s defense of the Landesman article); Jack Shafer, *How Not to Handle Press Critics*, SLATE (January 28, 2004) (describing an online skirmish between Landesman and Daniel Radosh, the latter having written a blog criticizing Landesman’s article); Jack Shafer, *Enslaved by His Sources*, SLATE (January 28, 2004). There is, indeed, a considerable gap between the estimated (tens of thousands per year) and reported (totaling around 2000 since the year 2000) numbers of trafficked persons in the United States. This disparity has raised concerns as to the advisability of allocating federal dollars to a problem that may not exist to nearly the degree some statistics claim. The fact that the U.S. government paid a public relations firm nearly \$12

This is particularly true in the American context, given our brutal history of transatlantic slavery.<sup>180</sup> Perhaps even more significantly, equating trafficking with slavery, which, inaccurate as a matter of international law, harms trafficked persons by implicitly raising the definitional threshold for trafficking, and harms true victims of slavery by diluting the contents of the anti-slavery prohibition.

The 1926 International Convention to Suppress the Slave Trade and Slavery defines slavery as the “status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>181</sup> Though a number of advocates and scholars have argued for expansionist readings of the slavery definition to include any forced exploitation of a person’s labor<sup>182</sup> – regardless of whether the powers attached to the right of ownership are exercised – such efforts are misguided

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million do find victims of trafficking as part of the government’s outreach program adds fuel to the fire. See Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence*, WASHINGTON POST (September 23, 2007); Jerry Markon, *In D.C. Area, Most Cases Involve Prostitution*, WASHINGTON POST (September 23, 2007). It is important to note, however, that just because this clandestine victim population is difficult to locate does not mean they do not exist. See GAO BETTER DATA REPORT, *supra* note 176, at \_\_\_\_ (noting how trafficked persons are a hidden population, unlikely to come forward due to traffickers’ threats or a distrust of law enforcement).

<sup>180</sup> [Insert citation to Karen Bravo article.]

<sup>181</sup> International Convention to Suppress the Slave Trade and Slavery, September 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter 1926 Convention]. The 1956 Supplementary Convention extends the 1926 Convention’s application to “institutions or practices similar to slavery” – which include four servile statuses: debt bondage, serfdom, specific types of servile marriage, and child exploitation. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1, Apr. 1, 1957, 18 U.S.T. 3201, 226 U.N.T.S. 3 [hereinafter Supplementary Convention].

<sup>182</sup> Sociologist and activist Kevin Bales popularized an expanded notion of slavery as including any form of dealing with human beings leading to the forced exploitation of their labor. See KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* (1999). In so doing, Bales conflates slavery with forced labor and servitude. Forced labor is defined under international labor law as encompassing “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.” Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 U.N.T.S. 55, entered into force May 1, 1932. Though not defined in treaty law, the term “servitude” refers to the concept of “servile status” found in the Supplementary Slavery Convention, so would include, e.g., debt bondage, servile marriage, and trafficking in children. See Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 903 (2009) [hereinafter Gallagher, *Human Rights and Human Trafficking*].

Regrettably, some international law scholars have accepted Bales’ expansionist interpretation, despite its inaccuracy as a matter of international law. See e.g., James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 9 (2008); [insert reference to Quirk?]

as a matter of international law.<sup>183</sup> The *travaux préparatoires* of the 1926 Convention make clear that the ownership element was a necessary component of the slavery definition, and references to slavery in subsequently developed international human rights law reveal that the concept of slavery implied the destruction of an individual's juridical personality.<sup>184</sup> While recent developments in international criminal law gesture towards the possibility that slavery could *potentially* include debt bondage and trafficking, the core requirement of "the exercise of any or all of the powers attached to the right of ownership" remains intact.<sup>185</sup>

One does not have to be a legal purist to appreciate the dangers of conflating trafficking with slavery. Equating the two has negative implications for the victims of both phenomena. Conflation risks diluting the meaning of slavery, the prohibition of which carries heightened legal weight under international law because of its status as a *jus cogens* norm, or a norm accepted by the international community of States as a norm from which *no* derogation is permitted.<sup>186</sup> Diluting the legal force of the prohibition on slavery could affect the ability of the international community to bring to justice those criminally responsible for violating the prohibition, and, moreover, violate the rights of those accused of crimes to be informed of the content of the charges against them.<sup>187</sup>

Conversely, equating trafficking with slavery raises the legal bar for trafficking. Trafficking encompasses a wide range of practices, involving varying levels of exploitation, with true slavery at one extreme end of the spectrum and comprising a small fraction of all trafficking cases. Conflating trafficking with slavery undermines this understanding of the trafficking phenomenon, thus compromising law enforcement and the general public's ability to identify and name this human rights violation, to the detriment of all trafficking victims.<sup>188</sup>

### C. Impact on the Ground

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<sup>183</sup> For a comprehensive and cogent analysis of this issue, see Gallagher, *Human Rights and Human Trafficking*, *supra* note 182, at 799-810.

<sup>184</sup> See Gallagher, *Human Rights and Human Trafficking*, *supra* note 182, at 803. Indeed, as Gallagher notes, the drafters of the International Covenant on Civil and Political Rights (ICCPR) were explicit that the ICCPR's reference to the slave trade *not* encompass trafficking in women. *Id.*

<sup>185</sup> *Id.*, at 810.

<sup>186</sup> *Id.*, at 798.

<sup>187</sup> *Id.*, at 799.

<sup>188</sup> Moreover, in the U.S. context, the conflation is highly insensitive to the descendants of true slaves victimized by the United States' slave-holding and trading practices of the eighteenth and nineteenth centuries.

What effects has the neo-abolitionist crusade produced on the ground? Has it succeeded in reducing the incidence of prostitution or trafficking around the world? If so, at what cost?

The following discussion draws from sociological and anthropological studies to explore the ramifications of neo-abolitionist governance in the trafficking realm. Neo-abolitionist legal reforms and discursive practices have had real-world consequences. The gender stereotypes that their exclusive focus on the sex trafficking of women and girls promote have impeded efforts to identify and respond to the trafficking of men and male children, while at the same time enabled States to rely on discriminatory migration controls in the name of protecting women from trafficking. Whether their favored anti-prostitution interventions yield positive results remains highly questionable, while studies demonstrate that certain interventions have caused collateral damage with respect to other vulnerable populations. Yet the crusading impulse undergirding the neo-abolitionist crusade creates and maintains ideological blinders that resist the testing of core assumptions and objective assessment of the impacts of their policymaking. Moreover, as demonstrated below, whether they advance the anti-prostitution agenda or not, they have succeeded in doing little to eradicate human trafficking.

#### 1. Promoting gender stereotypes and gendered harms

The neo-abolitionist focus on women and children and sex trafficking feeds gender-biased approaches to anti-trafficking interventions, to the detriment of trafficked men and women seeking to migrate. On the one hand, it has detracted attention from the underreported and under-addressed problem of male trafficking, and, on the other hand, facilitated paternalistic restrictions on women's rights to migrate, rendering migrant women even more vulnerable to third party offers to facilitate their migration.

This gender bias has negative implications for victim identification. The prevailing orthodoxy of trafficked persons as women and children not only causes law enforcement officials and service providers to overlook male victims of trafficking, but also trafficked men to not recognize *themselves* as victims. The powerlessness and vulnerability associated with the "victim" label may be at odds with the way trafficked men (and, indeed, women) view themselves, having previously held a positive self-image as breadwinner and provider.<sup>189</sup> Victimhood is disempowering enough without the additional feminizing effect of the "trafficking" label resulting

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<sup>189</sup> Rebecca Surtees, *Trafficked Men as Unwilling Victims*, ST. ANTHONY'S INTERNATIONAL REVIEW 16, 25 (2008) [hereinafter Surtees, *Unwilling Victims*].

from the assumption that women, not men, are trafficked. Moreover, linking victimhood to gender can mask other aspects of an individual's identity that contribute to his or her vulnerability to trafficking – e.g., ethnicity, age, race, nationality, religion, class, and other factors that inform one's status in a particular community.<sup>190</sup>

That men are thus less “identifiable” as victims in turn has led policies and programs to be constructed around the female victim. Few trafficking interventions target and address the needs of male victims.<sup>191</sup> For instance, to the extent shelters are available for trafficked persons, they typically house only female victims, and, in any event, commonly follow a closed shelter model with restrictions on movement and outside contact that men may not be willing to accept.<sup>192</sup> Moreover, social norms that accept women as vulnerable but men as self-sufficient may cause service providers to overlook or even affirmatively deny the need to assist men. Sharing in these perceptions, trafficked men may be reluctant to accept assistance, as doing so might signal their status as failed migrants.<sup>193</sup>

At the same time, the abstract focus on the exploitation of women and girls' (assumed) particular susceptibility to victimization, leads to prophylactic solutions – i.e., restrictions on women's migration – that fail to appreciate, if not outright exacerbate, the background migratory pressures that create vulnerability to traffickers. The notion that women make for naïve, passive, ignorant migrants risks conflating any female migration with trafficking. Purported concern over these vulnerable women provides a convenient excuse for restrictions on women's migration, motivated at best by paternalism, and at worst a deeper anti-migration agenda. For example, Nepalese [and Bangladeshi – confirm] law restricts women under 35 from traveling overseas without a male guardian's written consent.<sup>194</sup> In similar vein, Indian government officials can deny permits to females migrating for labor where the work is deemed against public policy or public interest – for example, women under 30 are considered an especially vulnerable group and are prohibited from working as domestic workers in the Gulf, Africa,

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<sup>190</sup> Surtees, *Unwilling Victims*, *supra* note 189, at 20.

<sup>191</sup> Surtees, *Unwilling Victims*, *supra* note 189, at 23.

<sup>192</sup> Surtees, *Unwilling Victims*, *supra* note 189, at 28. In an international study commissioned by the Australian Agency for International Development, researchers found that women and girls comprise the overwhelming majority of trafficked persons detained in shelters. Researchers attributed this to the fact that women and girls are more likely to be identified through official channels as trafficked than men and boys, though this does not necessarily support a claim that females are trafficked in greater numbers. Gallagher & Pearson, *Detention of Trafficked Persons*, *supra* note 217, at 15.

<sup>193</sup> Surtees, *Unwilling Victims*, *supra* note 189, at 23.

<sup>194</sup> [Insert citations.]

and Southeast Asia.<sup>195</sup> In the United States, concern over abuse of domestic workers brought to the United States by foreign diplomats has caused the State Department to consider suspending certain embassies' diplomats from bringing in domestic workers altogether.<sup>196</sup>

These overbroad, prophylactic measures restricting migration are a convenient alternative to addressing the coercive and abusive practices that women may be subjected to in the course of movement – e.g., exorbitant migration and/or labor recruitment fees. It is in this sense that neo-abolitionist constructions of the problem of trafficking hinder development of long-term strategies for combating trafficking. Assuming away agency on the part of female migrants obviates critical examination of the ways in which women turn to informal migration avenues and to the informal economy for work (including the sex industry). This results in a fundamental failure to understand how restrictions on female migration (especially for semi- or unskilled workers) actually make all the more attractive offers by third parties to facilitate their clandestine migration, thus increasing vulnerability to trafficking.<sup>197</sup>

## 2. Collateral Damage: HIV/AIDS Prevention

The anti-prostitution funding restrictions have had a significant collateral impacts, ranging from self-censorship to withdrawal of basic social services to prostitute/sex worker populations. Many organizations have purged prohibited words such as “sex work” and “harm reduction” from their materials for fear of being seen as “promoting” prostitution.<sup>198</sup> Some organizations have withdrawn legal and social services from sex workers to avoid any appearance of support for sex worker collectives, including, for example, defunding English training classes for people in the sex sector, despite the fact that English language skills dramatically increased alternative job prospects.<sup>199</sup> Other organizations have simply chosen to cease applying for U.S. funding and, consequently, to downsize their programming, in order to avoid jeopardizing their relationships with,

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<sup>195</sup> [Insert citations.]

<sup>196</sup> [Confirm and cite to draft State Department Protocol office report issued pursuant to TVPRA 2008 -- see if draft finalized and get it.]

<sup>197</sup> [Cite to Saskia Sassen articles re: trafficking and migration.]

<sup>198</sup> As CATW explains, some may think that the terms “sex work” and “sex workers” destigmatizes and dignifies women in prostitution but, “in reality, what it dignifies is the sex industry. It lays the groundwork for recognizing buyers of commercial sex as legitimate ‘customers’ and pimps as ‘third party business agents or brokers.’” CATW Guide, *supra* note 38, at 6.

<sup>199</sup> Declaration of Dr. Carol Jennings, dated August 2, 2005, ¶ 15, appended to [figure out which brief], in DKT litigation, *supra* note 83.

or further stigmatizing, the populations with which they work. In the HIV/AIDS prevention field, in particular, adopting an explicit anti-prostitution stance compromises the “non-judgmental” attitude required for gaining access to stigmatized, and hence vulnerable populations such as sex workers/prostitutes.<sup>200</sup>

Whether requiring HIV/AIDS prevention organizations to evince an anti-prostitution stance actually helps combat prostitution, much less trafficking, is at best, debatable. Rather than curtailing prostitution activities, in some contexts, the funding restrictions have exacerbated the already dangerous conditions in the sex industry and decreased sex workers/prostitutes’ ability to leave the sex sector.<sup>201</sup> As Johns Hopkins epidemiologist Professor Chris Beyrer has found in studying the effects of the pledge worldwide, in several cases, the anti-prostitution pledge has demonstrated the potential to restrict programs for those it seeks to protect. Citing the closure of the Médecins Sans Frontieres-run Lotus Project in Svay Pak, Cambodia, which provided a range of services to sex workers, including primary health care, and English and computer lessons, Beyrer concluded that

the evidence suggests that as long as prostitution and sex trafficking remain conflated, women and men who voluntarily sell sex may be at risk of further marginalization and may, as witnessed by the Lotus Project, be less likely to receive the health, social, and education services they need to eventually move out of the industry.<sup>202</sup>

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<sup>200</sup> UNAIDS Case Study, *Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India and Bangladesh* 28 (November 2000) (concluding that “[t]raining to diminish moralistic and judgmental attitudes among staff proved to be successful” and that developing meaningful relationships with target groups was key issue, requiring time and empathy”); Centers for Disease Control and Prevention, *HIV Prevention Strategic Plan through 2005* 23 (January 2001) (warning that stigmatization of vulnerable groups profoundly affects prevention efforts worldwide because of its pernicious effects – i.e., stigmatized people are threatened with shunning and physical harm, and therefore avoid seeking HIV/AIDS testing, information, and other related services). [GET COPY OF SOURCES.]

<sup>201</sup> See Declaration of Dr. Carol Jenkins, appended to [get title of pleading,] in *DKT International, Inc. v. United States Agency for International Development*, [get formal case cite] (DDC) (August 7, 2005), ¶ 13. Dr. Jenkins notes that despite an HIV prevalence of 75 percent among sex workers of Addis Ababa, no agency funded by USAID – the largest single funder – could provide proper prevention services. *Id.* Moreover, in Papua New Guinea, agencies formerly funded by USAID were forced to secure alternate funding to cover literacy other empowerment activities for sex workers. *Id.* See also, Letter from AIDS Law Project, et al to President George W. Bush (May 18, 2005) (letter signed by over 150 civil society organizations detailing the harms of the anti-prostitution gag rule), available at <http://hrw.org/campaigns/hiv-aids/hiv-aids-letter/>.

<sup>202</sup> Nicole Franck Masenior & Chris Beyrer, *The US Anti-Prostitution Pledge: First Amendment Challenges and Public Health Priorities*, *PLoS Med* 4(7): e207 (July 24, 2007).

Moreover, the anti-prostitution pledge risks alienating critical partners in the fight against trafficking. Sex workers and public health service providers who have access to brothels are often best-positioned to report on the presence of trafficked women and children in a particular brothel.<sup>203</sup> But the specter of HIV/AIDS workers having an anti-prostitution agenda, or worse, actively working with organizations that raid brothels, as discussed below,<sup>204</sup> has caused brothel owners to deny them access.<sup>205</sup>

Indeed, as Beyrer notes, a substantial body of peer-reviewed published studies suggests that the empowerment and organization of sex workers can be an effective HIV prevention strategy and can reduce the harms associated with the industry, including violence and underage prostitutes.<sup>206</sup> Even Holly Burkhalter, formerly with Physicians for Human Rights, and currently Executive Director of IJM, once encouraged U.S. funding for nongovernmental groups that have successfully promoted empowerment and organization, citing as an example the Sonagachi Project, a community-based sex worker union in Calcutta, India, that has considerable bargaining authority and forbids the exploitation of underage girls.<sup>207</sup> The staunch commitment to the anti-prostitution agenda, however, sacrifices even consideration of such strategic alliances, regardless of their proven potential for positive impacts on the ground.<sup>208</sup>

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<sup>203</sup> [Insert reference to sex worker organizing around trafficking... see Doezema and public health studies.]

<sup>204</sup> See *infra* discussion accompanying notes \_\_\_ - \_\_\_ [cite to rescue paradigm section of article]

<sup>205</sup> Noy Thrupkaew, *The Crusade Against Sex Trafficking*, THE NATION (September 16, 2009).

<sup>206</sup> *Id.*

<sup>207</sup> Holly Burkhalter, *Better Lives for Sex Workers*, WASHINGTON POST A25 (December 8, 2003).

<sup>208</sup> The potential negative effects of the pledge are not limited to the fields of HIV/AIDS prevention, prostitution, and trafficking, however. As many feminists and public health advocates noted, the application of the anti-prostitution pledge could open the door to expansion of the “Mexico City” anti-abortion gag rule – traditionally imposed only on foreign NGOs – to U.S. based recipients of overseas family planning funds. See e.g., Susan Cohen, *Ominous Convergence: Sex Trafficking, Prostitution and International Family Planning*, 5 THE GUTTMACHER REPORT ON PUBLIC POLICY (MARCH 2005); *Taking the Prostitution Pledge* (editorial), NEW YORK TIMES (July 5, 2005). The Mexico City global gag rule on abortion prohibits U.S.-based NGOs from transferring U.S. international family planning funds to indigenous organizations overseas that use other, non-U.S. funds to provide abortion counseling or services, or engage in abortion rights advocacy. President Reagan had originally instituted the rule in 1984, to be reversed by President Clinton in 1993, and revived by George W. Bush in 2001. [Insert citation to Mexico City gag rule.] Concerns over possible extension of the Mexico City rule have been alleviated – at least for now – by the fact that President Obama lifted the gag rule shortly after assuming office. [Insert citation to Obama memorandum lifting the gag rule.] President Obama has *not* reversed the anti-prostitution pledge. The Department of Justice has,

### 3. Resistance to self-scrutiny: ideology substitutes for evidence

One of the key drawbacks of moral crusades is that ideology quickly comes to substitute for evidence, moral certainty precluding critical self-assessment. As multiple U.S. Government Accountability Office reports assessing U.S. government anti-trafficking programs have spotlighted, there has been a troubling lack of independent assessment of the foreign anti-trafficking interventions,<sup>209</sup> programs for which the United States has already invested a half-billion dollars.<sup>210</sup>

The reductive narrative contributes to this resistance to scrutiny. With respect to the favored intervention of brothel raids and rescues, for example, the desire to remove women and girls from situations of sexual exploitation and trafficking is a natural, intuitive impulse. This is particularly so when the object of rescue is characterized as innocent, naïve, and completely powerless. But as numerous studies have demonstrated, the problem of “rescue escapes,” described below, disrupts the savior script, at least for so long until a false consciousness is assigned to these uncooperative rescuees.

The ideological blinders are also maintained, at least in part, by the neo-abolitionist legal reforms discussed above, in Part II. The neo-abolitionist power to wield the threat of withdrawal of U.S. funds – against governments through the threat of unilateral sanctions, against NGOs through the anti-prostitution pledge, and against private actors through government contract clauses<sup>211</sup> – chills questioning of the neo-abolitionist assumptions that prostitution leads to trafficking, and that trafficking is best eradicated through criminalizing demand for prostitution. Despite peer-reviewed social science research demonstrating otherwise, discussed below, these assumptions are upheld as indisputable fact.

#### a. Rescue paradigm

The anti-prostitution pledge has permitted the channeling of federal funds towards feminist anti-prostitution and faith-based organizations like IJM, which will have received more than \$4 million from the U.S.

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however, dropped the Bush Administration’s appeal of an injunction against application of the anti-prostitution pledge issued in the AOSI litigation. [Cite to AOSI decision.]

<sup>209</sup> [Cite GAO reports. *See also* 2005 IOM report on research and data re: trafficking.]

<sup>210</sup> [Get most current funding statistic]

<sup>211</sup> [Describe COGR letter representing research universities, expressing concern that an earlier version of the FAR clause could be interpreted as precluding research into prostitution, which might be deemed as “advocating” prostitution.]

government. This funding has fueled the reliance on “rescue” campaigns rooted in a law and order approach, namely brothel raids to remove women and girls and to arrest and prosecute their [alleged abusers?]. The raids undoubtedly have saved some trafficking victims from exploitation. Brothel raids have provoked their share of controversy, however. Critics have impugned the raids for sweeping up voluntary sex workers in their net, exposing these women to harsh police treatment, deportation and/or detention.<sup>212</sup> From the neo-abolitionists’ perspective, however, harms to sex workers an acceptable risk for the sake of saving the “enslaved,” particularly the children.<sup>213</sup> Viewed in a vacuum, the tradeoff seems reasonable, but closer scrutiny of the aftermath of the rescues muddies the cost-benefit analysis.

Probably the greatest challenge to the rescue model is the fact that a significant portion of those rescued escaped their rescuers and returned to the brothels. Rather than questioning the effectiveness of the rescue model, neo-abolitionists have readily attributed this phenomenon to false consciousness of the victim, casting brothel returnees as simply not initially grateful or too used to their oppression. But, as Soderlund notes, the false consciousness thesis is a paradigm-saving technique that encourages activists to dodge the potential pitfalls of their own interventionist strategies.<sup>214</sup>

The hostile victim scenario actually provides critical insight into the psychology of trafficked persons that should inform anti-trafficking programming. As researchers have found, for many trafficked persons, rescue is perceived as substituting one system of control for another,<sup>215</sup> as these rescues often result in either involuntary repatriation to their home countries, or prolonged, involuntary detention in closed shelters. Remaining in the brothel may be preferable to deportation to Burma and the repressive conditions that caused the victims to migrate in the first

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<sup>212</sup> Though IJM has refined its techniques, its early raids resulted in the group being branded “cops for Christ” and vigilante “cowboys” that swooped into Cambodia and Thailand, conducted the raids without consulting local non-governmental organizations, and without a viable plan for the aftercare of those rescued, leaving local non-governmental organizations to deal with the fall-out. Thrupkaew, *supra* note 154, Maggie Jones, *Thailand’s Brothel Busters*, MOTHERJONES.COM (November/Deember 2003) [hereinafter Jones, *Thailand’s Brothel Busters*].

<sup>213</sup> Thrupkaew, *supra* note 154 (describing IJM’s “symbolic quest to provide individual rescue” to “the one” – the one girl deceived, the one girl raped, the one girl infected with AIDS).

<sup>214</sup> Soderlund, *supra* note \_\_\_\_, at 79.

<sup>215</sup> ANTI-SLAVERY INTERNATIONAL (Elaine Pearson), HUMAN TRAFFIC, HUMAN RIGHTS: REDEFINING VICTIM PROTECTION 33 (2002) [hereinafter REDEFINING VICTIM PROTECTION].

instance,<sup>216</sup> or to confinement in a shelter for months or even years, where victims' movement and outside contact is severely restricted (arguably in violation of international human rights law).<sup>217</sup> In Thailand, for instance, trafficked persons are afraid of shelters and will often deny their trafficking and opt for deportation rather than be sent to a shelter.<sup>218</sup> But the victim perspective seems rarely to factor into the rescue equation, as one UN official put it when asked about the rescue strategy, he had "never seen an issue where there is less interest in hearing from those who are most affected by it."<sup>219</sup>

Despite their well-intentioned desire to save individuals from exploitation, in the end, it remains unclear whether this goal has been accomplished. As Human Rights Watch researchers uncovered, surprisingly little attention is paid to the aftercare of those "rescued"—e.g., not tracking the numbers of minors repatriated to their home countries,<sup>220</sup> much less their post-repatriation conditions. Moreover, according to a USAID-funded census, the number of children offered for prostitution actually increased after one raid in Cambodia, which researchers attributed families of the rescued children having sent siblings of the rescued girls in order to pay back the girls' debt contracts held by the rescued girls, later to be joined in the brothels by rescued girls who had managed to escape their shelters.<sup>221</sup> Meanwhile, conditions in the brothels worsened, as brothel

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<sup>216</sup> For some, the choice amounts to either being raped for free in Burma or paid to do commercial sex work. See Thrupkaew, *supra* note 154.

<sup>217</sup> Indeed, routine detention of actual or suspected victims of trafficking potentially violates a number of fundamental principles of international law. For a comprehensive analysis of the legality of detention practices, see Anne Gallagher & Elaine Pearson, *Detention of Trafficked Persons in Shelters: A Legal and Policy Analysis*, at 22 (2008) [hereinafter Gallagher & Pearson, *Detention of Trafficked Persons*].

<sup>218</sup> Gallagher & Pearson, *Detention of Trafficked Persons*, at 22. Some victims have gone to great lengths to escape the shelters—e.g., being hospitalized for injuries from jumping out of windows. See Thrupkaew, *supra* note 154; Jones, *Thailand's Brothel Busters*, *supra* note 212.

<sup>219</sup> See Jones, *Thailand's Brothel Busters*, *supra* note 212 (quoting Phil Marshall of the UN Project on Human Trafficking in Southeast Asia's Mekong Region).

<sup>220</sup> See Thrupkaew, *supra* note 154 (quoting Joe Amon, director of the health and human rights division of Human Rights Watch).

<sup>221</sup> See Thrupkaew, *supra* note 154 (citing a USAID-funded census of sex workers in Cambodia before and after a 2003 IJM raid). Another example of amplified harms resulting from the law and order approach IJM heralds is the effect of a USAID nearly \$1 million grant to IJM to train Cambodian police in counter-trafficking techniques. Human rights organizations strongly criticized IJM's decision to partner with the Cambodian police given the notorious police involvement in trafficking through extorting protection money from brothel owners and assault and rape of sex workers and trafficked persons. It came as little surprise, therefore, when the Cambodian government launched indiscriminate sweeps of brothels and streets, resulting in three detainees being beaten to death and five

owners denied access to public health officials offering HIV prevention, suspecting their involvement in the brothel raids.<sup>222</sup>

The problems with the rescue model highlight the dangers of failing to understand the complexities of the trafficking phenomenon. Regrettably, the savior mentality avoids nuance in its quest for salvation and leaves little room for self-doubt. The fact that pursuing such raids bring in millions of dollars in federal funding,<sup>223</sup> that shelters have a financial incentive to stay full (i.e., to justify their funding) and that governments rely on shelters as evidence of their efforts to combat trafficking (i.e., in response to the threat of US anti-trafficking sanctions), adds to the disincentives against critical self-assessment. But the trail of harms created thus far demands that one question whether at least *some* of the resources allocated to rescue might be better used to address the underlying root causes that fuels risky migration and exploitative labor conditions in the first instance – if for no other reason than for the sake of every girl who replaces a rescued one.

b. Assessing the merits of prostitution reform strategies

Consistent with radical feminist theories regarding prostitution, neo-abolitionist trafficking policy rests on the basic assumption that prostitution is inherently violence, and therefore amounts to trafficking. It logically follows that eradicating trafficking requires eradication of prostitution, but through a legal regime that punishes all actors except the women and girls, who are victims of their circumstances. This assumption and policy prescription – which form the basis of neo-abolitionist prescriptions – have largely been unexamined by policymakers. But the extent to which they have become the basis of hundreds of millions of U.S. taxpayer dollars' worth of anti-trafficking interventions around the world demands closer scrutiny. The analysis below attempts to highlight the counter-evidence – not to suggest that anti-prostitution reforms are necessarily harmful, but that they require further scrutiny before they are embraced as necessarily beneficial to the populations they purport to help.

i. Prostitution as inherently violence against women, and therefore linked to trafficking

The U.S. State Department “Fact Sheet: The Link Between

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committing suicide. Though IJM was not involved in the sweeps, the Cambodian NGO community nonetheless blamed IJM for blindly “engaging with law enforcement while failing to heed the voices of those they ostensibly protect.” *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> [consider citing Polaris Project rescue program in Japan – tons of money, but very few victims located so far...]

Prostitution and Sex Trafficking,” formerly prominently displayed on the State Department website touted “[t]he indisputable connection between human trafficking and prostitution,” which “led the [Bush] Administration to take a strong stand against legalized and tolerated prostitution.”<sup>224</sup> As discussed in Part II, this view was at the core of the Bush Administration’s embrace of the neo-abolitionist agenda. But a closer examination of the relevant academic studies published in peer-reviewed scholarly journals demonstrates that neo-abolitionist portrayals of the relationship between trafficking and prostitution, and their underlying assumption that that violence is inherent in the sex industry, are far from “indisputable.” The sources cited in the Fact Sheet consist of either journalistic accounts or sources whose studies have been discredited in academic literature for their methodological flaws.<sup>225</sup> Indeed, when asked by a group of human rights activists, lawyers, and researchers for the sources upon which the Fact Sheet relied to make these claims,<sup>226</sup> the then-GTIP director responded merely that it was obvious to his officials that, “as stated in the fact sheet...prostitution ‘fuels’ the increase in sex trafficking. Where

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<sup>224</sup> BUREAU OF PUBLIC AFFAIRS, U.S. DEP’T OF STATE, FACT SHEET: THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING (2004) (on file with author) [hereinafter 2004 FACT SHEET]. The “Fact Sheet” was removed from the State Department website in \_\_\_\_ (ask TIP office when and why the fact sheet was removed).

<sup>225</sup> A cursory comparison between the claims made on the Fact Sheet against the handful of sources cited exposes the liberties with which “facts” are deployed. The Fact Sheet broadly asserts that “89 percent of women in prostitution want to escape,” but the source cited only purports to examine prostitution in nine countries. *See* 2004 FACT SHEET, at 1 (citing Melissa Farley *et al.*, *Prostitution and Trafficking in Nine Countries; An Update on Violence and Posttraumatic Stress Disorder*, J. TRAUMA PRAC., Vol 2, No. 3/4 at 33-74 (2003) [hereinafter Farley, *Prostitution and Trafficking*]; PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS (Melissa Farley ed., 2003)) [cross-check against Fact Sheet] Similarly, the Fact Sheet claims that “where prostitution has been legalized or tolerated, there is an increase in the demand for sex slaves.” Instead of social science research, the Fact Sheet cites a journalistic account that has been criticized for “proving little...for all [its] anger and bluster.” 2004 FACT SHEET, at 2 (citing VICTOR MALAREK, *THE NATASHAS: INSIDE THE NEW GLOBAL SEX TRADE* (2004)); *see* Mark Athitakis, *From Russia Without Love: Sex Slaves*, CHI. SUN-TIMES, Oct. 17, 2004, at 12 (reviewing the Malarek book and noting the need for “a careful, considered, and thorough piece of reporting, an expose with more rigor and less rant.”) The Fact Sheet’s claim of a correlation between legalized prostitution and increased demand for “sex slaves” is actually disputed by the State Department’s own 2005 Trafficking in Persons Report. The Report deems the Netherlands, where prostitution is legal, fully compliant with the U.S. minimum standards for the elimination of trafficking, and notes that the Dutch police reported a “*decrease* in trafficking in the legal sector.” U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT [insert page reference] (2005).

<sup>226</sup> Letter from Ann Jordan et al to Ambassador John Miller, April 21, 2005. [describe some of the criticisms...]

prostitution thrives, so does sex trafficking!”<sup>227</sup>

As sociologist Ronald Weitzer notes, “[i]n no area of the social sciences has ideology contaminated knowledge more pervasively than in writings on the sex industry,” where the canons of scientific inquiry are abandoned and research skewed to promote a particular political agenda.<sup>228</sup> In his review of studies produced by the researchers whose work was repeatedly cited and funded by the Bush Administration, Weitzer catalogues significant theoretical and methodological flaws.<sup>229</sup> These include sampling bias, reliance on disturbing, graphic anecdotes as evidence [of trends/the whole] while ignoring the counter-evidence, non-disclosure of the interview questions, and a failure to situate findings in related (and adverse) scholarly literature.<sup>230</sup> A 2003 study cited in the Fact Sheet reveals the bias of the researchers in its introduction:

prostitution dehumanizes, commodifies and fetishizes women....In prostitution, there is always a power imbalance....Prostitution excludes any mutuality of privilege or pleasure.<sup>231</sup>

Under its “Methods” section, the study reveals that the countries selected for the study were included in the study “because investigators in those states shared a commitment to documenting the experiences of women in prostitution, and *in some instances to providing alternatives to*

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<sup>227</sup> Letter from John Miller to Ann Jordan et al (undated).

<sup>228</sup> Ronald Weitzer, *Flawed Theory and Method in Studies of Prostitution*, 11 VIOLENCE AGAINST WOMEN 934 (2005) [hereinafter Weitzer, *Flawed Theory*].

<sup>229</sup> In *Flawed Theory*, Weitzer examines articles published by Raymond and Farley in 2004. See Weitzer, *Flawed Theory*, *supra* note 228. Farley, whose work is cited in the 2004 FACT SHEET, is director of the staunch anti-prostitution organization, Prostitution Research and Education. Raymond is [was?] co-executive director of the Coalition Against Trafficking in Women (CATW), a leading neo-abolitionist organization. [research and mention the federal grants they’ve received over the last 8 years]

A major objective of one of the Raymond studies was to construct a profile of “prostitute users” and to gather information on “men’s attitudes and treatment of women in prostitution.” Janice Raymond, *Prostitution on demand: Legalizing the buyers as sexual consumers*, 10 VIOLENCE AGAINST WOMEN 1156 (2004). As Weitzer points out, however, Raymond did not interview a single customer, and did not cite a single academic study published in a scholarly journal in support of her findings, despite the growing body of academic research on customers. Raymond thus opted not to follow “the canon of academic research that authors situate their findings in the related scholarly literature to highlight similarities and differences in findings and build on prior work.” Weitzer, *Flawed Theory*, *supra* note 228, at 940.

<sup>230</sup> As Weitzer states, “biased procedures beget forgone conclusions.” Weitzer, *Flawed Theory*, *supra* note 228, at 940. Sampling biases include selecting as interview subjects street prostitutes approached in the street (as opposed to those working in indoor venues), prostitutes who had contacted service agencies (so were in distress), or prostitutes interviewed in jail. Interviews were conducted by former prostitutes who believed that prostitution is a form of violence against women.

<sup>231</sup> Farley, *Prostitution and Trafficking*, *supra* note 225, at 34.

prostitution.”<sup>232</sup> The fact that the interviews were conducted by the authors of the study<sup>233</sup> notwithstanding this bias raises the question whether the interview questions – which were not disclosed in the study – were neutrally phrased and presented. Moreover, sources upon which the study relies mirror the methodological flaws (e.g., sampling bias) discussed above.<sup>234</sup> The research rejects “myths” about prostitution – e.g., that street prostitution is worse than indoor prostitution – without acknowledging, much less citing the adverse academic literature,<sup>235</sup> including the numerous studies demonstrating street prostitutes’ substantially greater vulnerability to victimization.<sup>236</sup>

ii. The Swedish approach as model for combating trafficking

In 1998, Sweden became the first country in the world to officially denounce prostitution as a form of gendered violence against women by criminalizing the purchase (but not the sale) of sex.<sup>237</sup> Two years later, the Netherlands took the opposite approach, acknowledging the sex industry as a legitimate commercial sector, removing adult consensual prostitution from the criminal code, and applying labor laws to the sector.<sup>238</sup> The Swedish approach has since been touted by the neo-abolitionists and Bush Administration officials as the preferred approach to combating prostitution (hence, trafficking) worldwide, and the Dutch approach reviled as promoting violence against women.<sup>239</sup>

A closer examination of social science studies evaluating the effectiveness of the Swedish model casts doubt on whether such enthusiasm over its potential to combat prostitution, much less trafficking, is

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<sup>232</sup> *Id.*, at 37 (emphasis added).

<sup>233</sup> *Id.*, at 42.

<sup>234</sup> Most of Farley’s citations are to studies Farley either authored or co-authored. One non-self-authored study upon which Farley relies is a rather dated 1982 study by Silbert & Pines finding that 70% of women in prostitution in San Francisco, California were raped. *See, e.g.*, Farley, *Prostitution and Trafficking*, *supra* note 225, at 35. The study actually found that 70% had been raped or had experienced a customer ‘similarly going beyond the work contract’ (the meaning of which was left vague). Moreover, as Weitzer points out, the authors of the study hired interviewers “who were former prostitutes, had been residents of a treatment facility in the city, and ‘had been victims of various assaults’ when they worked as prostitutes” and drew their interview population from the streets. *See* Weitzer, *Flawed Theory*, *supra* note 228, at 938, assessing M. Silbert & A. Pines, *Victimization of Street Prostitutes*, 7 *VICTIMOLOGY* 122-133 (1982).

<sup>235</sup> *Id.*, at 60.

<sup>236</sup> *See, e.g.*, [insert references cited in Bernstein, Kulick, and Weitzer studies.]

<sup>237</sup> [Insert reference to the Swedish law.]

<sup>238</sup> [Insert reference to Dutch law.]

<sup>239</sup> [Insert Bush administration officials’ references to the Swedish approach; check TIP Report assessments of Sweden]

warranted.<sup>240</sup> While the rates of street prostitution, which was a minor segment of the Swedish sex industry to begin with, decreased, whether the law resulted in an overall decrease in numbers of women prostitution remains unknown.<sup>241</sup> Some studies suggest that prior to the 1998 law, most purchases of sex by Swedish men were conducted abroad, and that the rates of such transactions have actually increased since the law was passed.<sup>242</sup> Moreover, some suggest the law resulted in streetwalkers simply began relying on the internet and cell phones to find clients, a trend that, consistent the trend in other Western European and U.S. cities towards the vast majority of prostitution activities moving indoors.<sup>243</sup> As for the trafficking figures, criminalization has apparently had positive effects in limiting trafficking in women for prostitution to Sweden, but there is also evidence that these activities are to some extent simply being diverted to other countries.<sup>244</sup>

The Swedish law's questionable impact on numbers of women trafficked and in prostitution aside, there remains the unaddressed question of the potentially negative impact of the law on the *conditions* under which prostitution takes place. The latter concern was of little interest to Swedish lawmakers – when confronted with the possibility that the law might actually drive prostitution underground and render prostitutes more vulnerable to exploitation to profiteers, legislators consistently responded that the purpose of the law was first and foremost to send a message that Swedish society did not accept prostitution.<sup>245</sup> Studies demonstrate, however, that the decreased visibility of prostitution activities has made it more difficult for social outreach programs to assist prostitutes.<sup>246</sup>

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<sup>240</sup> Gunilla Ekberg, a former Swedish government advisor and anti-prostitution activist, authored a report that has provided the basis of knowledge upon which neo-abolitionist strategies and approaches have been constructed. See Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Services*, 10 VIOLENCE AGAINST WOMEN [insert page cite] (2004). In the article, Ekberg situates herself firmly in the neo-abolitionist camp, characterizing prostitution as a form of sexual violence, regardless of the circumstances, and inseparable from the issue of sex trafficking. *Id.*, at \_\_\_\_\_. The vast majority of Ekberg's claims rely on inferior sources, including newspaper articles and personal conversations rather than social science literature. [confirm] For a critique of Ekberg's key assertions, see Vincent Clausen, *An assessment of Gunilla Ekberg's account of Swedish prostitution policy* (January 2007) (on file with author).

<sup>241</sup> ELIZABETH BERNSTEIN, REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY 153 (2007) [hereinafter BERNSTEIN, REGULATING SEX]; [Clausen, *supra* note 240 at 4, 8-10]; [supplement – maybe Kulick?]

<sup>242</sup> Clausen, *supra* note 240, at 6. [Supplement...]

<sup>243</sup> BERNSTEIN, REGULATING SEX, *supra* note 241, at 153; Clausen, *supra* note 240, at 6.

<sup>244</sup> Clausen, *supra* note 240, at 16. [Supplement...]

<sup>245</sup> Kulick, *supra* note \_\_\_\_\_, at \_\_\_\_\_. [insert additional citations]

<sup>246</sup> Kulick, *supra* note \_\_\_\_\_, at \_\_\_\_\_. [insert additional citations]

Prostitution has become more dangerous because it has become more difficult to judge whether a skittish client is simply fearful of getting caught or inclined towards abuse of the prostitute.<sup>247</sup> Indeed, studies suggest that it has actually been more difficult to prosecute pimps and traffickers because of client's reluctance to cooperate given their own criminality.<sup>248</sup>

Critique of the Swedish approach does not suggest that the Dutch approach is any better, however. In fact, in her path-breaking study of the Swedish and Dutch approaches, sociologist Elizabeth Bernstein exposes how these wildly divergent approaches actually had similar impacts on the ground, namely:

the removal of economically disenfranchised and racially marginalized streetwalkers and their customers from gentrifying city centers; the de facto tolerance of a small tier of predominantly white and relatively privileged indoor clients and workers; and the driving of illegal migrant sex workers further underground.<sup>249</sup>

As Bernstein and anthropologist Don Kulick found, the desire to promote gender equality was not the only motivation behind passage of the Swedish law.<sup>250</sup> It was also a response to Sweden's entry into the European Union, aiming to "stabilize cultural and geopolitical boundaries." The potential entry of migrant prostitutes was a motivating concern, since under EU law, a member State cannot deny prostitutes from another member State the right to work within its territory so long as prostitution is not illegal in the host State.<sup>251</sup> As Bernstein explains:

The Swedish law has served to assuage anxieties about national identity through a series of symbolic substitutions. Anxieties about slippery national borders are deflected onto anxieties about slippery moral borders, which affix themselves onto the bodies of female street prostitutes. The removal of these women from public streets can thereby pave the way for real estate developers, while bolstering Swedish national identity in the process.

In similar vein, the Dutch policy – which, though legalizing indoor prostitution and brothel keeping, limits employment to adult *legal* residents – similarly aimed to rid the country of many of its migrant prostitutes, who accounted for 50-60 percent of the sex trade.<sup>252</sup> Notwithstanding these difficulties, migrant prostitutes are apparently rising in numbers again, the economic incentives to migrate sufficient to justify the risks. Because of their precarious status, they were far more likely than before to rely on

<sup>247</sup> Kulick, *supra* note \_\_\_\_, at \_\_\_\_. [insert additional citations]

<sup>248</sup> Kulick, *supra* note \_\_\_\_, at \_\_\_\_. [insert additional citations]

<sup>249</sup> BERNSTEIN, REGULATING SEX, *supra* note 241, at 145-46.

<sup>250</sup> BERNSTEIN, REGULATING SEX, *supra* note 241, at 149-151; Don Kulick, *The Criminalization of Clients and Swedish Fear of Penetration*, 3 ANTHROPOLOGICAL THEORY 199 (2003).

<sup>251</sup> BERNSTEIN, REGULATING SEX, *supra* note 241, at 150.

<sup>252</sup> *Id.*, at 157

criminal networks to obtain fake identification documents.<sup>253</sup>

The comparison of the Swedish and Dutch approaches to prostitution reform demonstrates the importance of situating strategies to deal with the sex industry within the broader political-economic framework. Opposing strategies can have surprisingly similar effects on the ground, as concerns over migration, national identity, and gentrification of cities overshadow neo-abolitionist and sex worker concerns alike. The Swedish/Dutch comparison illustrates the necessity of interrogating these underlying motivations and assessing the real world impacts of prostitution reform strategies – rather than blindly adhering to a particular model based on ideology.

#### *D. Missed Opportunities*

The comparison of the Swedish and Dutch approaches illustrates how prostitution reform strategies – whether abolitionist or not – are ill-suited as solutions to the problem of human trafficking. On the one hand, clamping down on street prostitution may actually strengthen demand in other segments of the sex industry where trafficking can occur (e.g., pornography, escort agency prostitution, stripping).<sup>254</sup> On the other hand, regulating the sex industry does nothing in and of itself to counteract racism, xenophobia, and prejudice against migrants and ethnic minority groups in the industry, and could actually reinforce existing racial, ethnic, and national hierarchies in these sectors.

Neither prostitution reform strategy addresses the complex mix of socio-economic factors – e.g., poverty, discrimination – that lead people to undertake risky labor migration projects in an atmosphere hostile to migrants' rights and labor protections. Neither strategy addresses the exploitation of migrants, who are invariably, regardless of industry, at the lower end of the labor market hierarchy and thus the last to benefit from labor protections – to the extent such protections even apply to that industry. And neither strategy ultimately addresses the demand for trafficked services or labor.

Although trafficking is in one sense an act, or series of acts, of

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<sup>253</sup> *Id.*, at 163.

<sup>254</sup> BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN?: A MULTI-COUNTRY PILOT STUDY 43 (Int'l Org. for Migration, IOM Migration Research Series No. 15, 2003); Vidyamali Samarasinghe, *Confronting Globalization in Anti-Trafficking Strategies in Asia*, BROWN J. WORLD AFF., Summer-Fall 2003, at 102 (noting that while the Swedish decriminalization law arguably reduced demand in Sweden, demand increased in neighboring countries – the male clients simply went abroad to satisfy their desires); Bernstein, *supra* note \_\_\_\_, at \_\_\_\_ (noting the how Swedish men increasingly traveled to Finland to purchase commercial sex acts).

violence, rightfully addressed through strong criminal justice responses, the criminal justice approach is a limited one. It addresses the consequences of the trafficking phenomenon, but not its root causes. While the call for addressing root causes of any social ill seems idealistic, it is particularly appropriate in the trafficking context given the risk of re-trafficking. Even assuming trafficked persons are provided comprehensive medical, legal, and other social services to assist in their recovery, more often than not, they are repatriated back home, to the same socio-economic conditions that impelled them to undertake risky migration projects in the first instance. Indeed, the dangers may be exacerbated by the possibility of retaliation by traffickers or the social stigma associated with their status as having been trafficked. While residency status in the destination countries offers some prospect of a new beginning, few countries offer permanent residency status to trafficked persons, and those that do condition that status on the victim's cooperation with the prosecution of their traffickers – an option that could lead to re-traumatization of the victim and/or retaliation by the traffickers against the victim of his family back home.

Unsurprisingly, alternative migration avenues are underexplored with respect to their potential as anti-trafficking strategies. While there has been rhetorical support for the notion of ensuring “safe migration” – notably through a recent series of “high-level dialogues” sponsored by the United Nations<sup>255</sup> – there remains little political will to liberalize migration, at least among destination countries. The considerable public and political resistance is linked to popular (and mistaken) concerns about the negative impact of immigration flows on employment, national security, welfare systems, and national identity.<sup>256</sup> But rather than confront xenophobic reactions to migration issues, many governments have sought electoral or political advantage by promoting increasingly restrictive immigration policies.<sup>257</sup> This is not to suggest, however, that liberalizing migration is the cure-all to trafficking,<sup>258</sup> but further research into expansion of legal migration avenues is long overdue, even if simply limited to more extensive provision of permanent residency status to trafficked persons.

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<sup>255</sup> [insert cite to Sarah Paoletti's contribution to Penn symposium issue]

<sup>256</sup> CHRISTINA BOSWELL & JEFF CRISP, POVERTY, INTERNATIONAL MIGRATION AND ASYLUM 21-22 (United Nations Univ., World Inst. For Dev. Econ. Research, Policy Brief No. 8, 2003);

<sup>257</sup> MIKE KATE, ANTI-SLAVERY INT'L, THE MIGRATION-TRAFFICKING NEXUS: COMBATING TRAFFICKING THROUGH PROTECTION OF MIGRANT'S HUMAN RIGHTS \_\_\_\_ (2003).

<sup>258</sup> Indeed, studies suggest that only a proportion of migration flows can be absorbed by expanded legal migration schemes, and moreover, migrant networks can make migration flows self-perpetuating, implying that a small expansion of legal routes could in fact increase the demand for illegal migration. BOSWELL & CRISP, *supra* note 256, at 28.

Another aspect of the trafficking phenomenon that the prostitution reform debates fail to address substantively is the application of labor protection frameworks to vulnerable populations, particularly in the informal sector. Neo-abolitionist discourse precludes even contemplating a labor analysis, so as not to lend any legitimacy to the prostitution-as-work paradigm. Meanwhile, although sex work advocates have argued for application of labor protections to the sex industry, translating them into meaningful protections for migrants in the industry requires further study. As sociological studies have found, a sex worker's status as migrant can potentially interfere – legally and culturally – with her access to or, indeed, desire to avail herself of these protections. Moreover, as for labor rights protection with respect to sectors *outside* the sex industry, given the intense focus on the sex industry, there has been little attention to labor trafficking interventions to begin with, much less in-depth studies of possible labor reforms. Even several years post-TVPA, as multiple Department of Defense investigations have demonstrated, even basic prohibitions on confiscation of workers' passports by U.S. government contractors, for example, have been difficult to implement in practice – making application of affirmative labor rights protection seem aspirational, at best.

Finally, efforts to address the “demand” side of trafficking require greater depth in approach. As British sociologists O'Connell Davidson and Andersen have found, demand for trafficked persons is not simply about satiating sexual appetites or taking advantage of cheap migrant labor, but deeply entwined with the trafficked person's identity as a migrant “other.”<sup>259</sup> The vulnerability and lack of choice that results from their migrant (and possibly foreign and/or undocumented) status fosters the perception, if not the reality, that they are more “flexible” and “cooperative” with respect poorer working conditions, and more vulnerable to “molding” to the requirements of the job. Moreover, their racial “otherness” makes it easier to dress up an exploitative relationship as one of paternalism/maternalism towards the impoverished “other.” As O'Connell Davidson and Andersen concluded, truly addressing demand for trafficked persons thus requires preventive and educational work targeting the social construction of demand – that is, the social norms that permit exploitation of vulnerable labor.

As the above discussion underscores that there are no easy solutions to the problem of human trafficking. But understanding how even to approach the task of finding better practices requires understanding the trafficking phenomenon in its complexity, situating it in the broader context of labor migration in our globalized economy. Part of this calculus requires

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<sup>259</sup> O'CONNELL DAVIDSON & ANDERSON, *supra* note \_\_\_\_, at \_\_\_\_.

policymakers to pay much closer attention to the unintended and negative consequences of their policymaking, rather than relying on the “message” these interventions send. As Radin explains, “[t]here is always a gap between ideals we formulate and the progress we can realize.”<sup>260</sup> In the transition between the world as we know it and the ideal world, we try to make progress toward our vision of the good world. This requires pragmatic decisions that are non-ideal.

## CONCLUSION

To be written...

**INCORPORATE into text:** The increased allocation of funds to prostitution has changed the NGO service provision landscape. On the one hand, a 2006 restructuring of the way in which grants are administered to NGO service providers has caused migrants’ rights organizations with years of experience working with trafficked migrants to be unable to fund the full range of services they used to provide trafficked persons. Meanwhile, less experienced anti-prostitution startups that have adopted mandates to work with domestic youth in prostitution are [flush with funds] **[confirm with denise brennan]**.<sup>261</sup> In addition to the funding disparities, anti-trafficking conferences organized by government agencies, which once solicited participation by a broad range of community-based organizations, began

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<sup>260</sup> [insert citation to Radin]

<sup>261</sup> Denise Brennan, *Competing Claims of Victimhood? Foreign and Domestic Victims of Trafficking in the United States*, SEXUALITY RESEARCH & SOCIAL POLICY 52, Vol. 5, No. 4 (December 2009). Brennan cites as an example, Shared Hope International (SHI), a Christian organization that had previously worked abroad to open shelters for former prostitutes, received nearly \$1 million to assist law enforcement develop protocols to enable U.S. citizen victims, especially minors exploited for commercial sex, to obtain social services. SHI had positioned itself as an expert on domestic youth in prostitution by co-authoring a report on the topic with ECPAT-USA and the Protection Project. *Id.* at note 28. In 2006, procedures for government funding of social services for trafficked persons were restructured from direct grants to NGO service providers, to a system administered through the U.S. Conference of Catholic Bishops, under which limited services (i.e., excluding legal services) [are?] reimbursed on a monthly basis per client, with restrictions on the length of time clients could be assisted. Experienced service providers found the funds far from sufficient to cover the costs of trafficked persons’ needs. WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, THE U.S. RESPONSE TO HUMAN TRAFFICKING: AN UNBALANCED APPROACH 24-26 (MAY 2007).

inviting only organizations working with domestic youth in prostitution and other anti-prostitution organizations – with little to no experience delivering social services to trafficked persons – to shape future best practices in identifying and servicing trafficked persons.<sup>262</sup>

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<sup>262</sup> Brennan, *supra* note 261, at 53 n. 32.

