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## ARTICLE

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### RESCUING TRAFFICKING FROM IDEOLOGICAL CAPTURE: PROSTITUTION REFORM AND ANTI-TRAFFICKING LAW AND POLICY

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## INTRODUCTION

In the decade since it became a priority on the United States’ national agenda, the issue of human trafficking has spawned enduring controversy. New legal definitions of “trafficking” were codified in international and U.S. law in 2000, but 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 continue to rend the anti-trafficking advocacy community—and are as intractable as debates over abortion and other similarly contentious social issues. Attempts to equate trafficking with slavery invite both disdain and favor: they are often rejected for their insensitive and legally inaccurate conflation with transatlantic slavery yet simultaneously embraced for capturing the moral urgency of addressing this human rights problem. The anti-trafficking movement itself has been attacked by those who believe it is built on specious statistics concerning the problem’s magnitude and by others who think it undermines human rights goals by drawing at-

tention away from migrants' rights and efforts to combat slavery in all its contemporary forms.

U.S. law and policy have 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 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the U.N. Trafficking Protocol).<sup>1</sup> At the same time, the United States enacted a comprehensive domestic law on trafficking, the Trafficking Victims Protection Act of 2000 (TVPA).<sup>2</sup> Both instruments define trafficking as the movement or recruitment of men, women, or children, using force, fraud, or coercion, for the purpose of subjecting them to involuntary servitude or slavery in one or more of a wide variety of sectors (for example, agriculture, construction, or commercial sex).<sup>3</sup> These legal definitions reflect a concerted effort to move away from traditional perspectives that narrowly defined trafficking as the movement or recruitment of women or girls into the sex sector and toward a broader understanding of the problem as also involving the exploitation of women, men, and children in non-sex sectors.

Although trafficking into non-sex sectors arguably accounts for the larger proportion of trafficking activity,<sup>4</sup> anti-trafficking laws and policies—both within the United States and abroad—have nonetheless remained focused on sex-sector trafficking and prostitution. This focus reflects the potent influence of prostitution-reform debates on the anti-trafficking movement. Those debates have embroiled anti-trafficking advocates and policymakers in a struggle over whether prostitution is inherently coercive, and therefore a form of trafficking, or whether the trafficking label should be applied only to instances of

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<sup>1</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter U.N. Trafficking Protocol].

<sup>2</sup> Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106-386, div. A, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.), amended by Trafficking Victims Protection Reauthorization Act of 2003 (2003 TVPRA), Pub. L. No. 108-193, 117 Stat. 2875 (codified in scattered sections of 8, 18, and 22 U.S.C.), Trafficking Victims Protection Reauthorization Act of 2005 (2005 TVPRA), Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified in scattered sections of 18, 22, and 42 U.S.C.), and William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (2008 TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 6, 8, 18, 22, and 42 U.S.C.).

<sup>3</sup> See TVPA § 103(8) (codified at 22 U.S.C. § 7102 (2006)); U.N. Trafficking Protocol art. 3.

<sup>4</sup> See discussion *infra* note 164.

forced prostitution. The Bush Administration adopted the former position,<sup>5</sup> marking the increasing influence of the “neo-abolitionists”<sup>6</sup>—an unlikely alliance of feminists, conservatives, and evangelical Christians who have used the anti-trafficking movement to pursue abolition of prostitution around the globe.<sup>7</sup>

This Article examines the prostitution-reform debates on U.S. anti-trafficking policy and assesses their effects in the international arena. Part I 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 anti-trafficking advocates to prioritize protection of trafficked persons’ human rights in the face of the United States’ emphasis on an aggressive criminal justice response to trafficking.

Part II describes the ways in which the neo-abolitionists have gained dominance during the formative years of global anti-trafficking law and policy development, largely transforming the anti-trafficking movement into an 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 the recipients’ commitment to an anti-prostitution stance. The discussion further illustrates how the neo-abolitionists have shaped common understandings of the problem of human trafficking by deploying 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 control over the meaning of trafficking has been perhaps the greatest of the neo-abolitionists’ gains because

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<sup>5</sup> See *infra* notes 99-105 and accompanying text.

<sup>6</sup> There is not universal agreement on the appropriate terminology to use in the context of the prostitution-reform debates. Though advocates seeking to abolish prostitution often refer to themselves as “abolitionists,” I adopt the term “neo-abolitionists” to differentiate these advocates from the nineteenth-century antislavery reformers.

<sup>7</sup> Elizabeth Bernstein provides a comprehensive and insightful discussion of the neo-abolitionist advocacy movement. See ELIZABETH BERNSTEIN, TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX 183 (2007); Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 18 DIFFERENCES 128 (2007) [hereinafter Bernstein, *New Abolitionism*] (focusing on the converging factors underpinning the neo-abolitionist movement); Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Anti-trafficking Campaigns*, 36 SIGNS (forthcoming Autumn 2010) (manuscript on file with author) [hereinafter Bernstein, *Militarized Humanitarianism*].

it has significantly influenced how anti-trafficking interventions are constructed and implemented on the ground.

Part III 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 have promoted criminal justice responses that target prostitution and leave unquestioned the exploitative labor practices and migrant abuse that characterize the majority of trafficking cases. Such responses neglect to address the pervasive labor-migration problem resulting from globalization 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 stereotypes of innocent, naïve Third World women, neo-abolitionist discursive practices sustain a crusader impulse that resists a self-critical evaluation and assessment of the effects of neo-abolitionist policymaking on its target populations. In turn, this impulse has allowed ideology to overshadow social science data—both qualitative and quantitative—that call into question the effectiveness of neo-abolitionist strategies in combating prostitution, much less trafficking.

This Article does not aim to provide authoritative solutions to the trafficking problem. Nor does it seek to resolve debates over prostitution reform. I share a commitment to ending human trafficking but am suspicious of simple solutions and anti-trafficking policies not supported by empirical evidence. This perspective leaves me at times at odds with both those who believe that all prostitution is necessarily forced and those who believe that prostitution is just like any other form of work. In my view, both perspectives lack an empirical basis and neither provides a solid foundation for effective anti-trafficking policy. Trafficking is a complicated problem, requiring nuanced solutions that will vary depending on context.

This Article instead offers a historical account and critical assessment of the prostitution-reform debates' considerable influence on anti-trafficking law and policy development over the last decade. It does so to expose the difficulties of translating ideology—understood here as closely held moral and ethical beliefs—into effective governance strategies. There is an urgent need to adopt and emphasize policies that are guided foremost by a pragmatic, evidence-based approach that grapples with the real-world complexities of human trafficking. This empirical approach requires us to set aside our narrow ideological commitments and to objectively evaluate the actual impact

that “anti-trafficking” interventions have both on those they purport to help and on the vulnerable populations they collaterally affect.

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

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

Although trafficking is not a new phenomenon, it has only been in the last decade that countries have developed comprehensive international and national anti-trafficking laws. During the mid-1990s, a confluence of factors brought attention to the problem: most notably, the rise of the women’s human rights movement, the increased international labor migration in response to globalization, the feminization of poverty (and hence of migration), and the 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 a wide range of economic sectors, including 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” factors and immigration “pull” factors.<sup>8</sup> On the “push” side, trade liberalization and structural-adjustment policies, as well as gender-, class-, and race-discriminatory practices, have limited the job opportunities and social services available in poorer countries. On the “pull” side, destination countries’ unrelenting demand for cheap migrant labor, combined with greater access to information technology, has fed the expectation that jobs abroad for poor, unskilled laborers are plentiful.<sup>9</sup> But as individuals are migrating further and in far greater numbers than ever before, the opportunities for lawful migration have diminished as favored destination countries tighten their borders. 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 the need to migrate

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<sup>8</sup> Saskia Sassen, *Women’s Burden: Counter-geographies of Globalization and the Feminization of Survival*, 71 *NORDIC J. INT’L L.* 255, 255 (2002). Sassen analyzes the economic reasons for the proliferation of the migration and trafficking of women.

<sup>9</sup> See MIKE KAYE, *THE MIGRATION-TRAFFICKING NEXUS: COMBATING TRAFFICKING THROUGH THE PROTECTION OF MIGRANTS’ HUMAN RIGHTS* 11-13 (2003) (outlining the specific “push” and “pull” factors contributing to the growth in the number of migrant workers in recent years).

and increased restrictions on lawful migration.<sup>10</sup> With tightened borders, the risks and costs of smuggling operations rise and may cause smugglers to engage in trafficking to reap additional profits by exploiting migrants' labor postmigration.<sup>11</sup>

During the 1990s, it quickly became evident that the United States was a major destination country for all forms of human trafficking,<sup>12</sup> but outdated criminal laws made it difficult to convict traffickers.<sup>13</sup> Eager to address this global problem, President Clinton outlined a comprehensive and integrated policy framework that came to be known as the "three Ps"—prosecution of trafficking, prevention of trafficking, and protection of trafficked persons—to guide U.S. anti-trafficking initiatives at home and abroad.<sup>14</sup>

Meanwhile, existing international laws on trafficking, which dealt only with sex-sector trafficking,<sup>15</sup> proved inadequate to address modern manifestations of the problem, particularly the trafficking of men, women, and children into non-sex sectors.<sup>16</sup> International human

<sup>10</sup> See *id.* at 3; see also INT'L LABOUR OFFICE, A GLOBAL ALLIANCE AGAINST FORCED LABOUR 46 (2005) [hereinafter ILO 2005 REPORT]; Sassen, *supra* note 8, at 268-69.

<sup>11</sup> Smuggling is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident." Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3, Nov. 15, 2000, 2241 U.N.T.S. 507. Studies are inconsistent with respect to whether constraints on smuggling will lead to increased trafficking. See Anne Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789, 841 & n.214 (2009) (citing several scholars whose conclusions conflict).

<sup>12</sup> Cf. Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls, 1 PUB. PAPERS 358 (Mar. 11, 1998).

<sup>13</sup> The existing criminal laws did not factor in the psychological (as opposed to physical) coercion that accounted for many trafficked persons' inability to leave exploitative working conditions. The creation of the crime of "forced labor" in 2000 filled the gap. See TVPA, Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1466, 1486 (codified at 22 U.S.C. § 7109 (2006)) (providing a definition of "forced labor" broad enough to encompass psychological coercion).

<sup>14</sup> Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls, *supra* note 12; see also U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 13, 15 (2003), available at <http://www.state.gov/g/tip/rls/tiprpt/2003>.

<sup>15</sup> See Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271 [hereinafter 1949 Convention].

<sup>16</sup> Coverage of trafficking issues had traditionally fallen within the purview of the U.N. human rights agency—though, truth be told, the coverage was subject to other external mechanisms that produced scattershot reporting on the problem. See Gallagher, *supra* note 11, at 792-93. 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 (CE-

rights advocates called for the development of a new international law on trafficking. Such a law needed to capture the essential nature of trafficking as a phenomenon deeply rooted in migrant abuse and labor exploitation; it needed to redefine trafficking as a broader phenomenon, involving the recruitment or movement of persons, using force, fraud, or coercion, for the purpose of subjecting the persons to sex-sector or non-sex-sector exploitation (though for children, given their inability to legally consent, the element of force, fraud, or coercion would not be required).<sup>17</sup> In addition to recognizing a broader category of victims, a new international law on trafficking needed to 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 U.N. Trafficking Protocol to the then-draft U.N. Convention Against Transnational Organized Crime—and simultaneously working with Congress to develop a domestic anti-trafficking law. Human rights advocates were deeply troubled, however, that the first international anti-trafficking instrument to be drafted in fifty years was to take the form of a crime-control treaty.<sup>18</sup> Border-security concerns and potential involvement of organized crime in trafficking had given countries the political will

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DAW), neither treaty elaborated on the nature of states' obligations, and the treaties' respective expert committees have produced little substantive guidance. *See* Convention on the Rights of the Child art. 35, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 44 ("States Parties shall 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."); *id.* arts. 32 & 34 (providing that children are 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 art. 6, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 ("States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."); Gallagher, *supra* note 11, at 792-93 (asserting that "[d]uring the entire twentieth century . . . states could not even agree on a definition [of trafficking], much less on specific legal obligations," and that "occasional, confused reports emanating from a marginal and marginalized [U.N.] body" provided little help).

<sup>17</sup> *See* Ali Miller & Alison N. Stewart, *Report from the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective*, 20 WOMEN'S RTS. L. REP. 11, 14-18 (1998) (summarizing the findings of an NGO roundtable convened by the International Human Rights Law Group in January 1998). For a full list of the standards used to protect the rights of trafficked persons, see GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN ET AL., HUMAN RIGHTS STANDARDS FOR THE TREATMENT OF TRAFFICKED PERSONS (1999), *available at* <http://www.globalrights.org/site/DocServer/HRStandards.English.pdf?docID=204>.

<sup>18</sup> *See, e.g.*, Gallagher, *supra* note 11, at 793.

to address trafficking that might not have existed had trafficking been framed as a human rights issue. But while human rights advocates recognized that prosecuting traffickers is a first-line prevention strategy for combating trafficking, they were concerned that the criminal justice approach could provide a politically expedient means for governments to restrict immigration 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 and to inject a human rights perspective wherever possible.

Human rights advocates thus approached both the international and U.S. anti-trafficking law negotiations hoping to demonstrate how the success of criminal prosecutions is inextricably linked to protection 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 such as legal and medical assistance and housing, and protection against involuntary repatriation.<sup>19</sup> Even this limited platform proved difficult for rights advocates to advance, however, because the highly charged debates over prostitution reform sent the negotiations careening off on a tangent.

### B. *Conflicting Approaches to Prostitution Reform*

Negotiations over the international and U.S. anti-trafficking laws were quickly overtaken by factions battling over whether the trafficking definition should encompass voluntary prostitution. To illustrate how these 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 the nuances—the views of each side of the debates. The discussion underscores how these debates are rooted in deeply conflicting views about gender roles,

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<sup>19</sup> See U.N. Special Rapporteur on Violence Against Women, *Position Paper on the Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Submitted to the Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime*, at 4-6, U.N. Doc. A/AC.254/CRP.13 (May 20, 1999) [hereinafter *UNSRVAW Position Paper*]; see also U.N. High Comm'r for Human Rights, *Informal Note by the U.N. High Commissioner for Human Rights*, para. 16, *delivered to the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime*, U.N. Doc. A/AC.254/16 (June 1, 1999) [hereinafter *UNHCHR Position Paper*] (expressing concern for the lack of adequate housing and other needed support services for trafficking victims).

sexuality, and the proper role of criminal law in responding to societal harms—with divergence of opinion both between and within the two main factions. The discussion then describes how anti-trafficking law and policy became the vehicle by which these activists continue to battle for influence over prostitution policy worldwide.

### 1. The Neo-abolitionists

Representing one main faction in the prostitution-reform debates are the neo-abolitionists, an unusual alliance of feminists, neoconservatives, and evangelical Christians.<sup>20</sup> The neo-abolitionists believe that prostitution is exploitative and degrading to women, a form of violence against women that should be abolished.<sup>21</sup>

Leading feminist thinkers in this camp include U.S.-based feminists identified with Catharine MacKinnon and sometimes referred to as “radical feminists,” including Kathleen Barry and Sheila Jeffreys. These 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>22</sup> Women who (believe they) choose prostitution suffer from a “false consciousness,” the inability to recog-

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<sup>20</sup> Key actors in the neo-abolitionist coalition include the feminist organizations Coalition Against Trafficking in Women (CATW) and Equality Now, as well as neo-conservative Michael Horowitz of the Hudson Institute and evangelical leader Chuck Colson. See generally Bernstein, *Militarized Humanitarianism*, *supra* note 7 (arguing that neo-abolitionists are united not just by humanitarianism and conservative views of sexuality but also by “commitment to carceral paradigms of social justice and to militarized humanitarianism as the preeminent mode of engagement by the state”). Defending this odd alliance, Laura Lederer, an antipornography activist and later a Bush Administration anti-trafficking official, explained that the religious organizations brought “a fresh perspective and a biblical mandate to the women’s movement” and that the alliance strengthened women’s groups that “would not be getting attention internationally otherwise.” Anna-Louise Crago, *Unholy Collaboration*, RABBLE.CA, May 15, 2003, <http://www.rabble.ca/news/unholy-collaboration> (quoting Laura Lederer).

<sup>21</sup> See generally ANTHONY M. DESTEFANO, *THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED* (2007) (providing an account of the neo-abolitionist movement between 2000 and 2006); Gretchen Soderlund, *Running from the Rescuers: New U.S. Crusades Against Sex Trafficking and the Rhetoric of Abolition*, 17 NWSA J. 64 (2005) (describing and critiquing the “raid and rehabilitation model” used by many neo-abolitionists to free women from brothels).

<sup>22</sup> See, e.g., Catharine A. MacKinnon, *Prostitution and Civil Rights*, Speech at the Michigan Journal of Gender & Law Symposium: Prostitution: From Academia to Activism (Oct. 31, 1992) (describing how sex-based discrimination in areas like employment severely inhibits women’s choices), in 1 MICH. J. GENDER & L. 13, 28 (1993). See generally KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* (1995) (chronicling sexual exploitation from a feminist perspective).

nize their own oppression;<sup>23</sup> whether or not these “prostituted women”<sup>24</sup> seemingly consent, prostitution involves a violation of a human being. While some feminist neo-abolitionists very recently have begun to move away from this position by conceding the possibility of voluntary prostitution, they nonetheless support abolition on the ground that voluntary prostitutes represent only a small minority of “prostituted women.”<sup>25</sup>

Joining these feminists in their neo-abolitionist advocacy efforts are conservatives and evangelical Christians. Unlike their feminist allies, conservatives and Christian neo-abolitionists believe the wrong of prostitution lies in its departure from traditional social values rooted in heterosexual, patriarchal marriage and family, with sexuality expressed only within those confines. For conservatives and some Christian activists, women’s place is in the home rather than in the market; hence prostitution is “an issue of conscience and morality rather than of income possibilities and labor.”<sup>26</sup> In contrast, liberal or moderate Christians may embrace women’s participation in the market—so long as the domestic sphere retains symbolic, if not actual, male headship—and apply a pro-business model of bringing women out of prostitution and into the (legitimate) service market.<sup>27</sup> The va-

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<sup>23</sup> The origin of the term “false consciousness” has been attributed to Marxist philosopher Antonio Gramsci, who used it 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 own subordination.” Richard Delgado, Essay, *Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 653 n.57 (1993) (citing ANTONIO GRAMSCI, LETTERS FROM PRISON (Lynne Lawner ed. & trans., 1973); SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971)). Some commentators prefer the phrase “internalized oppression” over “false consciousness,” because the former 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, 1692 n.173 (1997).

<sup>24</sup> Neo-abolitionist feminists prefer the term “prostituted women” rather than “prostitutes” or “sex workers.” According to this view, some may think that using 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.’” JANICE G. RAYMOND, COAL. AGAINST TRAFFICKING IN WOMEN ET AL., GUIDE TO THE NEW U.N. TRAFFICKING PROTOCOL 6 (2001), available at [http://action.web.ca/home/catw/attach/Guideun\\_protocolENG.pdf](http://action.web.ca/home/catw/attach/Guideun_protocolENG.pdf).

<sup>25</sup> See, e.g., Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1768-69 (2010) (“[T]he risk of harm posed to the nonconsenting prostituted women vastly outweighs the benefits realized by freely choosing prostituted women.”).

<sup>26</sup> Soderlund, *supra* note 21, at 81.

<sup>27</sup> See Bernstein, *New Abolitionism*, *supra* note 7, at 140-41 & 146 n.20 (noting that some Christian humanitarian organizations teach women to serve food and drinks in

rying perspectives underlying the feminist-conservative-religious coalition thus diverge over why prostitution should be abolished—to challenge patriarchal structural inequality or to sustain it.<sup>28</sup>

The neo-abolitionists are united, however, in strategically embracing the label “abolitionist” in a conscious effort to invoke an analogy to the nineteenth-century campaigns to abolish the transatlantic slave trade. The “abolitionist” reference also revives early-twentieth-century feminists’ efforts to eradicate “white slavery,”<sup>29</sup> which initially referred to the “system of licensed prostitution in existence throughout much of Europe and parts of the United States.”<sup>30</sup> Perceiving prostitution as an international problem, these early feminists focused their attention and rhetoric on the international “traffic” of women and girls. The “white slavery abolitionists,” of whom Josephine Butler is most renowned, felt that “government-licensed prostitution institutionalized the oppression and corruption of women and was not successful in stemming the spread of venereal disease.”<sup>31</sup> 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 crusade to abolish prostitution” writ large.<sup>32</sup> Fueled by conservative attitudes toward women’s sexuality and concerns over a link between prostitution and disfavored racial minorities, the movement targeted the “export” or “trafficking” of “white” women from Europe and North Amer-

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Western-style cafés or to sew goods for sale); Dawn Herzog Jewell, *Red-Light Rescue: The “Business” of Helping the Sexually Exploited Help Themselves*, CHRISTIANITY TODAY, Jan. 2007, at 28, 33 (reporting two missionaries’ view that former prostitutes “are [already] in the service industry,” so “training for legitimate jobs in restaurants and hotels will fit with the women’s gifts”).

<sup>28</sup> See, e.g., Dempsey, *supra* note 25 (advancing the former position); Phyllis Chesler & Donna M. Hughes, *Feminism in the 21st Century*, WASH. POST, Feb. 22, 2004, at B7 (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>29</sup> For a fascinating and thorough exploration of these analogies, see Karen E. 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>30</sup> Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT’L ORG. 479, 513 (1990). The anti-white slavery movement initially did not seek to prohibit prostitution itself but rather targeted state licensing of prostitution. See *id.* at 513-14 (explaining the historical context and meaning of the anti-white slavery movement).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 515 (quoting A VINDICATION OF THE RIGHTS OF WHORES 12 (Gail Pheterson ed., 1989)).

ica for the purposes of prostitution” by foreign or immigrant men in the colonial nether regions of Asia, Africa, and South America.<sup>33</sup>

Though the “white slavery” phenomenon “eventually proved to be far smaller and [less] []significant than popularly depicted,”<sup>34</sup> the movement yielded a series of international laws on “white slavery” and “trafficking” beginning in 1904<sup>35</sup> and culminating in the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention).<sup>36</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

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<sup>33</sup> Dianne Otto, *Lost in Translation: Re-scripting the Sex Subjects of International Human Rights Law*, in *INTERNATIONAL LAW AND ITS OTHERS* 318, 324 (Anne Orford ed., 2006); see also *id.* (asserting that the movement against white slavery was “fuelled by racism and Victorian ideas about women’s sexuality”); Laura Reanda, *Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action*, 13 *HUM. RTS. Q.* 202, 207-09 (1991) (noting that in the early 1900s “trafficking in women became an issue for international treaty-making, primarily because of concern over the export of prostitutes from Europe to brothels in various parts of the colonial empires” and detailing the League of Nations’ concerns with the slave traffic).

<sup>34</sup> Nadelmann, *supra* note 30, at 514. Indeed, 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.” *Id.* at 514-15; see also Mary Ann Irwin, “White Slavery” as Metaphor: Anatomy of a Moral Panic, 5 *EX POST FACTO: J. HIST. STUDENTS AT S.F. ST. U.* 1 (1996), available at <http://userwww.sfsu.edu/~epf/1996/wslavery.html>.

<sup>35</sup> These early treaties included the International Agreement for the Suppression of the “White Slave Traffic,” May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; the International Convention for the Suppression of the White Slave Traffic, May 4, 1910, Gr. Brit. T.S. No. 20 (1912), (Cd. 6326); the Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, signed at Paris, on 18 May 1904, and the International Convention for the Suppression of the White Slave Traffic, signed at Paris, on 4 May 1910, *opened for signature* May 4, 1949, 2 U.S.T. 1997, 30 U.N.T.S. 23; the International Convention for the Suppression of Traffic in Women and Children, *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 416; the International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431; and the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children Concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Women of Full Age, Concluded at Geneva on 11 October 1933, Nov. 12, 1947, 53 U.N.T.S. 13.

<sup>36</sup> Article 1 of the 1949 Convention requires 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; [or] 2. [e]xploits the prostitution of another person, even with the consent of that person.” 1949 Convention, *supra* note 15, art. 1. Article 2 obligates parties to also “punish any person who: 1. [k]eeps or manages, or knowingly finances or takes part in the financing of a brothel; [or] 2. [k]nowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.” *Id.* art. 2.

with foreign clients.”<sup>37</sup> Although the rhetoric equating prostitution with trafficking and slavery made it into international law, the 1949 Convention had little impact on the behavior of states, including on their interactions with each other on the issue. Few states were signatories, and the treaty lacked an effective monitoring mechanism to ensure state compliance.<sup>38</sup>

Modern-day anti-prostitution feminists and their conservative and religious allies have resurrected the abolitionist rhetoric, targeting prostitution on a global level. As Jeffreys explains, prostitution is unequivocally damaging to all women, in that if one woman is a prostitute, all women can be treated as prostitutes.<sup>39</sup> Because “voluntary” prostitution is almost certainly an ontological impossibility, the failure of states to prohibit prostitution violates women’s right to sexual autonomy.

States vary enormously in how they characterize and address prostitution. There are generally four regulatory modes: (1) complete criminalization (“prohibitionism”); (2) partial criminalization (“toleration”); (3) decriminalization; and (4) legalization.<sup>40</sup> The criminalization paradigm “views [prostitution] as a social evil that should be subjected to penal measures,” though the approaches vary as to whether prostitutes

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<sup>37</sup> Otto, *supra* note 33, at 324-25.

<sup>38</sup> See Reanda, *supra* note 33, at 210 (detailing the weaknesses of the 1949 Convention). As Reanda explains, a supervisory follow-up mechanism—which ultimately proved ineffectual—was not established until the mid-1970s, and as of March 1988, the 1949 Convention had only fifty-nine parties. See *id.* at 210-16. The “marginalized” and now-defunct U.N. Working Group on Contemporary Forms of Slavery, which overtook nominal responsibility for monitoring the 1949 Convention, produced “occasional, confused reports” that “did not, in the end, matter very much to states . . . or indeed to those whose interests it was established to promote.” Gallagher, *supra* note 11, at 792, 819 & n.130, 820. Abolitionist feminists adopted the strategy in the 1980s to mid-1990s of pushing for broader ratification of the 1949 Convention. See Janet Halley et al., *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, 355 & n.60 (2006). Although this advocacy strategy “succeeded in making the [prostitution] issue visible,” many governments “did not want to ratify the 1949 Convention because the prohibitionist stance would have required them to alter their domestic legal systems.” *Id.* at 355.

<sup>39</sup> See SHEILA JEFFREYS, *THE IDEA OF PROSTITUTION* 239, 319 (1997).

<sup>40</sup> See The Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Ms. Radhika Coomaraswamy, on *Trafficking in Women, Women’s Migration and Violence Against Women*, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, ¶ 21, delivered to the U.N. Econ. & Soc. Council [ECOSOC], *Comm’n on Human Rights*, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) [hereinafter *Report of the Special Rapporteur*] (outlining the “four primary legal paradigms for addressing prostitution”); Halley et al., *supra* note 38, at 338-40 (describing the different approaches).

themselves are targeted.<sup>41</sup> Prohibitionist approaches target all actors (brothel owners, pimps, johns, and prostitutes), whereas toleration approaches exclude the prostitute from the penal measures applicable to all other actors.<sup>42</sup> Decriminalization leaves the relationships between prostitutes and pimps, brothel owners, clients, and others outside the criminal framework and punishes only acts illegal under generally applicable criminal law, such as rape and assault.<sup>43</sup> Legalization also adopts a nonpenal approach to prostitution but actively regulates the industry through zoning restrictions, licensing requirements, and public health measures such as mandatory health checks.<sup>44</sup>

Neo-abolitionists embrace the power of criminal law to combat prostitution and generally favor the toleration approach.<sup>45</sup> They believe in the expressive role of criminal law to stigmatize the buyers of sex as socially or morally tainted:<sup>46</sup> in their opinion, 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, trafficking, or both.<sup>47</sup> Meanwhile, whether because they are victims of male patriarchy or because they are victims of social deviance, women prostitutes should not be penalized themselves but instead should be the target of rescue and rehabilitation efforts.<sup>48</sup> Because prostitution is (almost always) coerced or forced, anti-trafficking laws are a legitimate vehicle for pursuing abolition of prostitution. The definition of trafficking should eliminate any distinction between forced and voluntary prostitution, thus enabling its application to prostitution writ large.

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<sup>41</sup> *Report of the Special Rapporteur, supra* note 40, ¶ 21.

<sup>42</sup> *Id.*; Halley et al., *supra* note 38, at 338.

<sup>43</sup> *Report of the Special Rapporteur, supra* note 40, ¶ 21; Halley et al., *supra* note 38, at 339.

<sup>44</sup> *Report of the Special Rapporteur, supra* note 40, ¶ 21.

<sup>45</sup> I should note, however, that, according to sociologist and ethnographer Elizabeth Bernstein, some neo-abolitionist feminists favor a prohibition approach on the ground that women in prison are better positioned to access services. Personal correspondence with Elizabeth Bernstein.

<sup>46</sup> For an insightful discussion of the relationship between stigma and the law, see Scott Burris, *Stigma and the Law*, 367 LANCET 529 (2006).

<sup>47</sup> Neo-abolitionist feminists have acknowledged the existence of male prostitution but have generally understood male prostitutes as feminized stand-ins for women. *See generally* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 141 (1989) (“[T]he structure of social power which stands behind and defines gender is hardly irrelevant, even if it is rearranged.”).

<sup>48</sup> Neo-abolitionist advocacy efforts, however, have largely focused on criminalizing the clients rather than on decriminalizing the prostitutes. Elizabeth Bernstein, *Carceral Politics as Gender Justice: The “Traffic in Women” and Neoliberal Circuits of Crime, Sex, and Rights* 13-14 (n.d.) (unpublished manuscript, on file with author).

## 2. The Non-abolitionists

Opposing the neo-abolitionist view is a diverse group of advocates who share disagreement with the neo-abolitionist agenda, whether for political, moral, or pragmatic reasons, but who are otherwise difficult to categorize under one label other than “non-abolitionist.” Though neo-abolitionist feminists often label these advocates as “pro-prostitution,”<sup>49</sup> non-abolitionists have varying levels of comfort with the notion of sex as work. Feminists falling into this camp adopt approaches to prostitution (or, preferably, “sex work”<sup>50</sup>) that can be consistent with liberal, libertarian, postmodern, or materialist feminist discourse.<sup>51</sup> They are united in objecting to the neo-abolitionist feminists’ assignment of a “false consciousness” to those who claim they voluntarily engage in prostitution.<sup>52</sup> Some embrace the “pro-sex-work” label on the ground that sex work can be liberatory, an expression of women’s right to sexual self-determination and equality.<sup>53</sup> Others suggest that the sex-as-liberatory position describes only a small minority of cases and believe that women can and do voluntarily engage in prostitution, with the understanding that sex work is one constrained option among many, all of which are undesirable or harmful.<sup>54</sup>

Non-abolitionists are unified in rejecting criminalization of prostitution. In their view, prohibitionism subjects sex workers to the exploitation that follows from a legal regime that criminalizes and thus marginalizes their activities in the informal sector.<sup>55</sup> Even a toleration ap-

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<sup>49</sup> See, e.g., Dorchen Leidholdt, Prostitution: A Violation of Women’s Human Rights, Presentation at Cardozo Law School (Nov. 17, 1992) (“[T]he 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.”), in 1 CARDOZO WOMEN’S L.J. 133, 133 (1993).

<sup>50</sup> Many on this side of the debate prefer the term “sex work” over “prostitution” because the former captures the possibility of framing the selling of sex as a form of labor.

<sup>51</sup> See Gabrielle Simm, *Negotiating the United Nations Trafficking Protocol: Feminist Debates*, 23 AUSTL. Y.B. INT’L L. 135, 137, 139-42 (2004) (describing how these different feminist theories view trafficking and prostitution).

<sup>52</sup> See *id.* at 138 (describing this view of neo-abolitionist feminists).

<sup>53</sup> See *id.* at 137 (explaining liberal feminism).

<sup>54</sup> See *id.* at 140 (noting the “perception [of some ‘Third World feminists’] that women in developing countries turn to prostitution as a last resort”).

<sup>55</sup> See Halley et al., *supra* note 38, at 396 (explaining the view that “sex work and trafficking d[o] not disappear but rather [go] deeper underground and merely change[] form” when criminalized, such that “worse working conditions, lower pay, greater dependence on pimps, and higher health risks to sex workers” result (footnote omitted)); *cf.* Simm, *supra* note 51, at 160 (“Sex worker rights activists, as well as sex

approach at best deprives these women of a livelihood by potentially driving customers and bosses away and, at worst, compromises sex workers' safety by forcing them to bargain in the shadows and subjecting them to state-sponsored violence or rape by the police.<sup>56</sup>

Non-abolitionists disagree, however, over whether decriminalization or legalization is the better approach; their preference is often contingent on national and political context.<sup>57</sup> For some, legalization has the advantage of formally recognizing prostitution either as a valid livelihood option or as an activity that is better regulated than left to the market. For others, however, legalization carries the potential for overregulation by the state, resulting in these women being marginalized in red-light districts and stigmatized as disease carriers. Decriminalization is favored, particularly among some sex-worker advocacy groups, because it brings prostitution out from under the thumb of the state. For those uncomfortable with the sex-as-liberatory perspective, decriminalization may be appealing because it falls short of official state acceptance of prostitution as a livelihood option.

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 that fit into the paradigm of forced or coerced labor.<sup>58</sup> Non-abolitionists agree that "where trafficking exists it should be punished."<sup>59</sup> But absent coercion, force, or fraud, adult sex workers' agency, however constrained, "should be acknowledged and respected."<sup>60</sup>

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work feminists, have criticised the approach of sexual slavery feminists as racist and imperialist in that it denies the possibility of agency and ignores the subjectivity of women who migrate to work in the global sex industry."

<sup>56</sup> See, e.g., Halley et al., *supra* note 38, at 400 (stating that the Swedish toleration regime "is paternalistic and harmful to sex workers, exposing them to further marginalization and exploitative working conditions since the industry is pushed underground").

<sup>57</sup> See *id.* at 398-405 (comparing the costs and benefits of legalization in the Netherlands and de facto decriminalization in Israel); Simm, *supra* note 51, at 156-59 (exploring the debate over "forced" versus "voluntary" prostitution and identifying the need to consider country conditions).

<sup>58</sup> See Simm, *supra* note 51, at 139 (discussing the distinction made by non-abolitionist feminists). Given a child's inability to consent as a matter of law, the forced/voluntary distinction does not apply to child prostitution, just as it does not apply to other forms of child labor.

<sup>59</sup> *Id.* at 137.

<sup>60</sup> *Id.*

C. *How Prostitution-Reform Advocacy Intersected with the Anti-trafficking Movement*

Negotiations over new international and U.S. laws on trafficking quickly became the battleground for the prostitution debates. Human rights advocates who had come to the U.N. Trafficking Protocol negotiations with the goal of injecting a rights perspective into the treaty quickly became embroiled in these highly divisive battles<sup>61</sup>—a dynamic that was mirrored in negotiations over the U.S. anti-trafficking law. In both fora, negotiations stalled over whether the legal definition of trafficking should encompass all prostitution and, in the process, marginalized advocacy efforts critical to overcome governments' reluctance to afford substantive rights protections to trafficked persons.

1. The U.N. Trafficking Protocol Negotiations

Regrettably, the substantial time and effort that international human rights advocates could have devoted to advancing the rights of trafficked persons were diverted to trying to avoid the prostitution wars and, when forced into taking part, to defending against partisan attacks.<sup>62</sup> The International Labor Organization (ILO) and the U.N. Office of the High Commissioner for Human Rights (OHCHR) approached the negotiations with the goal of maintaining a legal distinction between trafficking and prostitution, with trafficking encompassing prostitution only where coerced, forced, or induced by fraud.<sup>63</sup> Notwithstanding their explicit refusal to adopt a stance on prostitu-

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<sup>61</sup> See Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 1002 (2001) (explaining that the International Human Rights Network “oppos[ed] all forms of prostitution” while the Human Rights Caucus aimed to “protect and legitimize sex work”); Simm, *supra* note 51, at 146-53 (describing the debates about “the definition of trafficking, the issue of consent and the position of children”); Kara Abramson, Note, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT’L L.J. 473, 483-92 (2003) (explaining “autonomy arguments for recognizing the ability to consent” and “protectionist arguments against recognizing the ability to consent”).

<sup>62</sup> Though groups could agree on the issue of rights protection while taking divergent positions on the trafficking definition, the International Human Rights Network refused the Human Rights Caucus’s invitation to join forces to advocate for substantive rights protections. Divisiveness over the trafficking definition proved too great an obstacle to cooperation. See generally Melissa Ditmore & Marjan Wijers, *The Negotiations on the UN Protocol on Trafficking in Persons*, 4 NEMESIS 79, 80-86 (2003).

<sup>63</sup> See, e.g., ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* (forthcoming 2010); Gallagher, *supra* note 61, at 984-85.

tion, these agencies were quickly labeled as “pro-prostitution” and as allies of the sex industry by neo-abolitionist groups.<sup>64</sup>

Such labeling is emblematic of the dichotomizing effect of the prostitution-reform debates on the U.N. Trafficking Protocol negotiations. But a number of human rights advocates do not take a position on prostitution, for a variety of reasons. Some are ambivalent over the prostitution-as-violence versus prostitution-as-work debate. They are uncomfortable with the rapid growth of the sex industry but also support defending the human right of those in the sex industry not to be subjected to the abuses so many suffer, including violence from state actors through abusive application of criminal law. Others reject the neo-abolitionist agenda on purely pragmatic grounds, arguing, for example, that efforts to eradicate prostitution drive the industry further underground and ultimately endanger the prostitutes, or 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”—“precisely the position taken by many police officers, judges and jurists.”<sup>65</sup> Moreover, even where anti-prostitution measures ostensibly protect sex workers, the societal stigma against sex workers more often than not infuses their “victimhood” with a measure of guilt or unworthiness such that they end up penalized in practice.<sup>66</sup> Still others believe that regardless of one’s view of prostitution, given limited resources, the “trafficking” label should be reserved for the worst forms of exploitation and therefore only encompass situations involving external force, fraud, or coercion.<sup>67</sup>

While the U.N. agencies rejected the neo-abolitionist conflation of trafficking and prostitution, they did not seek to use anti-trafficking law to establish affirmative rights for those in the sex industry, to the disappointment of some sex-worker groups. Indeed, from the start, sex-worker groups were skeptical that new anti-trafficking legislation

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<sup>64</sup> CATW, for example, criticized the High Commissioner for Human Rights 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. RAYMOND, *supra* note 24, at 6.

<sup>65</sup> JULIA O’CONNELL DAVIDSON, PROSTITUTION, POWER AND FREEDOM 122 (1998). For a discussion of the impact of this bias on the prosecution of sex workers’ rape claims, see Barbara Sullivan, *Rape, Prostitution and Consent*, 40 AUSTL. & N.Z. J. CRIMINOLOGY 127 (2007).

<sup>66</sup> See, e.g., Radhika Coomaraswamy, Special Rapporteur on Violence Against Women, U.N. Comm’n on Human Rights, Address to the NGO Seminar on Trafficking in Persons 3 (June 21, 1999) (transcript on file with author).

<sup>67</sup> See, e.g., Gallagher, *supra* note 61, at 983-84, 983 n.61.

could advance their goals of removing sex-work-specific offenses from criminal law and applying workers' rights protections to sex workers.<sup>68</sup> As the Network of Sex Work Projects (NSWP) publicly stated in opposing the U.N. Trafficking Protocol,

Historically, anti-trafficking measures 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. 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>69</sup>

Concerned that without the input of sex-worker organizations the U.N. Trafficking Protocol could harm sex workers, some human rights advocates invited sex-worker groups to participate in the negotiations. But ultimately, as the NSWP predicted, "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>70</sup>

In fact, the U.N. Trafficking Protocol does not offer much even to trafficking victims, as debates over the legal definition of trafficking consumed so much time that little substantive attention was paid to victim protection. The definitional debates centered on whether the trafficking definition would encompass "non-coerced, adult migrant prostitution."<sup>71</sup> "Trafficking" is an umbrella concept that encompasses a wide range of fact patterns 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.<sup>72</sup> The prostitution debates centered on two aspects of the trafficking definition: (1) whether to include an explicit force/fraud/coercion requirement, and (2) whether the end purposes of trafficking listed in the definition of "trafficking" should include voluntary prostitution. One group of states, supported by a group of neo-abolitionist

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<sup>68</sup> Jo Doezeema, *Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiations*, 14 SOC. & LEGAL STUD. 61, 76 (2005).

<sup>69</sup> *Id.* at 77 (citing NETWORK OF SEX WORK PROJECTS, COMMENTARY ON THE DRAFT PROTOCOL TO COMBAT INTERNATIONAL TRAFFICKING IN WOMEN AND CHILDREN SUPPLEMENTARY TO THE DRAFT CONVENTION ON TRANSNATIONAL ORGANIZED CRIME (1999), available at <http://www.walnet.org/csis/groups/nswp/untoc-comment.html>).

<sup>70</sup> Doezeema, *supra* note 68, at 80; see also *id.* (noting that the U.N. Trafficking Protocol "distinguish[es] between 'trafficking' and 'prostitution' through the qualifier of 'consent'").

<sup>71</sup> Gallagher, *supra* note 61, at 984.

<sup>72</sup> See U.N. Trafficking Protocol, *supra* note 1, art. 3(a).

NGOs calling itself the International Human Rights Network, argued against a coercion requirement as creating a false distinction between “forced” and “voluntary” prostitution.<sup>73</sup> This group also sought to include in the trafficking definition “use in prostitution” as a separate end purpose.<sup>74</sup> In contrast, another group of states, supported by the non-abolitionist NGO coalition the Human Rights Caucus<sup>75</sup> and all but one of the U.N. bodies that intervened in the negotiations,<sup>76</sup> favored requiring a force/fraud/coercion element<sup>77</sup> and opposed including non-coerced prostitution as an end purpose.<sup>78</sup>

After much debate, the states agreed on a definition of trafficking:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. 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;

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<sup>73</sup> Gallagher, *supra* note 61, at 984 & n.62. The International Human Rights Network was organized by CATW. *Id.* at 1002 n.161.

<sup>74</sup> *Id.* at 986.

<sup>75</sup> Members of the Human Rights Caucus included the International Human Rights Law Group (from the United States), the Foundation Against Trafficking Women (from the Netherlands), the Global Alliance Against Traffic in Women (from Thailand), the Asian Women’s Human Rights Council (from India and the Philippines), La Strada (from Poland, Ukraine, and the Czech Republic), Fundación Esperanza (from Colombia, the Netherlands, and Spain), the Foundation for Women (from Thailand), and KOK (from Germany). Simm, *supra* note 51, at 139.

<sup>76</sup> These included the U.N. OHCHR, the U.N. High Commissioner for Refugees (UNHCR), the ILO, and the U.N. Children’s Fund (UNICEF). The now-defunct U.N. Working Group on Contemporary Forms of Slavery, which nominally monitored implementation of the 1949 Convention, supported the abolitionist view but did not formally participate in the negotiation process.

<sup>77</sup> See GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN ET AL., *supra* note 17, at 4, 5 n.4 (defining trafficking as “involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt bondage” and arguing that sex workers should be afforded “the same rights and protections” as other workers); *UNSRVAW Position Paper*, *supra* note 19, at 15; *UNHCHR Position Paper*, *supra* note 19, para. 12 (suggesting that a “preferable and more accurate description of purposes” of trafficking would be not just for “forced labour” but also for “bonded labour and/or servitude”).

<sup>78</sup> See Gallagher, *supra* note 61, at 985-86.

(b) The consent of a victim of trafficking in persons 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>79</sup>

The definition reflects a compromise in the prostitution debate. Two aspects of the trafficking definition allowed the neo-abolitionists and non-abolitionists both to 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 lauded the inclusion of language concerning the irrelevance of consent, arguing 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, in contrast, interpreted the coercion requirement as excluding voluntary migration for prostitution and argued that the irrelevance-of-consent language served only to prevent traffickers from using victims’ “consent” as a defense to the crime.<sup>80</sup>

The neo-abolitionists heralded the inclusion of the terms “exploitation of the prostitution of others” and “other forms of sexual exploitation” as signifying the indivisibility of trafficking and exploitation of prostitution.<sup>81</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 respective domestic laws*.<sup>82</sup>

<sup>79</sup> U.N. Trafficking Protocol, *supra* note 1, art. 3.

<sup>80</sup> See Gallagher, *supra* note 61, at 984-85 (describing the differing opinions on a “consent” requirement).

<sup>81</sup> See RAYMOND, *supra* note 24, at 5 (“[T]he exploitation of prostitution and trafficking cannot be separated. The Protocol acknowledges that much trafficking is for the purpose of prostitution and for other forms of sexual exploitation.”).

<sup>82</sup> Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, *Interpretative Notes for the Official Records (travaux préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, para. 64, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000) (emphasis added).

Ultimately, the neo-abolitionists did not achieve their main strategic goal of achieving a treaty-based prohibition of prostitution.<sup>83</sup>

But the biggest losers in the prostitution debates were the human rights advocates who had gone to Vienna with the goal of including in the treaty substantive rights protections for trafficked persons. The Human Rights Caucus and the U.N. human rights agencies were not able to achieve their broader goal of securing strong protection and support obligations with respect to victims. Rather than calling upon States Parties to support and protect trafficked persons as a matter of hard obligation, the U.N. Trafficking Protocol urges States Parties to consider such measures “[i]n appropriate cases and to the extent possible under . . . domestic law.”<sup>84</sup> Rights advocates’ efforts to include a provision protecting trafficked persons from prosecution for offenses committed as a result of their having been trafficked—for example, illegal immigration and prostitution—were 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 laws to trafficked persons.<sup>85</sup>

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

Unsuccessful in their efforts to criminalize prostitution as a matter of international law, the neo-abolitionist groups, which were largely U.S. based, hung their hopes on efforts by Congress to develop a comprehensive U.S. domestic law on trafficking.

During the U.N. Trafficking Protocol negotiations, the Clinton Administration had led efforts to require the elements of force, fraud, and coercion in the trafficking definition,<sup>86</sup> notwithstanding intense domestic pressure from the neo-abolitionists.<sup>87</sup> The neo-abolitionists

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<sup>83</sup> Neo-abolitionist feminists nonetheless have taken advantage of the language concerning the irrelevance of consent to support their reading of the U.N. Trafficking Protocol as supportive of the neo-abolitionist position. *See, e.g.*, Brief of Amicus Curiae, The Coalition Against Trafficking in Women at 1, *Dart v. Craigslist, Inc.*, No. 09-1385 (N.D. Ill. Aug. 6, 2009), available at <http://action.web.ca/home/catw/readingroom.shtml?x=126762>.

<sup>84</sup> U.N. Trafficking Protocol, *supra* note 1, art. 6(1).

<sup>85</sup> *Id.* art. 14(1).

<sup>86</sup> *See* Gallagher, *supra* note 61, at 985 n.63 (“The United States initially led the move to reject the inclusion of non-coerced sex work into the trafficking definition although its support wavered occasionally, apparently in response to domestic pressures.”).

<sup>87</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

were more effective on U.S. soil, however, working closely with Representative Christopher Smith (R-NJ) to sponsor an anti-trafficking bill that was later enacted as the Trafficking Victims Protection Act of 2000 (TVPA).<sup>88</sup> Consistent with neo-abolitionist preferences, Representative Smith's initial bill focused on the trafficking of women and children into the sex industry.<sup>89</sup> As Professor Jayashri 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>90</sup> A competing bill favored by the Clinton Administration incorporated a broader definition of trafficking that, consistent with the U.N. Trafficking Protocol, addressed trafficking of men, women, and children into both sex and non-sex sectors.<sup>91</sup> Under pressure to adopt the more expansive view, Representative Smith, working with Senator Sam Brownback (R-KS), accepted an expanded trafficking definition.<sup>92</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

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"pro-prostitution," using this issue to attack the Clinton Administration in election-year political battles. See William J. Bennett & Charles W. Colson, Op-Ed., *The Clintons Shrug at Sex Trafficking*, WALL ST. J., Jan. 10, 2000, at A26 (accusing the Clinton Administration of attempting to "lend legitimacy to prostitution and hard-core pornography"); Hanna Rosin & Steven Mufson, *Bitter Issues in Crime Treaty Debate: What Is Prostitution?*, WASH. POST, Jan. 15, 2000, at A2 (describing how "[c]onservatives and religious opponents . . . focused their criticism on Hillary Clinton"); Philip Shenon, *Feminist Coalition Protests U.S. Stance on Sex Trafficking Treaty*, N.Y. TIMES, Jan. 13, 2000, at A5 (describing protests against the Clinton Administration's support for wording that limited sexual exploitation to "forced prostitution").

<sup>88</sup> See TVPA, Pub. L. No. 106-386, div. A, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

<sup>89</sup> See Freedom from Sexual Trafficking Act of 1999, H.R. 1356, 106th Cong. (1999).

<sup>90</sup> Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 170 (2007) (quoting *Trafficking of Women and Children in the International Sex Trade, Hearing Before the Subcomm. on International Operations and Human Rights of the H. Comm. on International Relations*, 106th Cong. 56 (1999) (prepared statement of Rep. Smith)).

<sup>91</sup> The Comprehensive Antitrafficking in Persons Act of 1999, H.R. 3154, 106th Cong. (1999), was introduced by Representative Sam Gejdenson (D-CT) in the House on October 27, 1999. See *id.* § 3. Senator Paul Wellstone (D-MN) introduced an identical bill in the Senate on Nov. 2, 1999. See Comprehensive Antitrafficking in Persons Act of 1999, S. 1842, 106th Cong. § 3 (1999).

<sup>92</sup> See International Trafficking Act of 2000, S. 2449, 106th Cong. § 3 (2000); Trafficking Victims Protection Act of 1999, H.R. 3244, 106th Cong. § 3 (1999).

(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>93</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>94</sup> Without the force/fraud/coercion element required for severe forms of trafficking, this definition encompasses noncoerced migrant prostitution. Including “sex trafficking” in the TVPA definitions was, at best, a symbolic victory for the neo-abolitionists, however, because the statute limited application of its key operational terms to *severe* forms of trafficking.<sup>95</sup> For example, the TVPA does not criminalize “sex trafficking” unless it involves “trafficking of children” or is “effected by force, fraud, or coercion.”<sup>96</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 contains a provision that ultimately became a powerful vehicle for the neo-abolitionists to promote their anti-prostitution agenda worldwide. 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 U.N. Trafficking Protocol’s goal of fostering international cooperation.<sup>97</sup> Under this regime, the President is authorized to deny nonhumanitarian, non-trade-related U.S. assistance (and U.S. support for multilateral development bank assistance) to any govern-

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<sup>93</sup> TVPA § 103(8) (codified at 22 U.S.C. § 7102 (2006)).

<sup>94</sup> *Id.* § 103(9) (codified at 22 U.S.C. § 7102).

<sup>95</sup> Following President Clinton’s “three Ps” framework, the TVPA enhanced the tools available to prosecute traffickers for severe forms of trafficking by increasing sentences for existing crimes and criminalizing trafficking and trafficking-related acts. *Id.* § 112 (codified at 22 U.S.C. § 7109). 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. *Id.* § 107(b) (codified as amended at 22 U.S.C. § 7105).

<sup>96</sup> *Id.* § 112 (codified at 22 U.S.C. § 7109). The TVPA also criminalizes “[t]rafficking with respect to peonage, slavery, involuntary servitude, or forced labor.” *Id.* (codified at 22 U.S.C. § 7109). By contrast, “sex trafficking” of adults when force, fraud, and coercion are absent is not criminalized. *See id.* (codified at 22 U.S.C. § 7109).

<sup>97</sup> For an 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).

ment not making significant efforts to comply with U.S.-defined “minimum standards for the elimination of trafficking.”<sup>98</sup>

Since its creation, the U.S. anti-trafficking sanctions regime has had tremendous influence on the development and implementation of anti-trafficking laws worldwide. 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 end of the Clinton Administration brought an opportunity for the neo-abolitionists to recalibrate U.S. anti-trafficking policy. The neo-abolitionist lobby found a powerful ally in President Bush, who came to champion the anti-prostitution cause at home and abroad. Responding to its faith-based constituency, the Bush Administration took on anti-trafficking as a key humanitarian initiative. In National Security Presidential Directive 22 (NSPD-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>99</sup>

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<sup>98</sup> TVPA § 110(a) (codified as amended at 22 U.S.C. § 7107).

<sup>99</sup> National Security Presidential Directive/NSPD-22, at 2-3 (Dec. 16, 2002), *available at* <http://www.combat-trafficking.army.mil/documents/policy/NSPD-22.pdf>. President Bush publicized 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. 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 innocent and vulnerable.” Address to the United Nations General Assembly in New York City, 2 PUB. PAPERS 1190, 1193 (Sept. 23, 2003); *see also* DESTEFANO, *supra* note 21, at 103 (noting that President Bush’s speech “showed that his administration had made anti-trafficking part of its moral agenda and signaled that the United States was committed to using its bully pulpit to espouse its stance”); *cf.* Soderlund, *supra* note 21, at 77 (describing how the speech drew on long-standing tropes).

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 delink trafficking from prostitution, and even to legitimize prostitution as a form of work for women.”<sup>100</sup>

In the service of the neo-abolitionist cause, law and policy initiatives during the Bush Administration waged a war on prostitution at home and abroad. The neo-abolitionists had key support in the government bureaucracy to implement the anti-prostitution agenda worldwide, having successfully lobbied for a neo-abolitionist to direct the U.S. State Department Office to Monitor and Combat Trafficking in Persons (GTIP),<sup>101</sup> the office responsible for coordinating U.S. anti-trafficking policy. Because 2003 was the first year that countries risked anti-trafficking sanctions for failure to comply with the U.S. minimum standards,<sup>102</sup> the U.S. government’s new anti-prostitution policy factored into perceptions—if not the reality—of what would be required of other countries in order to avoid sanctions.<sup>103</sup> The State Department posted on its website a “Fact Sheet” 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>104</sup> Prominent display of the Fact

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<sup>100</sup> *Trafficking in Women and Children in East Asia and Beyond: A Review of U.S. Policy: Hearing Before the Subcomm. on East Asian and Pacific Affairs of the S. Foreign Relations Comm.*, 108th Cong. 23 (2003) (prepared statement of Donna M. Hughes, Professor and Carlson Endowed Chair in Women’s Studies, University of Rhode Island) [hereinafter Hughes 2003 Senate Statement].

<sup>101</sup> In 2002, the neo-abolitionists successfully campaigned to oust then-GTIP Director Nancy Ely-Raphel and replace her with former U.S. Representative John Miller (R-WA). In congressional testimony, the neo-abolitionists set the stage for Ely-Raphel’s ouster, criticizing GTIP’s failure to consider demand for prostitution in the *2002 Trafficking in Persons Report* and singling out Ely-Raphel specifically for being “extremely naïve” and “gross[ly] lack[ing in] political will” for believing that “the connection between legalized prostitution . . . and . . . trafficking . . . [was] only ‘anecdotal.’” *Foreign Government Complicity in Human Trafficking: A Review of the State Department’s 2002 Trafficking in Persons Report Before the H. Comm. on International Relations*, 107th Cong. 76 (2002) (prepared statement of Donna M. Hughes) [hereinafter Hughes 2002 House Statement].

<sup>102</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 2003, to allow countries a grace period to bring laws and policies into compliance with the U.S. minimum standards on trafficking. Chuang, *supra* note 97, at 454.

<sup>103</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 the United States’ preference for such an approach to prostitution. *See id.* at 466-70.

<sup>104</sup> BUREAU OF PUB. AFFAIRS, U.S. DEP’T OF STATE, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING (2004) (footnote omitted), available at <http://2001-2009.state.gov/r/pa/ei/rls/38790.htm> [hereinafter 2004 FACT SHEET].

Sheet on the State Department website alongside the Department's "Model Law to Combat Trafficking in Persons"—which encouraged countries to adopt a definition of trafficking that encompasses non-coerced prostitution<sup>105</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 that were introduced and largely adopted in the 2003, 2005, and 2008 reauthorizations of the TVPA.<sup>106</sup> Three initiatives in particular—each foreshadowed in earlier neo-abolitionist congressional testimony articulating an agenda for U.S. anti-trafficking policymaking<sup>107</sup>—merit close attention: (1) anti-prostitution restrictions on federal-grant 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 threatened 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 was included in the House version of the 2008 reauthorization bill marks the tremendous inroads the neo-abolitionists have 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 pri-

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<sup>105</sup> OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, LEGAL BUILDING BLOCKS TO COMBAT TRAFFICKING IN PERSONS §§ 100, 206(a) (2004) (on file with author).

<sup>106</sup> 2003 TVPRA, Pub. L. No. 108-193, 117 Stat. 2875 (codified in scattered sections of 8, 18, and 22 U.S.C.); 2005 TVPRA, Pub. L. No. 109-164, 119 Stat. 3558 (codified in scattered sections of 18, 22, and 42 U.S.C.); 2008 TVPRA, Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 6, 8, 18, 22, and 42 U.S.C.).

<sup>107</sup> In testimony before a subcommittee of 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 suspected trafficking, (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. Hughes 2003 Senate Statement, *supra* note 100, at 24-26.

marily about, 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, and by inadequate labor and migration frameworks to manage their consequences,<sup>108</sup> neo-abolitionism constructs trafficking as a moral or social problem driven by social deviance or entrenched male patriarchy.

The following discussion describes the neo-abolitionist legal reforms and reductive narrative used to heighten the urgency and stakes of the 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, Representative Smith and the neo-abolitionists made clear their desire for more substantive application of the “sex trafficking” term than that provided in the TVPA.<sup>109</sup> Over the next eight years, the neo-abolitionists advanced this agenda through legal reforms targeting funding of activities deemed supportive of prostitution and by facilitating the criminalization of traffickers, pimps, and johns.

##### 1. Anti-prostitution Restrictions on Grant Administration

The neo-abolitionists first targeted federal funding for anti-trafficking and HIV/AIDS outreach organizations, advocating that such funding be contingent on their adoption of an anti-prostitution stance.<sup>110</sup> The 2003 TVPRA thus prohibited the use of U.S. funds for

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<sup>108</sup> For a discussion that attempts to contextualize trafficking in this broader frame, see generally Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137 (2006).

<sup>109</sup> See, e.g., *Implementation of the Trafficking Victims Protection Act: Hearing Before the H. Comm. on International Relations*, 107th Cong. 8 (2001) (statement of Rep. Smith).

<sup>110</sup> “The Bush Administration’s fight against global sex trafficking conveniently dovetail[ed] with its quest to dismantle public health efforts that support[ed] women’s reproductive rights and champion[ed] condom use as a viable means to control pregnancy and the spread of HIV/AIDS.” Soderlund, *supra* note 21, at 79. Having reinstated the Mexico City Policy (the “Global Gag Rule”), which banned foreign NGOs from receiving federal funding if they performed or promoted abortions generally, see Memorandum on the Restoration of the Mexico City Policy, 66 Fed. Reg. 17,303, 17,309 (Mar. 29, 2001), curbing prostitution was the next logical step in the Bush Administration and its faith-based constituency’s desire to police nonprocreative sex on a global level.

(1) programs that “promote, support, or advocate the legalization or practice of prostitution”; and (2) “any 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>111</sup> Entities applying for anti-trafficking funds that do not have a policy on prostitution are technically not required to adopt one, though this nuance is not publicized but rather clarified only in the congressional record.<sup>112</sup> Moreover, it remains undefined what types of programs “promote, support, or advocate the legalization or practice of prostitution”—for example, whether holding a conference at which the legalization of prostitution is debated or the potential negative impacts of criminalization are assessed could be deemed “promoting” prostitution.<sup>113</sup>

Even more stringent anti-prostitution grant restrictions were applied to HIV/AIDS funding under the Global AIDS Act.<sup>114</sup> The Global AIDS Act requires that “[n]o funds . . . be used to promote or advocate the legalization or practice of prostitution or sex trafficking” and that “[n]o funds . . . [b]e used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking.”<sup>115</sup> Recipients of HIV/AIDS funds thus are required to

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<sup>111</sup> 2003 TVPRA § 7 (codified at 22 U.S.C. § 7110 (2006)).

<sup>112</sup> According to a colloquy between TVPRA sponsors Representatives Tom Lantos and Christopher 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.” 149 CONG. REC. 27,040 (2003) (colloquy between Reps. Lantos and Smith).

<sup>113</sup> See *Crossing the Border: Immigrants in Detention and Victims of Trafficking: Hearing Before the H. Subcomm. on Border, Maritime, and Global Counterterrorism of the H. Comm. on Homeland Security*, 110th Cong. 82-83 (2007) (prepared statement of Ann Jordan, Program Director, Initiative Against Trafficking in Persons, Global Rights) (criticizing the anti-prostitution pledge for its restriction of valuable speech and activity in which grantees would otherwise engage).

<sup>114</sup> United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711 (codified as amended in scattered sections of 22 U.S.C.) [hereinafter Global AIDS Act].

<sup>115</sup> *Id.* § 301 (codified as amended in scattered sections of 22 U.S.C.). Notably, because there was no pre-enactment hearing on the restrictions, Congress did not consider evidence of the rationales that the government subsequently proffered for the pledge requirement. See H.R. REP. No. 108-60, at 27 (2003), reprinted in 2003 U.S.C.C.A.N. 712, 717.

sign what advocates have come to call the “anti-prostitution pledge”<sup>116</sup> affirming their adoption of an explicit anti-prostitution policy.<sup>117</sup>

Some civil-society organizations, particularly public health organizations, object to the restrictions for arguably violating the First Amendment<sup>118</sup> and undermining HIV/AIDS prevention efforts on the ground.<sup>119</sup> The First Amendment challenges were based on claims 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>120</sup> According to these advocates—who,

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<sup>116</sup> See, e.g., *PEPFAR Reauthorization: From Emergency to Sustainability, Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 65-66 (2007) (statement of Rep. Smith).

<sup>117</sup> Following the D.C. Circuit decision in the DKT litigation, *infra* note 118, the U.S. Agency for International Development (USAID) clarified that a recipient of HIV/AIDS funding can “maintain an affiliation with separate organizations that do not have a[n] [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.” U.S. AGENCY FOR INT’L DEV., ACQUISITION & ASSISTANCE POLICY DIRECTIVE (AAPD), AAPD 05-04 amend. 1 (July 23, 2007). Adequate separation requires, among other factors, both physical and financial separation between recipient and affiliate. *Id.*

<sup>118</sup> Although the funding restrictions originally were applied only to foreign NGOs, a controversial legal opinion issued by the Department of Justice’s Office of Legal Counsel in September 2004 supported their application even to U.S.-based NGOs working abroad. See Letter from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alex M. Azar, II, Gen. Counsel, U.S. Dep’t of Health & Human Servs. (Sept. 20, 2004), available at <http://www.genderhealth.org/pubs/DOJtoHHS.pdf> (withdrawing the Department’s earlier advice that the provisions of the 2003 TVPRA and Global AIDS Act were limited to “foreign organizations acting overseas”). The decision spawned two lawsuits by NGOs claiming that the funding restrictions violated First Amendment prohibitions against compelled speech, viewpoint discrimination, and the imposition of “unconstitutional conditions” on grantees’ privately funded speech. Compare *DKT Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 477 F.3d 758, 764 (D.C. Cir. 2007) (holding that the funding restrictions are constitutional), with *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 570 F. Supp. 2d 533, 550 (S.D.N.Y. 2008) (issuing a preliminary injunction preventing the government from enforcing the funding restrictions). Neo-abolitionist feminists filed memoranda of law as amici curiae for the U.S. government in these cases. See, e.g., Memorandum of Law of Apne Aap and Eighteen Other Organizations as *Amici Curiae*, *Alliance for Open Soc’y Int’l v. U.S. Agency for Int’l Dev.*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006) (No. 05-8209).

<sup>119</sup> For example, the Brazilian government returned \$40 million in grants on the ground that the restrictions would curtail its highly successful HIV/AIDS prevention program by undermining its ability to conduct effective outreach and programs with sex workers if its NGO partners were forced to state their explicit opposition to prostitution. See Michael M. Phillips & Matt Moffett, *Brazil Refuses U.S. AIDS Funds, Rejects Conditions*, WALL ST. J., May 2, 2005, at A3.

<sup>120</sup> See BRENNAN CTR. 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 4* (2008), avail-

notably, do not take a position on prostitution—adopting an anti-prostitution stance compromises programming because gaining access to stigmatized and vulnerable populations such as prostitutes requires a “nonjudgmental” attitude on the part of the service providers.<sup>121</sup> In defense of the funding restrictions, however, neo-abolitionists argue that, while promoting condom use in the sex industry has reduced 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>122</sup> Moreover, notwithstanding arguments to the contrary by the World Health Organization,<sup>123</sup> for example, neo-abolitionists “adamantly reject the notion that it is impossible to do effective HIV/AIDS-prevention work among prostituted people while condemning . . . prostitution.”<sup>124</sup>

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able at <http://www.brennancenter.org/page/-/Justice/Pledge%20Decision%202008%20Q%20and%20A.Final.pdf> (noting that enjoining the anti-prostitution pledge requirement would allow NGOs “to engage in a range of First Amendment protected activities . . . without fear that such work would be deemed by the government to be a basis for suspending or terminating USAID or HHS funds”).

<sup>121</sup> See CTFRS. FOR DISEASE CONTROL & PREVENTION, HIV PREVENTION STRATEGIC PLAN THROUGH 2005, at 22-23 (2001) (warning that stigmatization of vulnerable groups “profoundly affect[s] prevention efforts” because “people [who] may be shunned and physically harmed” may avoid seeking HIV/AIDS testing, information, and other related services); CAROL JENKINS, UNAIDS, FEMALE SEX WORKER HIV PREVENTION PROJECTS: LESSONS LEARNT FROM PAPUA NEW GUINEA, INDIA AND BANGLADESH 52 (2000) (concluding that “[t]raining to diminish moralistic and judgmental attitudes among staff proved to be successful” and that “the development of meaningful relationships with target groups is a key issue, requiring time and empathy” (emphasis omitted)).

<sup>122</sup> Hughes 2003 Senate Statement, *supra* note 100, at 24. This sentiment was shared by John Miller, Director of GTIP, who wrote in an opinion piece 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*, SEATTLE TIMES, May 20, 2004, <http://community.seattletimes.nwsources.com/archive/?date=20040520&slug=johnmiller20>.

<sup>123</sup> See World Health Org., HIV/AIDS Sex Work Toolkit: Key Principles, [http://www.who.int/hiv/topics/vct/sw\\_toolkit/context/en/index4.html](http://www.who.int/hiv/topics/vct/sw_toolkit/context/en/index4.html) (last visited Apr. 15, 2010) (listing “adopting a non-judgemental attitude” as a “key principle” of best practices in “sex work interventions”).

<sup>124</sup> Memorandum of Law of Apne Aap and Eighteen Other Organizations as *Amici Curiae* at 1, *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006) (No. 05-8209). *Amici* were comprised of anti-prostitution organizations, none of which appears to specialize in public health services. *Compare id.* (identifying the interests of these organizations, “mostly led by survivors of prostitution,” which “view prostitution as an abuse of human rights”), *with Amicus Brief on Behalf of AIDS Action and 25 Other Public Health Organizations and Public Health Experts in Support of Plaintiffs-Appellees at 2, Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 254 Fed. App’x 843 (2d Cir. 2007) (No. 06-4035) (“*Amici*’s shared mission in combating

## 2. Anti-prostitution Restrictions on U.S. Government Contractors

Anti-prostitution restrictions have also been brought to bear on the activities of U.S. military personnel and government contractors. Beginning in 2001, human rights advocates sought to expose and hold accountable U.N. peacekeepers and U.S. military personnel and government contractors for their involvement in both sex- and non-sex-sector trafficking. Allegations had surfaced that U.S. military leaders in South Korea and U.S. government contractors in Bosnia-Herzegovina were involved in trafficking-related activities.<sup>125</sup> Yet 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.<sup>126</sup> Reports of U.S. government-contractor involvement in trafficking were not limited to the sex sector, however, as reports also surfaced regarding the trafficking of men for forced labor on U.S. military bases in Iraq.<sup>127</sup>

Human rights advocates sought to establish criminal liability and civil penalties for government-contractor involvement in trafficking.

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HIV/AIDS is seriously threatened by the condition attached to funding provided by [the U.S. government] for international AIDS programs that NGOs—including U.S.-based organizations entitled to freedom of speech under the First Amendment of the Constitution—must adopt a policy explicitly opposing prostitution.”)

<sup>125</sup> See *The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System?: Hearing Before the Subcomm. on International Operations and Human Rights of the H. Comm. on International Relations*, 107th Cong. (2002) (considering allegations of U.N. police involvement in trafficking); OFFICE OF THE INSPECTOR GEN., DEP'T OF DEFENSE, ASSESSMENT OF DOD EFFORTS TO COMBAT TRAFFICKING IN PERSONS, PHASE I—UNITED STATES FORCES KOREA (2003) (reporting on the Defense Department's investigation of “public allegations that U.S. military personnel, particularly those stationed in South Korea, are engaged in activities that promote and facilitate the trafficking and exploitation of women” (internal quotation marks omitted)); HUMAN RIGHTS WATCH, HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION 6 (2002) (reporting that Human Rights Watch investigators found evidence that civilian contractors in Bosnia and Herzegovina, including some employed by the U.S. military, “engaged in trafficking-related activities”); Sealing Cheng, *Muckraking and Stories Untold: Ethnography Meets Journalism on Trafficked Women and the US Military*, SEXUALITY RESEARCH & SOC. POL'Y, Dec. 2008, at 6 (recounting the media attention that prompted the U.S. government to investigate the military's involvement in trafficking in South Korea).

<sup>126</sup> See Martina Vandenberg, *Out of Bondage: Defense Department Should Focus Attack on Global Trafficking in People*, LEGAL TIMES, Feb. 14, 2005, at 53-54.

<sup>127</sup> See, e.g., Cam Simpson, *Pipeline to Peril: Desperate for Work, Lured into Danger*, CHI. TRIB., Oct. 9, 2005, at 1 (describing the trafficking in Nepalese men to work for army contractors in Iraq).

With respect to criminal liability, they sought to fill a jurisdictional loophole in the Military Extraterritorial Jurisdiction Act of 2000 (MEJA)—which provided U.S. federal jurisdiction over civilian contractors attached to the Department of Defense engaged in felony-level offenses<sup>128</sup>—to cover contractors attached to any U.S. government agency.<sup>129</sup> Moreover, to deter U.S. government contractors from engaging in trafficking activities, human rights advocates pursued the inclusion in all U.S. government contracts of mandatory anti-trafficking clauses that, if violated, would result in contract termination.

Advocates' efforts to address all forms of trafficking in the military context were quickly subsumed, however, by an anti-prostitution agenda. Efforts to expand MEJA jurisdiction were promptly defeated, in part due to political concerns over ramifications for the accountability of CIA agents in the Abu Ghraib abuses. Notwithstanding the lack of political will for holding contractors accountable for purchasing human beings, there was plenty of support for holding military personnel liable for purchasing commercial sex acts.<sup>130</sup> A September 2004 Armed Services Committee hearing<sup>131</sup>—the first to address human trafficking and government-contractor impunity—“focused completely on the ‘demand side’ of trafficking, an effort to end service members’ patronizing of prostitutes.”<sup>132</sup> Thereafter, a 2005 executive order was issued, amending the *U.S. Manual for Courts-Martial* to subject U.S. service members who patronize a prostitute to dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.<sup>133</sup>

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<sup>128</sup> Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. § 3261 (2006)); see also Vandenberg, *supra* note 126, at 52-53 (summarizing MEJA and criticizing the Defense Department for waiting four years before issuing implementing regulations).

<sup>129</sup> See Vandenberg, *supra* note 126, at 53.

<sup>130</sup> See *id.* at 52 (“[T]he Pentagon has actually adopted a zero tolerance policy merely on prostitution. What we have seen in the field is not zero tolerance for trafficking, but zero tolerance for whistleblowers who report trafficking and zero prosecutions of traffickers.”).

<sup>131</sup> *Enforcing U.S. Policies Against Trafficking in Persons: How Is the U.S. Military Doing?: Issue Forum Jointly Convened by the Comm’n on Security and Cooperation in Europe and the H. Armed Servs. Comm.*, 108th Cong. (2004), available at [http://www.csce.gov/index.cfm?FuseAction=UserGroups.Home&ContentRecord\\_id=287&ContentType=B&UserGroup\\_id=69](http://www.csce.gov/index.cfm?FuseAction=UserGroups.Home&ContentRecord_id=287&ContentType=B&UserGroup_id=69).

<sup>132</sup> See Vandenberg, *supra* note 126, at 52.

<sup>133</sup> Exec. Order No. 13,387, 70 Fed. Reg. 60,697, 60,701 (Oct. 18, 2005).

The neo-abolitionists also influenced advocacy by targeting U.S. government anti-trafficking contract clauses. The 2003 TVPRA requires U.S. government contracts to contain clauses authorizing termination by the U.S. government if the contractor or subcontractor (or its employees) “engages in severe forms of trafficking,” “procure[s] a commercial sex act,” or “uses forced labor in the performance of the . . . contract.”<sup>134</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>135</sup>

Although these clauses cover trafficking into both sex and non-sex sectors, “[t]he contractor community’s attention has focused on the unprecedented implications of the commercial sex provision” of the government-contract clause.<sup>136</sup> A number of industry representatives and civil-society organizations objected to the government-contract clauses’ expectation that employers would monitor their employees’ activities after work hours, particularly with respect to prostitution, when such activities are not otherwise punishable under U.S. federal law and might not be proscribed by the domestic laws of the host country.<sup>137</sup> Moreover, human rights advocates have raised concerns

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<sup>134</sup> 2003 TVPRA § 3(b), Pub. L. No. 108-193, 117 Stat. 2875, 2876-77 (codified as amended at 22 U.S.C. § 7104(g) (2006)). An earlier interim rule implementing this provision prohibited contractors, subcontractors, or contractor employees from “any activities . . . that support or promote” the acts prohibited in the final rule. See Federal Acquisition Regulation; FAR Case 2005-012, Combating Trafficking in Persons, 71 Fed. Reg. 20,301, 20,302 (Apr. 19, 2006) (interim rule). This provision was ultimately removed at the behest of academic and research institutions, however, who commented 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. See, e.g., Letter from Anthony P. DeCrappeo, President, Council on Governmental Relations, to Gloria Sochon, Gen. Servs. Admin. (June 16, 2006) (on file with author).

<sup>135</sup> See Federal Acquisition Regulation; FAR Case 2005-012, Combating Trafficking in Persons, 72 Fed. Reg. 46,335, 46,342 (Aug. 17, 2007) (revised interim rule). This rule was finalized in January 2009. See Federal Acquisition Regulation, FAR Case 2005-012; Combating Trafficking in Persons, 74 Fed. Reg. 2741 (Jan. 15, 2009) (codified at 48 C.F.R. pts. 12, 22, and 52 (2009)).

<sup>136</sup> Martina E. Vandenberg & Damien Specht, *It’s Not Just About Prostitution: FAR Compliance and Human Trafficking*, J. INT’L PEACE OPERATIONS, May–June 2009, at 17.

<sup>137</sup> See, e.g., Letter from Patricia A. Meagher, ABA Section of Pub. Contract Law, to Laurieann Duarte, Regulatory Secretariat (VIR), Gen. Servs. Admin., at 10 (Oct. 16, 2007) (noting that no federal law “criminalizes commercial sex acts” and arguing that “[t]he Revised Interim Rule would therefore penalize contractors for activities beyond illegal human trafficking”); Letter from Dr. Sarah E. Mendelson, Ctr. for Strategic & Int’l Studies, to Laurieanne [sic] Duarte, Regulatory Secretariat (VIR), Gen. Servs. Admin., at 5 (Oct. 16, 2007) [hereinafter CSIS Letter] (observing that “[t]rafficking in persons and the procurement of a commercial sex act fall into two distinct legal categories” and that “procurement of a commercial sex act is not covered by federal law”).

regarding the way in which the anti-prostitution clause has deflected attention from contractor involvement in non-sex-sector trafficking. “The focus[] on the . . . commercial sex provisions . . . masks the more salient risk [of nonsexual] forced labor,”<sup>138</sup> a phenomenon that the U.S. government has had difficulty addressing on its own military bases in Iraq. For example, the U.S. government has had to repeatedly admonish contractors and subcontractors for confiscating workers’ passports and using deceptive hiring practices to lure workers to U.S. military bases in Iraq and Afghanistan.<sup>139</sup> Because the final regulations governing implementation of these clauses rely primarily on self-reporting by contractors, they already risk zero compliance—all the more so with respect to non-sex-sector trafficking.<sup>140</sup>

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In defense, the U.S. government asserted that private-contractor employees’ actions “reflect upon the Government’s integrity and ethics” and that employee violations of this nature are “more likely to occur after working hours.” Federal Acquisition Regulation; FAR Case 2005-012, Combating Trafficking in Persons, 74 Fed. Reg. at 2742. The government 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.” Federal Acquisition Regulation; FAR Case 2005-012, Combating Trafficking in Persons, 72 Fed. Reg. at 46,337.

<sup>138</sup> Vandenberg & Specht, *supra* note 136, at 17.

<sup>139</sup> See Cam Simpson & Amer Madhani, *Pipeline to Peril: U.S. Cash Fuels Human Trade*, CHI. TRIB., at 15, Oct. 9, 2005 (reporting that “[s]ome U.S. subcontractors in Iraq . . . employ practices condemned by the U.S. elsewhere, including fraud, coercion and seizure of workers’ passports”); Fragmentary Order by General George Casey No. 06-188, Prevention of Trafficking in Persons in MNF-I (Apr. 4, 2006) (outlining policies aimed at preventing, among other problems, “illegal confiscation of worker . . . passports” and “deceptive hiring practices”); Memorandum from Robert K. Boyles, Colonel, USAF, Principal Assistant Responsible for Contracting—Forces, Joint Contracting Command—Iraq/Afghanistan, on Withholding of Passports, Trafficking in Persons, to All Contractors (Apr. 19, 2006) (directing contractors to cease the practice of withholding employee passports and ordering them to return the passports by May 1, 2006).

<sup>140</sup> See CSIS Letter, *supra* note 137, at 2-4 (arguing that the rule lacks explicit requirements for contractors and a clear definition of “forced labor”). The rule “stop[s] short of authorizing audits—which undoubtedly would prompt Contractors into compliance—or even of requiring a company to certify compliance with the prohibition against human trafficking.” Tenley A. Carp, *The FAR and DFARS Ban on Human Trafficking—Heavy on Rhetoric, Light on Enforcement*, GOV’T CONTRACTOR, Jan. 17, 2007, ¶ 12, at 1. The final rule significantly softened the employers’ obligation articulated in an earlier interim rule that would have required contractors to establish policies and procedures to combat human trafficking, to develop a human trafficking awareness program for employees, and to obtain written agreement from employees indicating they would abide by said policies and procedures. See Federal Acquisition Regulation; FAR Case 2005-012, Combating Trafficking in Persons, 71 Fed. Reg. 20,301, 20,303 (Apr. 19, 2006) (interim rule). Moreover, whereas a former rule required trafficking allega-

### 3. Targeting “Sex Trafficking”

In addition to attempting to deter involvement in or support for prostitution through the threat of withdrawal of U.S. federal funding, the neo-abolitionists have pursued broader and more aggressive criminalization of prostitution-related activities at home and abroad. Viewing prostitution as primarily a problem of supply and demand,<sup>141</sup> the neo-abolitionists sought to criminalize demand worldwide, modeling their approach on Swedish laws targeting the sex industry by criminalizing clients’ purchase of sex. Within the United States, the neo-abolitionists sought to transform acts defined as “sex trafficking” under the TVPA into a federal crime and to correct what they argued was the discriminatory provision of social services to only foreign victims of trafficking<sup>142</sup>—a claim that was ultimately found to have not been substantiated.<sup>143</sup>

The 2005 and 2008 TVPRAs instantiate the inroads neo-abolitionists have made toward their goal of combating “sex traffick-

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tions be reported to the combatant commander, *see* Defense Federal Acquisition Regulation Supplement; Combating Trafficking in Persons, 71 Fed. Reg. 62,560, 62,561 (Oct. 26, 2006) (interim rule), the final rule requires only reporting to the contracting officer, Federal Acquisition Regulation; FAR Case 2005-012, Combating Trafficking in Persons, 74 Fed. Reg. at 2742. Unlike a combatant commander, the contracting officer might not wield sufficient power to ensure accountability for violations. Indeed, a whistleblower lawsuit recently filed against ArmorGroup reveals the difficulty of achieving contractor compliance with the government-contract clauses and the ensuing impunity for noncompliance. *See* Complaint for Declaratory, Injunctive, and Monetary Relief and Jury Demand, paras. 1, 3, *Gordon v. ArmorGroup North America, Inc.*, No. 09-01717 (D.D.C. Sept. 9, 2009) (alleging that the plaintiff was retaliated against after he reported serious violations, including violations of the TVPA, to the State Department).

<sup>141</sup> *See, e.g.*, Janice G. Raymond, *Prostitution on Demand: Legalizing the Buyers as Sexual Consumers*, 10 VIOLENCE AGAINST WOMEN 1156, 1157 (2004) (arguing that “male demand is a primary factor in the expansion of the sex industry worldwide”).

<sup>142</sup> *See, e.g.*, Donna M. Hughes, *Enslaved in the U.S.A.: American Victims Need Our Help*, NAT’L REV. ONLINE, July 30, 2007, <http://article.nationalreview.com/322852/enslaved-in-the-usa/donna-m-hughes> (criticizing the lack of federally funded services for U.S. citizens who are victims of sex trafficking in the United States).

<sup>143</sup> The U.S. government assessed this claim of discrimination by surveying its agencies’ programs and practices and soliciting input from NGOs, but it found the services provided to American, as opposed to foreign, victims to be generally comparable. *See* SUBCOMM. ON DOMESTIC TRAFFICKING, SENIOR POL’Y OPERATING GROUP ON TRAFFICKING IN PERSONS, FINAL REPORT AND RECOMMENDATIONS 8-12 (2007) (asserting that statutory differences in services available to domestic and international victims are based on the unique needs of certain international populations (for example, their ineligibility for cash and medical assistance available to U.S.-citizen victims of crime) and that “no empirical data were provided or gathered to support or refute” NGOs’ claims that domestic victims are “less likely to have access to intensive case management services that many international victims have”).

ing” (as defined in the TVPRA). The 2005 TVPRA allocates resources to end demand for sex trafficking, particularly “domestic trafficking in persons,” focusing on analysis and dissemination of best practices for addressing sex trafficking and commercial sex acts.<sup>144</sup> For each of fiscal years 2006 and 2007, it appropriated \$25 million for state and local law enforcement agencies to educate, investigate, and prosecute persons who purchase commercial sex acts<sup>145</sup> and \$10 million for NGOs to assist citizen 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>146</sup> In an effort to influence other countries’ activities, the 2008 TVPRA includes as sanctions-regime criteria whether a country has made “serious and sustained” efforts to reduce the demand for commercial sex acts and sex tourism.<sup>147</sup>

In their lobbying for the 2008 TVPRA, the neo-abolitionists sought to federalize the criminal prosecution of pandering, pimping, and prostitution-related offenses. Though they ultimately did not succeed, they managed to achieve passage of legislation in the House of Representatives to that effect. H.R. 3887 created the federal crime of “sex trafficking”:

Whoever knowingly, in or affecting interstate or foreign commerce [in the United States or its territories], persuades, induces, or entices any individual to engage in prostitution for which any person can be charged with an offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.<sup>148</sup>

The neo-abolitionists justified this expansion, arguing that “the federal government should be prosecuting all sex trafficking, not just severe forms of sex 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>149</sup> The proposed legislation drew vehement objections,

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<sup>144</sup> 2005 TVPRA, Pub. L. No. 109-164, § 201(a), 119 Stat. 3558, 3567-68 (codified at 42 U.S.C. § 14044 (2006)).

<sup>145</sup> *Id.* § 204, 119 Stat. at 3571 (codified as amended at 42 U.S.C. § 14044c).

<sup>146</sup> *Id.* § 202, 119 Stat. at 3569-70 (codified at 42 U.S.C. § 14044a).

<sup>147</sup> 2008 TVPRA § 106, 122 Stat. 5044, 5049 (codified at 22 U.S.C. § 7106(b)(11) (Supp. 2008)).

<sup>148</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. sec. 221, § 2430 (2007).

<sup>149</sup> Jessica Neuwirth, President, Equality Now, Statement to the New York City Council (June 11, 2008), *available at* [http://www.equalitynow.org/english/pressroom/press\\_releases/presidentstatement\\_20080613\\_en.html](http://www.equalitynow.org/english/pressroom/press_releases/presidentstatement_20080613_en.html); *see also* Donna M. Hughes,

however, from anti-trafficking advocates, the Department of Justice (DOJ), local law enforcement agencies, and the Heritage Foundation, on the grounds that shifting prosecutorial responsibility from local and state levels to the DOJ would amount to a “federalization of state crimes”;<sup>150</sup> divert precious resources away from the DOJ’s core mission of prosecuting crimes involving force, fraud, or coercion, or child victims (where coercion is presumed);<sup>151</sup> and “trivialize[] the seriousness of actual human trafficking by equating it with run-of-the-mill sex crimes—such as pimping, pandering, and prostitution.”<sup>152</sup>

Having failed to further federalize prostitution-related crimes, the neo-abolitionists have shifted their efforts to the state level, successfully incorporating definitions of trafficking that encompass prostitution-related crimes.<sup>153</sup> The neo-abolitionist legal-reform strategy has also been remarkably successful in signaling and exporting to the rest of the world an anti-prostitution stance. As explored in detail in Part III, these reforms have had tremendous impacts on the ground.

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*Wilberforce Can Free Again: Protecting Trafficking Victims*, NAT’L REV. ONLINE, Mar. 12, 2008, <http://article.nationalreview.com/351239/wilberforce-can-free-again/donna-m-hughes> (“[T]he Wilberforce Act will change the older Mann Act statute by eliminating its transportation-of-victims requirement . . . . When transportation across state lines is not provable, prosecutors will no longer need to show brutality or acts of fraud, force, or coercion . . .”).

<sup>150</sup> U.S. DEP’T OF JUSTICE, H.R. 3887: THE WILLIAM WILBERFORCE TRAFFICKING IN PERSONS REAUTHORIZATION ACT OF 2007, COMMENTS REFLECTING MANAGERS’ AMENDMENT 1-2 (n.d.) (on file with author); *see also* Letter from Chuck Canterbury, Nat’l President, Fraternal Order of Police, to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary, and Arlen Specter, Ranking Member, Senate Comm. on the Judiciary (Dec. 6, 2007) (voicing concern that the Act would “involve . . . the Federal government” in “simple prostitution cases . . . unrelated to human trafficking”); Letter from Alexandria House et al., to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary, et al. 2 (Jan. 23, 2008) (criticizing as “unnecessary, confusing and resource draining” the Act’s provision to “federalize[] all prostitution-related crimes as ‘sex trafficking’”).

<sup>151</sup> *See* Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, Office of Legislative Affairs, to John Conyers, Jr., Chairman, House Comm. on the Judiciary 8-9 (Nov. 9, 2007) (arguing that the federal government “lacks the necessary resources and capacity to prosecute these [additional] offenses”).

<sup>152</sup> Brian W. Walsh & Andrew M. Grossman, *Human Trafficking Reauthorization Would Undermine Existing Anti-trafficking Efforts and Constitutional Federalism*, LEGAL MEMORANDUM (Heritage Found., Washington, D.C.), Feb. 14, 2008, at 1.

<sup>153</sup> *See, e.g.*, MD. CODE ANN., CRIM. LAW § 11-303 (LexisNexis 2002) (amended 2007, 2009) (criminalizing, among other things, “tak[ing] or caus[ing] another to be taken to any place for prostitution”).

### B. *The Reductive Narrative*

While neo-abolitionists have succeeded in pursuing legal reforms to advance their anti-prostitution agenda, their more powerful influence lies in their ability to shape anti-trafficking discourse. Discourse is a way of exercising power.<sup>154</sup> Discourses “form regularities that emerge and become systematized in and through the articulation and reiteration of particular norms and practices, not because they are logical or true but rather because of this regularity.”<sup>155</sup>

Taking advantage of their power to control anti-trafficking discourse within the United States, the neo-abolitionists have embedded in the public consciousness a reductive narrative of trafficking. Through two discursive moves, this narrative redefines the putative victim population as linked to the sex sector—first, by focusing attention on sex-sector trafficking to the exclusion of non-sex-sector trafficking, and second, by conflating trafficking with prostitution. While in some sense all narratives are reductive, these particular discursive moves have set in motion a set of negative (however unintended) consequences. The reductive trafficking narrative oversimplifies 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. In so doing, the narrative circumscribes the range and content of anti-trafficking interventions proffered, feeding states’ preference for aggressive criminal justice responses. It overlooks, if not discounts, the need for better migration and labor frameworks or socioeconomic policies to counter the negative effects of globalizing trends that drive people to undertake risky migration projects in the first instance.

#### 1. The Focus on Sex Trafficking

The influence of neo-abolitionist discourse traces back to Representative 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 in-

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<sup>154</sup> See 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 EUR. J. INT’L REL. 37, 47 (2003) (“[D]iscourse is not separate from nor against power but is, in fact, a way of exercising it.”).

<sup>155</sup> *Id.*

ternational sex trade industry with no way out” each year.<sup>156</sup> Though the 50,000 figure actually encompassed trafficking of men, women, and children into the United States for sweatshop labor, domestic work, and agricultural labor (and was downgraded in 2003 to a figure of 18,000 to 20,000),<sup>157</sup> “[t]he misleading claim that all these . . . were ‘sex slaves’ . . . 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>158</sup> The neo-abolitionist feminists strategically “fram[ed] the harms of prostitution and trafficking as politically neutral questions of humanitarian concern about third world women.”<sup>159</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 to waging the fight against commercial sexuality” at home and abroad.<sup>160</sup> Accordingly, congressional testimony in the lead-up to the TVPA played on the imagery of women and children forced into literal sexual slavery, utilizing graphic images of women and girls locked in trailers, raped, and deprived of food.<sup>161</sup> Victims were “portrayed as no more than unwilling goods exchanged between unscrupulous men, . . . ‘commodities . . . bodies exchanged on a market.’”<sup>162</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”—of innocent women lured, deceived, and seduced into prostitution by evil, wanton men.<sup>163</sup>

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<sup>156</sup> Wendy Chapkis, *Soft Glove, Punishing Fist: The Trafficking Victims Protection Act of 2000* (quoting Representative Christopher Smith), in *REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY* 51, 53 (Elizabeth Bernstein & Laurie Schaffner eds., 2005).

<sup>157</sup> See U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT*, *supra* note 14, at 7 (reporting a figure of 18,000 to 20,000 men, women, and children trafficked into the United States for forced labor and sexual exploitation).

<sup>158</sup> Chapkis, *supra* note 156, at 54.

<sup>159</sup> Bernstein, *Militarized Humanitarianism*, *supra* note 7, at 8 (citing comments by Jessica Neuwirth of Equality Now).

<sup>160</sup> *Id.*

<sup>161</sup> See Srikantiah, *supra* note 90, at 170 nn.70-71, 171 (recounting the explicit stories of brutality).

<sup>162</sup> Chapkis, *supra* note 156, at 60 (citation omitted).

<sup>163</sup> See Bernstein, *New Abolitionism*, *supra* note 7, at 132-33 (noting “the extent to which the tropes that animated the moral panic around White Slavery in the last century have been recycled in campaigns against ‘modern-day slavery’”); William F. McDonald, *Traffic Counts, Symbols & Agendas: A Critique of the Campaign Against Trafficking of Human Beings*, 11 *INT’L REV. VICTIMOLOGY* 143, 165 (2004) (asserting similarities in discourse between the current campaign and the historical “white slavery” campaign).

The inordinate focus on sex-sector trafficking belies the reality that non-sex-sector trafficking accounts for nearly as many—and arguably more<sup>164</sup>—trafficking cases worldwide. Yet “U.S. enforcement priorities, media attention, and NGO practice” have treated trafficking for forced prostitution as the “paradigmatic instance of what ‘modern-day slavery’ is assumed to be.”<sup>165</sup> A comparison of the number of U.S. prosecutions during the period 1996 to 2000 (pre-TVPA) and the period 2001 to 2005 (post-TVPA) reveals an 871% increase in cases involving sex-sector trafficking and only a 109% increase in non-sex-sector trafficking cases.<sup>166</sup> Media reporting on sex-sector trafficking is hugely disproportionate to the reporting on non-sex-sector trafficking,<sup>167</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>168</sup> and India<sup>169</sup> and Peter Landesman’s *New York Times Magazine* exposé on

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<sup>164</sup> The ILO estimates that 2.45 million people are “in forced labour at a given time as a result of trafficking,” broken down as follows: 43% for “commercial sexual exploitation,” 32% for “economic exploitation,” and 25% for “mixed” or “undetermined” forms. ILO 2005 REPORT, *supra* note 10, at 14 & fig.1.4. At the same time, the ILO estimates that there are 12.3 million people in forced labor, with 7.8 million in “economic exploitation” and 1.39 million in “commercial sexual exploitation.” *Id.* at 12 & fig.1.2. The ILO thus identifies only 20% of all forced-labor cases as trafficking cases. *Id.* at 14. How the ILO distinguishes trafficking from forced labor remains unclear, however, and the breadth of the trafficking definition suggests that most—if not all—forced-labor cases would also qualify as trafficking cases. The 7:1 ratio of non-sex-sector to sex-sector forced-labor cases thus suggests at least the *possibility* that the number of non-sex-sector trafficking cases actually exceeds the number of sex-sector trafficking cases.

<sup>165</sup> Bernstein, *New Abolitionism*, *supra* note 7, at 130.

<sup>166</sup> See U.S. DEP’T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING, FISCAL YEARS 2001–2005, at 25, 27 (2006) (reporting an increase from seven sex trafficking cases to sixty-eight sex trafficking cases and from eleven labor trafficking cases to twenty-three labor trafficking cases).

<sup>167</sup> See Debbie Nathan, *Oversexed: Anti-trafficking Efforts Too Often Neglect Other Forms of Forced Labor*, NATION, Aug. 29–Sept. 5, 2005, at 27 (explaining that faith-based groups, feminists, the government, and the media focus on sex crimes).

<sup>168</sup> See Nicholas D. Kristof, *Back to the Brothel*, N.Y. TIMES, Jan. 22, 2005, at A15; Nicholas D. Kristof, *Girls for Sale*, N.Y. TIMES, Jan. 17, 2004, at A15; Nicholas D. Kristof, *The Good Daughter, in a Brothel*, N.Y. TIMES, Dec. 17, 2006, at C13; Nicholas D. Kristof, Op.-Ed., *A Heroine from the Brothels*, N.Y. TIMES, Sept. 25, 2008, at A29; Nicholas D. Kristof, *If This Isn’t Slavery, What Is?*, N.Y. TIMES, Jan. 4, 2009, at WK8. A constant refrain in Kristof’s articles is that sex trafficking is the twenty-first century’s version of slavery and that “the main difference is that the modern [victims] are dead of AIDS by their late 20s.” Kristof, *The Good Daughter, in a Brothel*, *supra*.

<sup>169</sup> See, e.g., Nicholas D. Kristof, *Slavery in Our Time*, N.Y. TIMES, Jan. 22, 2006, at C17; Nicholas D. Kristof, Op.-Ed., *The 21st-Century Slave Trade*, N.Y. TIMES, Apr. 22, 2007, at WK3.

“sex slavery” in the United States.<sup>170</sup> The vast majority of documentaries and films on trafficking focus on sex-sector trafficking.<sup>171</sup>

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>172</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>173</sup> only began receiving media attention within the last three years,<sup>174</sup> when non-abolitionists made it a priority in lobbying for the 2008 TVPRA. Recent case law reveals that those trafficked into non-sex sectors tend to be viewed simply as exploited migrants rather than trafficked per-

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<sup>170</sup> Peter Landesman, *The Girls Next Door*, N.Y. TIMES MAG., Jan. 25, 2004, at 30.

<sup>171</sup> See, e.g., Children: The World Affairs Blog Network, Human Trafficking and Slavery Related Movies and Documentaries, <http://www.children.foreignpolicyblogs.com/human-trafficking-and-slavery-related-movies-and-documentaries> (last visited Apr. 15, 2010) (cataloguing such movies and documentaries). Popular offerings include *TRADE*, *Sex Slaves*, and *Libya 4-ever*. See *id.* Of particular note is the miniseries *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. See generally Kate Aurthur, *Lifetime’s Place Is in the House (and Senate): How Did Women’s Television Turn into a Political Lobby?*, N.Y. TIMES, Oct. 16, 2005, at A1 (discussing the movie). Lifetime encouraged its viewers to get involved in support of ending the demand for prostitution. See Press Release, Lifetime, Mira Sorvino, Donald Sutherland and Robert Carlyle Star in the Lifetime Original Miniseries “Human Trafficking,” a Chilling Portrayal of Today’s Global Sex Trade and the Desperate Fight to Save Its Countless Victims, available at [http://www.feministcampus.org/HUMAN\\_TRAFFICKING\\_press\\_release.pdf](http://www.feministcampus.org/HUMAN_TRAFFICKING_press_release.pdf) (last visited Apr. 15, 2010) (announcing Lifetime’s intent to use the miniseries as a platform to raise awareness and work with Congress to support the End Demand for Sex Trafficking Act of 2005). Ironically, it did so while widely publicizing the miniseries with “unabashedly seductive” ads depicting sexy young women, blindfolded and in bondage. Sarah Karnasiewicz, *Sex Sells: Is the Coverage of Sex Slavery About More than Human Dignity?*, SALON.COM BROADSHEET, Oct. 26, 2005, <http://dir.salon.com/story/mwt/broadsheet/2005/10/26/sexslaves/print.html>.

<sup>172</sup> Cam Simpson, *Desperate for Work, Lured into Danger*, CHI. TRIB., Oct. 9, 2005, at 1; Cam Simpson, *Into a War Zone, On a Deadly Road*, CHI. TRIB., Oct. 10, 2005, at 1.

<sup>173</sup> See HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES 20-21 (2001).

<sup>174</sup> See, e.g., *Diplomatic Abuse of Servants Hard to Prosecute* (NPR radio broadcast Mar. 1, 2007), transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=7672967> (reporting on various individuals accused of domestic slavery); *Servants: Diplomat Held Us as Suburban ‘Slaves,’* (NPR radio broadcast Mar. 1, 2007), transcript available at <http://www.npr.org/templates/transcript/transcript.php?storyId=7626754> (reporting on a Kuwaiti diplomat accused of holding three former workers as slaves).

sons; the problem is viewed as one of hiring illegal immigrants, not of abusive labor conditions.<sup>175</sup>

Critics of the biased treatment of the different forms of trafficking attribute the disparity to the “mediagenic” nature of sex-sector trafficking—simply put, the fact that “sex sells.”<sup>176</sup> The reductive narrative of trafficking as being about women and children forced into prostitution resonates because of its simple narrative structure, with a bad guy (evil trafficker or deviant, sex-crazed male) doing bad things (sexual violence or enslavement) to an innocent, ignorant, impoverished victim (trafficked woman or child, sex slave, or 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 tendency to assume that the nanny and male farm worker are illegal migrants masks the reality that many cross borders legally. And even if they do not, 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-sector trafficking narrative of innocence debauched. Migrants exploited in fields, farms, restaurants, hair and nail salons, 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 mores, which can coerce or lure “our” daughters, sisters, and wives into the sex industry.<sup>177</sup> This simplified version of trafficking is much easier to explain

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<sup>175</sup> In *United States v. Lubis*, for instance, the defendant was convicted of harboring twenty women for over eight years and farming 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. Freeman Klopott, *Federal Judge Slams Feds for Not Charging Illegal Immigrants’ Employers*, WASH. EXAMINER, Aug. 14, 2009, [http://www.washingtonexaminer.com/local/Federal-judge-slams-feds-for-not-charging-illegal-immigrants\\_employers-8103073.html](http://www.washingtonexaminer.com/local/Federal-judge-slams-feds-for-not-charging-illegal-immigrants_employers-8103073.html). The federal judge sentenced the defendant to only three years of probation and \$2000 restitution, noting that he was “troubled” that he was being asked to send the defendant to prison when the employees had spent five days a week with their employers and only weekends with him. *Id.* See generally *United States v. Lubis*, No. 09-00091 (E.D. Va. Feb. 11, 2009).

<sup>176</sup> See, e.g., Jennifer Block, *Sex Trafficking: Why the Faith Trade Is Interested in the Sex Trade*, CONSCIENCE, Summer–Autumn 2004, at 32, 33 (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); Karnasiewicz, *supra* note 171 (criticizing the sexual nature of Lifetime’s *Human Trafficking* miniseries and the media’s focus on the sex trade instead of the labor trade).

<sup>177</sup> See 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, 281 (2006) (“At its most incendiary, abolitionists insist that ‘[w]omen became goods and services in an industry

to the general populace than the complex, multilayered narrative concerning the destabilizing effects of globalization and the resulting transnational flow of capital, goods, and people.<sup>178</sup>

## 2. Conflating Sex Trafficking and Prostitution

Neo-abolitionists have capitalized on this intense focus on sex-sector trafficking to conflate sex-sector trafficking and prostitution and to pursue abolition of prostitution under the banner of “trafficking.” Their success is well evidenced by the direct link between trafficking and prostitution that NSPD-22 posits and publicizes in the State Department Fact Sheet, and by the neo-abolitionist law and policy reforms described above. Focusing on women’s 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 possible.

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 prostitute women are subordinated, oppressed and unfree.”<sup>179</sup> Instead, those women—the self-proclaimed “sex workers” who defy the dominant narrative—are explained away as suffering from a false consciousness and thereby unaware of their oppression or as deviant in desiring abuse.

Under this construction, Third World prostitutes represent the paradigmatic example of prostitution amounting to sex-sector trafficking. They are characterized as “perpetually underprivileged and marginalised” by all-encompassing economic and cultural oppression, such that the very possibility of choice or agency is negated.<sup>180</sup> “By

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without national borders. The sex industry treats women as moveable property . . .’ In the wake of such language, panic over the exploitation of (our white) women . . . can exponentially amplify.” (footnote omitted)). Kidnapping is an oft-used trope in trafficking narratives, despite the fact that such occurrences are rare in actual trafficking.

<sup>178</sup> See *id.* at 277 (“[T]he reduction of human trafficking to sexual slavery obfuscates the complexities that surround this practice . . .”).

<sup>179</sup> Barbara Sullivan, *Trafficking in Women: Feminism and New International Law*, 5 INT’L FEMINIST J. POL. 67, 76 (2003); see also *id.* at 75-77 (explaining and criticizing this view held by neo-abolitionist feminists while arguing that members of the sex trade are able to practice freedom and consent); Noah D. Zatz, *Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution*, 22 SIGNS 277, 280-81 (1997) (recognizing prostitutes’ varying reactions to their experiences).

<sup>180</sup> Ratna Kapur, *Post-colonial Economies of Desire: Legal Representations of the Sexual Subaltern*, 78 DENV. U. L. REV. 855, 866 (2001) (emphasis omitted).

equating choice with wealth, and coercion with poverty, no space remains to recognize and validate the choices that women make when confronted with limited economic opportunities.”<sup>181</sup> As sociologist Kamala Kempadoo argues, the universalizations and generalizations that 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>182</sup> The reductive portrayal of the trafficking victim sets up a neoimperialist power relation that presumes and establishes an essential divide between East and West, South and North—exotic, archaic, and authoritarian versus progressive and enlightened; it positions Third World women as ignorant, tradition bound, poor, and infantilized, resembling minors in need of guidance.<sup>183</sup>

In the prostitution context, the neo-abolitionist narrative “do[es] offer an important critique of liberal notions of freedom and consent that presume autonomous individuals abstracted from relations of power.”<sup>184</sup> These liberal notions miss their mark in the trafficking context by failing to appreciate the nuances of context—for example, how significant economic, gender, and racial inequalities severely compromise the exercise of choice in many prostitution contexts. As sociologist Laura Agustín notes, many migrant prostitutes do not—contrary to the view of some Western sex-worker advocates—adopt the view that sex work is art, therapy, or like any other job.<sup>185</sup> While formalizing the industry might enable workers to advocate on their own behalf, many migrants do not self-identify as sex professionals but rather view sex work as a

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<sup>181</sup> *Id.* at 869. Some commentators argue that “poverty is a context, but not the specific cause,” of trafficking and “urge[] that ‘[a]cademics and policymakers move beyond ‘poverty’ and ‘lack of education’ to recognize the subtleties of the challenges and frustrations confronting people living in the less developed parts of our . . . world.” Mike Dottridge, *Responses to Trafficking in Persons: International Norms Translated into Action at the National and Regional Levels* (citation and footnote omitted), in U.N. OFFICE ON DRUGS & CRIME, AN INTRODUCTION TO HUMAN TRAFFICKING: VULNERABILITY, IMPACT AND ACTION 103, 114 (2008).

<sup>182</sup> See Kamala Kempadoo, *Introduction: Globalizing Sex Worker’s Rights*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 1, 11-14 (Kamala Kempadoo & Jo Doezema eds., 1998).

<sup>183</sup> See Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 18 (2002) (describing the image of a Third World woman as “truncated, . . . sexually constrained, tradition-bound, incarcerated in the home, illiterate, and poor”).

<sup>184</sup> Sullivan, *supra* note 179, at 76.

<sup>185</sup> Laura Agustín, *Migrants in the Mistress’s House: Other Voices in the “Trafficking” Debate*, 12 SOC. POL. 96, 110 (2005).

temporary financial measure.<sup>186</sup> As Agustín explains, there is an inescapable, fundamental “contradiction[] of working in a sector where illegality is the norm.”<sup>187</sup> Normalizing sex work through harm-reduction strategies cannot avoid the practical obstacles to agency that most migrant sex workers suffer as a result of their unlawful migration status.<sup>188</sup>

Nonetheless, treating prostitution as possibly a form of work at least focuses attention on the specificities of context: for instance, the fact that certain working conditions are better for some (e.g., nationals) than others (e.g., migrants). Moreover, as Sullivan explains, the prostitution-as-work “discursive strategy . . . opens up a space for the formation of new identities not based on passivity, or sexual exploitation and sexual victimhood.”<sup>189</sup> Perhaps “[i]t is not sex work itself that promotes oppressi[on] . . . 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>190</sup> Indeed, when it comes to the 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 . . . appropriat[ing] the chains that bind them.”<sup>191</sup>

The neo-abolitionist refusal to mark the differences between rape and sex for money has discursive and practical perils. It implies that prostitutes 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>192</sup> It also perpetuates the Madonna-versus-whore stigma, or the sense that only those who unwittingly ended up in prostitution are deserving of protection. Because all prostitution is

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 98.

<sup>188</sup> See *infra* text accompanying notes 268-70 (discussing the impact of legalization on migrant sex workers in the Netherlands).

<sup>189</sup> Sullivan, *supra* note 179, at 79.

<sup>190</sup> Zatz, *supra* note 179, at 291.

<sup>191</sup> Margaret Jane Radin & Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 8, 14 (Martha M. Ertman & Joan C. Williams eds., 2005) [hereinafter *RETHINKING COMMODIFICATION*]. Context is critical. Illustrating this point, Ann Lucas asks if, assuming bodily integrity is essential to personhood, a rape survivor is “less human” than others. Ann Lucas, *Prostitution, Law, and Commodification*, in *RETHINKING COMMODIFICATION*, *supra*, at 248, 257. If, in an ideal world, “every adult would experience sexuality as communion and interpersonal sharing,” then are the “voluntarily celibate” lower on the scale of “human flourishing”? *Id.*

<sup>192</sup> O’CONNELL DAVIDSON, *supra* note 65, at 122.

trafficking, and thus a crime and a human rights abuse, neo-abolitionist strategies prioritize prohibition and antiproliferation 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 noncommodified, it cannot, as a practical matter, escape what Margaret Radin calls the “commodification double bind.”<sup>193</sup> 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, and equally unacceptable for society to heap opprobrium and further oppression on those who try to create and enter such markets under those conditions.”<sup>194</sup> While in an ideal world sex would perhaps not be commodified, in our nonideal world some women face a choice between selling sex and letting themselves or their children go hungry.<sup>195</sup> For the neo-abolitionist, the latter option is an acceptable trade-off in exchange for the ideal world of noncommodified sex—but unacceptable for non-abolitionists favoring harm reduction.

### 3. “Militarized Humanitarianism” and “Carceral Feminism”

Through the two discursive moves described above, the neo-abolitionist narrative delimits and collapses complex forms of women’s migration—ranging from deception and abuse to informed decisions—into a simple portrayal of women as victims of crime. It thus precludes understanding of the complex structural, social, and economic aspects of women’s migration, including the possibility that “trafficked women” may be migrant sex workers or migrant women attempting to meet their own needs or responding to labor demands in the West. What is called “trafficking” when it involves sex is often called “international labor migration” when it involves other kinds of work. As political scientist Jacqueline Berman argues, the neo-abolitionist narrative “elide[s] and displace[s] this specific intersection of gender, immigration, economics, and globalization.”<sup>196</sup>

Thus construed, trafficking is no longer the product of the disparities of wealth created by globalization, gendered labor markets, or inadequate migration frameworks, but rather the result of the sexual

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<sup>193</sup> Radin & Sunder, *supra* note 191, at 11.

<sup>194</sup> *Id.* at 12.

<sup>195</sup> For further discussion of the commodification of sex, see generally Lucas, *supra* note 191, at 248.

<sup>196</sup> Berman, *supra* note 154, at 58.

proclivities of deviant individuals. 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 that 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 enemies, of unskilled migrant workers.”<sup>197</sup> 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.

Capitalizing on the “recycled” “tropes” of “violated femininity, shattered innocence, and the victimization of ‘womenandchildren,’”<sup>198</sup> the neo-abolitionist campaign promotes, in Bernstein’s terms, a “militarized humanitarianism and carceral feminism” in its pursuit of social remedies.<sup>199</sup> The neo-abolitionist approach thus feeds a border-protection and crime-control agenda by framing trafficking as a humanitarian issue that the “privileged” can combat by supporting efforts to rescue and restore victims and punish the depraved individuals who perpetrate the abuse.<sup>200</sup> Epitomizing this approach are the “rescue and restore” campaigns 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] such press outlets as Dateline, CNN, and FOX News,” typically involve male IJM employees who “go undercover as potential clients to investigate brothels, partnering with local law enforcement to rescue underage and allegedly unwilling brothel occupants and deliver them to state-sponsored or faith-based rehabilitation facilities.”<sup>201</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—

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<sup>197</sup> Bernstein, *New Abolitionism*, *supra* note 7, at 144.

<sup>198</sup> *Id.* at 133.

<sup>199</sup> *Id.* at 137.

<sup>200</sup> *See id.* (arguing that this approach relies on “the beneficence of the privileged rather than the empowerment of the oppressed” and uses “criminal justice interventions” to effect social change).

<sup>201</sup> *Id.* at 139; *see also* Samantha Power, *The Enforcer*, *NEW YORKER*, Jan. 19, 2009, at 52, 57-60 (reporting on the experiences of IJM members involved in “rescues” at brothels).

the “rescue and restore” model has been enthusiastically embraced by faith-based and anti-prostitution feminist organizations alike, and lauded and generously funded by the U.S. government.<sup>202</sup>

At the same time, the neo-abolitionists are committed to punitive and criminal paradigms of justice. As prominent neo-abolitionists have explained, “trafficking isn’t a poverty issue but a law-enforcement issue.”<sup>203</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>204</sup> The source of the harm thus lies not in institutions of corporate capitalism and the state but in “individual, deviant men: foreign brown men . . . or even more remarkably, African American men living in the inner city,” against whom the full power of law enforcement and criminal law must be brought to bear.<sup>205</sup> Indeed, the “root cause” of much of the suffering in the developing world is not “hunger, homelessness, lack of education or disease” but “the failure of the criminal justice system to protect the poor from violence.”<sup>206</sup> Traffickers should be prosecuted and incarcerated to the full extent of the law and the johns sent to “john school” to be educated about the harms of prostitution. For the neo-abolitionists, in reducing prostitution “supply” by targeting demand, criminal justice provides the path to salvation.

In this sense, the criminalization approach to trafficking has effects analogous to those found in the domestic violence context—where criminalization has entrenched the view that domestic violence is “an insular rather than endemic wrong” and that the problem is solved

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<sup>202</sup> See Soderlund, *supra* note 21, at 65-66 (noting the high degree of frequency with which “rescued” sex slaves escape from safe houses); Maggie Jones, *Thailand’s Brothel Busters*, MOTHER JONES, Dec. 2003, at 19 (describing similar occurrences, including ones in which the women bribed their rescuers to let them stay in the brothel); Noy Thrupkaew, *Beyond Rescue*, NATION, Oct. 26, 2009, at 21 (reporting on the IJM’s “rescue” work, including its successes and failures); Noy Thrupkaew, *The Crusade Against Sex Trafficking: Do Brothel Raids Help or Hurt the “Rescued”?*, NATION, Oct. 5, 2009, at 11 [hereinafter Thrupkaew, *The Crusade Against Sex Trafficking*] (same).

<sup>203</sup> Landesman, *supra* note 170, at 36-37 (quoting Gary Haugen, IJM President).

<sup>204</sup> Press Release, Concerned Women for America, Human Trafficking Now Tied for World’s #2 Crime Second to Drug Dealing as Largest and Fastest-Growing (Dec. 6, 2005) (quoting Dr. Janice Shaw Crouse, Senior Fellow, Beverly LaHaye Institute, Concerned Women for America), available at [http://www.newsbull.com/forum/topic.asp?TOPIC\\_ID=28652](http://www.newsbull.com/forum/topic.asp?TOPIC_ID=28652); see also Hughes 2002 House Statement, *supra* note 101, at 75 (“The trafficking process begins with the demand for victims to be used in prostitution and other commercial sex acts.”).

<sup>205</sup> Bernstein, *New Abolitionism*, *supra* note 7, at 144.

<sup>206</sup> Thrupkaew, *The Crusade Against Sex Trafficking*, *supra* note 202, at 11.

once the “wicked people” perpetrating the violence are “managed.”<sup>207</sup> Under this construction, the government and society are absolved of their responsibility for having fostered the broader socioeconomic conditions that feed the trafficking phenomenon. At the same time, trafficked persons become a tool for those pursuing penological goals, their access to assistance legally contingent on their cooperation with prosecutions. Trafficking thus becomes yet another context in which “feminist liberatory discourse challenging patriarchy and female dependency . . . has been replaced by a discourse emphasizing crime control.”<sup>208</sup> Policies that fixate on criminalization as the solution to trafficking should similarly “be viewed with a jaundiced eye.”<sup>209</sup>

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-sector trafficking and prostitution and shaping service provision on the ground. Whether these developments are beneficial to trafficked persons is explored in detail below.

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

There is no doubt that neo-abolitionists have made significant contributions to the anti-trafficking movement. In no small part due to neo-abolitionist advocacy efforts, trafficking quickly became a national and foreign policy priority for the Bush Administration. The standards applied in the sanctions regime, which reflect the neo-abolitionists’ influence, have motivated other countries to take seriously the problem of sex-sector trafficking. That neo-abolitionists’ focus on prostitution has drawn attention to sex-sector trafficking arguably has also indirectly created space for concerns regarding non-sex-sector trafficking to be raised and potentially addressed.

The incentivizing effect of neo-abolitionism aside, whether neo-abolitionism has served the trafficking cause—or even that of abolition of prostitution—requires close scrutiny of the impacts of neo-abolitionist law and policy reforms. This Part undertakes such an analysis, assessing (1) their impact on the development and implementation of anti-trafficking legal frameworks, and (2) their impact

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<sup>207</sup> Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 809 (2007).

<sup>208</sup> *Id.* at 812 (quoting ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 183 (2000)).

<sup>209</sup> *Id.* at 809.

on their target populations and other vulnerable populations collaterally affected. As with any policymaking, neo-abolitionist reforms have yielded a set of unintended consequences that should caution against embracing them as wholesale solutions to the problem of human trafficking. Critical self-assessment is necessary to avoid offering ideology-based rather than evidence-based policymaking.

A. *The Impact on U.S. and International Anti-trafficking Laws*

Neo-abolitionist advocacy has affected the ability of U.S. and international anti-trafficking laws to serve the populations they were designed to protect in two critical respects: (1) by drawing attention away from those trafficked into non-sex sectors, and (2) by confusing legal standards by strategically equating trafficking with slavery. Both effects perpetuate inconsistency and confusion regarding the legal definitions of trafficking and thus undermine the central goal of the U.N. Trafficking Protocol—that is, to foster international cooperation among states to combat this crime and human rights violation.

U.S. and international anti-trafficking laws were designed to address both sex- and non-sex-sector trafficking of men, women, and children. As discussed above,<sup>210</sup> expanding the definition of trafficking to include non-sex-sector forms was a significant—and necessary, given the arguably greater number of non-sex-sector victims—improvement on the prior legal regime. Neo-abolitionist pressure has resulted in uneven domestic enforcement of these laws, however, with the emphasis on law enforcement activity, resource allocation, and service provision targeted at sex-sector trafficking and prostitution. Other countries have followed suit, more likely to adopt domestic laws on sex-sector trafficking than on non-sex-sector trafficking, and often passing anti-prostitution laws under the guise of “trafficking” laws. Until recently, neo-abolitionist pressure led the U.S. sanctions regime to condone—if not encourage—such uneven legislative responses to the different forms of trafficking.<sup>211</sup>

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<sup>210</sup> See *supra* discussion accompanying notes 15-17.

<sup>211</sup> See Chuang, *supra* note 97, at 481 (arguing that a review of the Trafficking in Persons reports confirms that more credit is given to governments that make an effort to combat sex trafficking than to those that focus on trafficking for nonsexual purposes). The 2007, 2008, and 2009 Trafficking in Persons reports have made a much more concerted effort, however, to highlight the problem of labor trafficking and take countries to task for not addressing this problem. See, e.g., U.S. STATE DEP'T, TRAFFICKING IN PERSONS REPORT 14-19 (2009) (discussing forced labor, debt bondage, and involuntary domestic servitude as among the major forms of trafficking).

The focus on sex-sector trafficking undermines the U.S. and international legal definitions of trafficking and the U.N. Trafficking Protocol's goal of ensuring a consistent legal definition of trafficking from country to country in order to facilitate more effective international cooperation. For example, a uniform definition of trafficking is necessary to foster coordinated transnational responses to trafficking cases and to facilitate data collection regarding this underresearched phenomenon. Statistics in the trafficking field are notoriously unreliable, unsubstantiated figures often recycled and accepted as true, as if sheer repetition guarantees veracity.<sup>212</sup> One of the key obstacles to data 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>213</sup> Additionally, neo-abolitionist pressure on states to conflate sex trafficking and prostitution perpetuates this confusion and inconsistency.

A second respect in which neo-abolitionist advocacy undermines anti-trafficking legal standards stems from its tendency to equate trafficking and slavery. The neo-abolitionists branded the public consciousness with images of "sexual slavery" when they strategically used the term to provide moral urgency for their cause and garner support for the 2000 TVPA. But there are costs to casually equating the two phenomena. In addition to being inaccurate as a matter of interna-

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<sup>212</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 06-825, HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD 2-3 (2006) [hereinafter GAO, BETTER DATA] (concluding that the "accuracy of [trafficking] estimates is in doubt because of methodological weaknesses, gaps in data, and numerical discrepancies"); David A. Feingold, *Trafficking in Numbers: The Social Construction of Human Trafficking Data* (criticizing the methods by which trafficking data are calculated and presented), in SEX, DRUGS, AND BODY COUNTS: THE POLITICS OF NUMBERS IN GLOBAL CRIME AND CONFLICT (Peter Andreas & Kelly Greenhill eds., forthcoming 2010). As the GAO notes, the "availability," "reliability," and "comparability" of the underlying data are "limited by several factors." GAO, BETTER DATA, *supra*, at 15-16. For instance, some countries "do not systematically collect data on victims," and those that do often focus on women and children trafficked for sexual exploitation, leaving other forms of trafficking underreported. *Id.* at 15. Moreover, the "capacity for data collection and analysis in countries of origin is often inadequate," and in countries of destination estimates are extrapolated from nonrandom, potentially nonrepresentative samples of reported victims. *Id.* at 15-16. The U.S. government, for example, "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>213</sup> See GAO, BETTER DATA, *supra* note 212, at 16 ("The incompatibility of definitions for data collection is exacerbated by the intermingling of trafficking, smuggling, and illegal migration in official statistics.").

tional law, conflating trafficking with slavery hurts victims of both practices.

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>214</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>215</sup> regardless of whether the powers attached to the right of ownership are exercised, such efforts are misguided as a matter of international law.<sup>216</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 a general acceptance of the concept of slavery as implying the destruction of an individual’s juridical personality.”<sup>217</sup> While recent developments in international criminal law gesture toward the possibility that slavery could include debt bondage and traf-

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<sup>214</sup> International Convention to Suppress the Slave Trade and Slavery art. 1, Sept. 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,” a category that includes 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, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

<sup>215</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 6 (2004) (defining slavery as “the total control of one person by another for the purpose of economic exploitation”). In so doing, Bales conflates forced labor and servitude with slavery. 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 art. 2(1), *adopted* June 28, 1930, 39 U.N.T.S. 55 (as modified by the Final Articles Revision, 1946). Though not defined in treaty law, the term “servitude” refers to the concept of “servile status” found in the Supplementary Convention and would thus include, for example, debt bondage, servile marriage, and trafficking in children. See Gallagher, *supra* note 11, at 802-03 & 803 n.49. Regrettably, some international law scholars have accepted Bales’s 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) (defining slavery as any form of forced exploitation of one’s labor).

<sup>216</sup> For a comprehensive and cogent analysis of the international definition of slavery, see Gallagher, *supra* note 11, at 799-810.

<sup>217</sup> *Id.* at 803. Indeed, as Gallagher notes, the drafters of the International Covenant on Civil and Political Rights (ICCPR) were “explicit . . . that the [instrument’s] reference to the slave trade . . . was *not* meant to encompass trafficking in women.” *Id.*

ficking, the core requirement—the exercise of “any or all of the powers attaching to the right of ownership”<sup>218</sup>—remains intact.

One does not have to be a legal purist to appreciate the dangers of conflating trafficking with slavery. Conflation risks diluting the force of “slavery,” a concept that carries heightened legal weight under international law because its prohibition is a *jus cogens* norm—a norm accepted by the international community of states as one from which no derogation is permitted.<sup>219</sup> Diluting the legal force of the prohibition of slavery could impede international efforts to bring to justice those criminally responsible for violating the prohibition and, moreover, lead to a “violation of the right of accused persons to be ‘informed promptly and in detail of the nature, cause and content of the charge [against them].’”<sup>220</sup> Conversely, equating trafficking with slavery risks inadvertently raising the legal threshold for trafficking by creating expectations of more extreme harms than required under the law. Trafficking encompasses a wide range of practices, involving varying levels of exploitation, with true slavery at one end of the spectrum and comprising an exceptionally small fraction of all trafficking cases.

Perpetuating an understanding of trafficking that is inconsistent with the legal definitions of the phenomenon—whether excluding non-sex-sector trafficking or inaccurately analogizing to slavery—undermines the ability of law enforcement and the general public to accurately identify and name this human rights violation, to the detriment of all trafficking victims.<sup>221</sup>

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<sup>218</sup> 1926 Convention, *supra* note 214, art. 1.

<sup>219</sup> Gallagher, *supra* note 11, at 798 & n.23.

<sup>220</sup> *Id.* at 799 (alteration in original) (citation omitted).

<sup>221</sup> Inconsistent statistics, combined with a general skepticism that such human rights violations can occur within U.S. borders, have 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, Landesman, *supra* note 170, generated much skepticism about the presence of trafficking within our borders. See, e.g., Jack Shafer, *Sex Slaves of West 43rd Street*, SLATE, Jan. 26, 2004, <http://www.slate.com/id/2094414> (questioning Landesman’s claim that tens of thousands of women and girls are held in forced prostitution in the United States); see also Jack Shafer, *Doubting Landesman*, SLATE, Jan. 27, 2004, <http://www.slate.com/id/2094502> (recounting the skeptical reactions of reporters from the *Los Angeles Times* and the *Nation* to the story); Jack Shafer, *Enslaved by His Sources*, SLATE, Feb. 3, 2004, <http://www.slate.com/id/2094896> (questioning the credibility of Landesman’s sources); Jack Shafer, *How Not to Handle Press Critics*, SLATE, Jan. 29, 2004, <http://www.slate.com/id/2094648> (describing Landesman’s angry response to Daniel Radosh’s blog criticizing Landesman’s article); Jack Shafer, *The Times Magazine Strikes Back*, SLATE, Jan. 28, 2004, <http://www.slate.com/id/2094580> (renewing criticism of the article after a *New York Times Magazine* editor defended it).

### B. *The Impact on the Ground*

Neo-abolitionist legal reforms and discursive practices have yielded results that call into question their effectiveness as a vehicle for eradicating prostitution, much less trafficking. Their exclusive focus on the sex-sector trafficking of women and girls promotes gender stereotypes that impede efforts to identify and respond to the trafficking of men and boys and enables states to rely on discriminatory migration controls in the name of protecting women from trafficking. Studies also demonstrate that favored neo-abolitionist interventions, such as anti-prostitution funding restrictions, rescue campaigns, and criminalization of demand, have been of questionable effectiveness in combating trafficking and are potentially harmful to both their target population and other vulnerable populations.

#### 1. Promoting Stereotypical Perceptions

The neo-abolitionist focus on sex-sector trafficking of women and children feeds gender-biased approaches to anti-trafficking interventions, to the detriment of men and women seeking to migrate. It has detracted attention from the underreported and underaddressed problems of male trafficking and non-sex-sector trafficking of women. It has also facilitated paternalistic restrictions on women's rights to migrate, rendering women even more vulnerable to third-party offers to facilitate their migration.

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

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There is, indeed, a considerable gap between the estimated and the reported numbers of trafficked persons in the United States (tens of thousands per year and approximately two thousand since the year 2000, respectively). See Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence*, WASH. POST, Sept. 23, 2007, at A1 (reporting the varying figures). This disparity has raised concerns about the advisability of allocating federal dollars to a problem that may not exist to nearly the degree some statistics claim. The fact that the United States government paid a public relations firm nearly \$12 million to find victims of trafficking as part of the government's outreach program, *id.*, adds fuel to the fire. See also Jerry Markon, *In D.C. Area, Most Cases Involve Prostitution*, WASH. POST, Sept. 23, 2007, at A8 (noting the relatively low number of trafficking prosecutions in the D.C. area and stating that, even when such cases are prosecuted, they are similar to ordinary prostitution charges). Just because this clandestine victim population is difficult to locate does not mean it does not exist. See, e.g., GAO, *BETTER DATA*, *supra* note 212, at 15 (acknowledging that "[t]rafficking victims are a hidden population," unlikely to come forward because of traffickers' threats or a distrust of law enforcement).

their families, traditional gender roles in the family—men as breadwinners, women tied to the home—render migration more socially acceptable for men than it is for women, who are assumed to be passive, naïve, and ignorant migrants. Consequently, exploited women are conceptualized as trafficked, while men subjected to the same abuse are more commonly seen as irregular migrants.

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 leads trafficked men not to 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, if they previously held positive self-images as breadwinners and providers.<sup>222</sup> Victimhood is disempowering enough without the additional feminizing 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>223</sup>

That men are thus less “identifiable” as victims has in turn led policies and programs to be constructed around the female victim. Few trafficking interventions target and address the needs of male victims.<sup>224</sup> For instance, to the extent shelters are available for trafficked persons, they typically house only female victims and, in any event, often follow a closed-shelter model with restrictions on movement and outside contact that, some argue, men may not be willing to accept.<sup>225</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, traf-

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<sup>222</sup> Rebecca Surtees, *Trafficked Men as Unwilling Victims*, 4 ST. ANTONY’S INT’L REV. 16, 25 (2008).

<sup>223</sup> *Id.* at 20.

<sup>224</sup> *Id.* at 23.

<sup>225</sup> *Id.* at 28. An international study of shelter practices confirmed that women and girls comprise the “overwhelming majority of trafficked persons detained in shelters.” Anne Gallagher & Elaine Pearson, *The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking*, 32 HUM. RTS. Q. 73, 95 (2010). The researchers attributed this to the fact that “[w]omen and girls are more likely to be identified through official channels as trafficked” than are men and boys, though “this does not necessarily support a claim that females are trafficked at a greater rate than males.” *Id.*

ficked men may be reluctant to accept assistance, as doing so might signal their status as failed migrants.<sup>226</sup>

At the same time, the abstract focus on exploitation and on the assumed particular susceptibility of women and girls to victimization leads to prophylactic solutions that fail to address and may exacerbate the background migratory pressures that create vulnerability to traffickers. The notion that women make for naïve, passive, ignorant migrants risks conflating female migration with trafficking. Purported concern for vulnerable women provides a convenient excuse for restricting women's migration—motivated at best by paternalism, at worst by a deeper antimigration agenda. The laws of many developing countries restrict women from traveling overseas for work.<sup>227</sup> For example, Indian government officials can deny permits to females migrating for labor when the work is deemed against public policy or public interest; women under the age of thirty are considered especially vulnerable and are prohibited from working as domestic workers in western Asia and northern Africa.<sup>228</sup>

These broad, prophylactic migration restrictions are a convenient alternative to addressing the coercive and abusive practices that women may be subjected to in the course of movement—for example, exorbitant migration and 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 sector). This, in turn, results in a fundamental failure to understand how restrictions on female migration, especially for semiskilled or unskilled workers, actually make offers by third parties to facilitate their clandestine migration all the more attractive, thus increasing vulnerability to trafficking.

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<sup>226</sup> Surtees, *supra* note 222, at 23, 26.

<sup>227</sup> See U.N. Econ. & Soc. Council [ESOSOC], Comm'n on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, paras. 47-48, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) (reporting emigration restrictions affecting women in Nepal and Romania); GALLAGHER, *supra* note 63, at § 3.2.1; NANA OISHI, *WOMEN IN MOTION: GLOBALIZATION, STATE POLICIES, AND LABOR MIGRATION IN ASIA* 59-61, 60 tbl.3.2 (2005) (detailing emigration restrictions on female migration in Asia).

<sup>228</sup> OISHI, *supra* note 227, at 60 tbl.3.2.

## 2. HIV/AIDS Prevention

The anti-prostitution funding restrictions have also resulted in collateral damage to sex-worker populations—ranging from self-censorship to withdrawal of basic social services, including those targeting HIV/AIDS prevention.

Many organizations have purged prohibited words such as “sex work” and “harm reduction” from their materials for fear of being seen as “promoting” prostitution. Some organizations have withdrawn legal and social services from sex workers to avoid any appearance of support for sex-worker collectives. For example, organizations have defunded English classes for people in the sex sector, despite the increased job prospects that English language skills can bring.<sup>229</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, 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 “nonjudgmental” attitude required for gaining access to stigmatized—and hence vulnerable—populations such as prostitutes.<sup>230</sup>

Whether requiring that HIV/AIDS prevention organizations adopt an anti-prostitution stance actually helps combat prostitution, much less trafficking, is highly questionable. Rather than curtailing prostitution activities, in some contexts the funding restrictions have exacerbated the already dangerous conditions in the sex industry and decreased prostitutes’ ability to leave the sex sector.<sup>231</sup> According to Johns Hopkins epidemiologists Nicole Franck Masenior and Chris Beyrer, the anti-prostitution pledge has demonstrated the potential to restrict programs for those it seeks to protect. Citing the closure of

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<sup>229</sup> See Declaration of Dr. Carol Jenkins, para. 15, Memorandum of Law in Support of DKT International’s Motion for a Preliminary Injunction Ex. 3, DKT Int’l, Inc. v. U.S. Agency for Int’l Dev., 435 F. Supp. 2d 5 (D.D.C. 2006) (No. 05-01604).

<sup>230</sup> See *id.* para. 14; see also sources cited *supra* note 121.

<sup>231</sup> Declaration of Dr. Carol Jenkins, paras. 11, 13, DKT Int’l, 435 F. Supp. 2d 5 (No. 05-01604). Dr. Jenkins notes that “despite an HIV prevalence of 75 percent among the sex workers of Addis Ababa, no agency funded by USAID (the largest single funder) can provide proper prevention services.” *Id.* para 13. Moreover, in Papua New Guinea, agencies formerly funded by USAID were “forced to secure [alternate] funding to cover literacy and other empowerment activities for sex workers.” *Id.*; see also Letter from Human Rights Watch et al. to President George W. Bush (May 18, 2005), available at <http://www.hrw.org/en/news/2005/05/17/us-restrictive-policies-undermine-anti-aids-efforts> (detailing, in a letter signed by over 150 civil-society organizations, the harms of the anti-prostitution gag rule).

the Médecins Sans Frontières–run Lotus Project in Svay Pak, Cambodia, which provided a range of services to sex workers, including primary healthcare and English and computer lessons, Masenior and 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>232</sup>

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. But the specter of HIV/AIDS workers having an anti-prostitution agenda—or worse, actively working with organizations that raid brothels<sup>233</sup>—has caused brothel owners to deny them access.<sup>234</sup>

Indeed, as Masenior and Beyrer note, “[a] substantial body of peer-reviewed published studies suggests that the empowerment, organization, and unionization of sex workers can be an effective HIV-prevention strategy and can reduce the other harms associated with sex work, including violence, police harassment, unwanted pregnancy, and the number of underage sex workers.”<sup>235</sup> The Sonagachi Project, for example—often cited by neo-abolitionists as “pro-prostitution”—has been lauded by public health experts for using its considerable bargaining authority to dramatically increase condom use and to prevent the exploitation of underage girls.<sup>236</sup> Neo-abolitionists’ staunch commitment to the anti-prostitution agenda, however, bars even con-

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<sup>232</sup> Nicole Franck Masenior & Chris Beyrer, *The US Anti-Prostitution Pledge: First Amendment Challenges and Public Health Priorities*, 4 PLOS MED. 1158, 1160 (2007).

<sup>233</sup> See *infra* subsection III.B.3.

<sup>234</sup> See Thrupkaew, *The Crusade Against Sex Trafficking*, *supra* note 202, at 18 (reporting that, after raids in Cambodia, “pimps believed that local HIV-education and social work NGOs had aided IJM and the police, and [there]after . . . cut off the groups’ access to the women and barred them from providing care”).

<sup>235</sup> Masenior & Beyrer, *supra* note 232, at 1159.

<sup>236</sup> Proponents of the Sonagachi Project’s work include Holly Burkhalter, formerly with Physicians for Human Rights and currently Vice President of Government Relations for IJM. See Holly Burkhalter, *Better Health, Better Lives for Sex Workers*, WASH. POST, Dec. 8, 2003, at A25 (encouraging “U.S. funding of local nongovernmental groups that have records of excellence in promoting empowerment and organization” of sex workers and citing the Sonagachi sex-worker union as a model).

sidering the forging of strategic alliances with such community-based groups, despite their positive impacts on the ground.<sup>237</sup>

### 3. The Rescue Paradigm

The anti-prostitution pledge has permitted the channeling of federal funds toward feminist anti-prostitution and faith-based organizations like IJM, which will have received more than \$4 million from the U.S. government by the end of 2010.<sup>238</sup> 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 brothel keepers and their customers. Brothel raids undoubtedly have saved some trafficking victims from exploitation, but they have also provoked their share of controversy. Critics have impugned the raids for sweeping up voluntary sex workers in their net, exposing these women to harsh police treatment, detention, and deportation.<sup>239</sup> From the neo-abolitionists’ perspective, however, harms

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<sup>237</sup> The potential negative effects of the pledge are not, however, limited to the fields of HIV/AIDS prevention, prostitution, and trafficking. 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 antiabortion gag rule—traditionally imposed only on foreign NGOs—to U.S.-based recipients of overseas family-planning funds. See, e.g., Susan A. Cohen, *Ominous Convergence: Sex Trafficking, Prostitution and International Family Planning*, GUTTMACHER REP. ON PUB. POL’Y, Feb. 2005, at 12, 14, available at <http://www.guttmacher.org/pubs/tgr/08/1/gr080112.pdf>; Editorial, *Taking the Prostitution Pledge*, N.Y. TIMES, July 2, 2005, <http://www.nytimes.com/2005/07/02/opinion/02sat3.html>. The Mexico City global gag rule on abortion prohibited the U.S. Agency for International Development (USAID) from providing funds to organizations overseas that use non-USAID funds to provide abortion counseling or services or to engage in abortion-rights advocacy. See Memorandum on Mexico City Policy and Assistance for Voluntary Population Planning, 74 Fed. Reg. 4903 (Jan. 23, 2009). President Reagan instituted the rule in 1984; it was rescinded by President Clinton in 1993 but reinstated by President George W. Bush in 2001. *Id.* Concerns over the possible extension of the Mexico City rule have been alleviated by the fact that President Obama lifted the gag rule shortly after assuming office. See *id.* President Obama has *not*, however, reversed the anti-prostitution pledge. Though the Department of Justice initially dropped the Bush Administration’s appeal of an injunction against application of the anti-prostitution pledge issued in the Alliance for Open Society International litigation, it recently sought to reinstate the appeal. See *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, No. 08-4917 (2d Cir. Jan. 14, 2010) (reinstating appeal).

<sup>238</sup> See Thrupkaew, *The Crusade Against Sex Trafficking*, *supra* note 202, at 13.

<sup>239</sup> Though IJM has refined its techniques, its “early raids resulted in [the group] being branded vigilante ‘cowboys’ and ‘cops for Christ’” that swooped into Cambodia and Thailand to conduct raids without consulting local NGOs or having a viable plan for the aftercare of those rescued, leaving the local NGOs to deal with the fallout. *Id.* at 14; see also Jones, *supra* note 202 (describing how many of those rescued ultimately

to sex workers are an acceptable risk for the sake of saving the “enslaved,” particularly the children.<sup>240</sup> Viewed in a vacuum, the trade-off may seem reasonable, but closer scrutiny of the aftermath of the “rescues” suggests otherwise.

Probably the greatest challenge to the rescue model is the fact that a significant portion of those “rescued” end up escaping their “rescuers” and returning to the brothels. Rather than question the effectiveness of the rescue model, neo-abolitionists have readily attributed this phenomenon to false consciousness of the victim, casting brothel returnees as not initially grateful or as too accustomed to their oppression. But, as Soderlund notes, the false-consciousness thesis is “a paradigm-saving technique, one that encourages activists to dodge potential pitfalls in their own interventionist strategies.”<sup>241</sup>

Indeed, the hostile-victim scenario provides critical insight into the psychology of trafficked persons, which should inform anti-trafficking policies. As researchers have found, many trafficked persons perceive rescue as substituting one system of control for another,<sup>242</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 being deported to their home country, with the repressive conditions that caused them to migrate in the first instance, or to confinement in a shelter.<sup>243</sup> Shelter confinement can last for months or even years, during which time victims’ movements and outside contacts are severely restricted—arguably in violation of international human rights law.<sup>244</sup>

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fled the shelters to return to prostitution); Tara McKelvey, *Of Human Bondage*, AM. PROSPECT, Nov. 2004, at 17, 19 (reporting that those rescued by IJM are often unable to safely return to their home countries).

<sup>240</sup> See, e.g., Thrupkaew, *The Crusade Against Sex Trafficking*, *supra* note 202, at 13 (describing IJM’s “symbolic quest to provide individual rescue” to “the one”—“[t]he one girl deceived[,] [t]he one girl kidnapped[,] [t]he one girl raped[,] [t]he one girl infected with AIDS” (internal quotation marks omitted) (quoting Sharon Cohn Wu, Senior Vice President of Justice Operations, IJM)).

<sup>241</sup> Soderlund, *supra* note 21, at 79.

<sup>242</sup> See ELAINE PEARSON, ANTI-SLAVERY INT’L, HUMAN TRAFFIC, HUMAN RIGHTS: REDEFINING VICTIM PROTECTION 33 (2002) (“For many trafficked persons, they are not ‘rescued’ from their situation, but are captured by the authorities.”).

<sup>243</sup> For some, the choice amounts to either “be[ing] raped for free in Burma or paid to do commercial sex work.” Thrupkaew, *The Crusade Against Sex Trafficking*, *supra* note 202, at 16 (internal quotation marks omitted).

<sup>244</sup> 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 Gallagher & Pearson, *supra* note 225, at 83-103, which reviews the international legal framework governing victim detention

In Thailand, for instance, trafficked persons are afraid of shelters and will often deny their trafficking and opt to be deported rather than sent to a shelter.<sup>245</sup> But the victim's perspective seems rarely to factor into the rescue equation. As one U.N. 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>246</sup>

Despite the good intentions behind the rescue campaigns, it remains unclear whether they have been effective in saving individuals from exploitation in the long term. As Human Rights Watch researchers uncovered, surprisingly little attention is paid to the aftercare of those "rescued." The number of minors repatriated to their home countries is not tracked by IJM,<sup>247</sup> much less their post-repatriation conditions. According to a USAID-funded census, the number of children offered for prostitution actually increased after one raid in Cambodia.<sup>248</sup> Researchers attributed this to families of the rescued girls having sent the girls' siblings to pay back the girls' debt contracts, only to be joined later in the brothels by the rescued girls, who had managed to escape their shelters.<sup>249</sup> Moreover, conditions in the brothels worsened, as brothel owners denied access to public health officials offering HIV prevention services, suspecting their involvement in the brothel raids.<sup>250</sup>

The problems with the rescue model highlight the dangers of failing to understand the complexities of the trafficking phenomenon.

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and concludes that detention may violate the right to freedom of movement, thus constituting an unlawful deprivation of liberty, and discriminate on the basis of gender.

<sup>245</sup> *Id.* at 107. Some victims have gone to great lengths to escape the shelters—for example, one tried to climb out a window, only to fall and be hospitalized for severe injuries. See Jones, *supra* note 202, at 20; Thrupkaew, *The Crusade Against Sex Trafficking*, *supra* note 202, at 14.

<sup>246</sup> Jones, *supra* note 202, at 19 (internal quotation marks omitted).

<sup>247</sup> See Thrupkaew, *The Crusade Against Sex Trafficking*, *supra* note 202, at 16.

<sup>248</sup> *Id.* at 18.

<sup>249</sup> *Id.* Another example of amplified harms resulting from the law-and-order approach IJM heralds is the aftermath of a nearly \$1 million grant IJM received to instruct the Cambodian police in countertrafficking. Human rights organizations had strongly criticized IJM's decision to partner with the Cambodian police, given the history of police involvement in trafficking, through extortion of brothel owners, and in assaults and rapes of sex workers. *Id.* It came as little surprise, therefore, when the Cambodian government conducted "indiscriminate sweeps of streets and brothels" that resulted in three detainees being beaten to death by prison guards and five detainees committing suicide. *Id.* at 19. Though IJM was not involved in the sweeps, the Cambodian NGO community nonetheless blamed IJM for blindly "engag[ing] with law enforcement while failing to heed the voices of those they ostensibly protect." *Id.*

<sup>250</sup> *Id.* at 18.

Regrettably, the savior mentality avoids nuance in its quest for salvation and leaves little room for self-doubt. The fact that pursuing such raids brings in millions of dollars in federal funding, that shelters have a financial incentive to stay full (to justify their funding), and that governments rely on shelters as evidence of their efforts to combat trafficking (in response to the threat of U.S. anti-trafficking sanctions), adds to the disincentives for critical self-assessment. But the trail of harms demands that one question be asked: whether at least some of the resources allocated to rescue might be better used to address the underlying root causes that fuel risky migration and exploitative labor conditions—if for no other reason than for the sake of those who invariably replace the rescued.

#### 4. Criminalizing Demand

In 1998, Sweden became the first country to officially denounce prostitution as a form of gendered violence against women by criminalizing the purchase but not the sale of sex.<sup>251</sup> Two years later, the Netherlands took the opposite approach, acknowledging the sex industry as a legitimate commercial sector, removing consensual adult prostitution from the criminal code, and applying labor laws to the sector.<sup>252</sup> The Swedish approach has since been touted by the neo-abolitionists and Bush Administration officials as the preferred approach to combating prostitution (and hence trafficking) worldwide and the Dutch approach reviled as promoting violence against women.<sup>253</sup>

A closer examination of social science studies evaluating the effectiveness of the Swedish model casts doubt on whether its potential to combat prostitution, much less trafficking, deserves such enthusiasm. While the rates of street prostitution—which was a minor segment of the Swedish sex industry to begin with<sup>254</sup>—decreased, it remains un-

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<sup>251</sup> Lag om förbud mot köp av sexuella tjänster (Svensk författningssamling [SFS] 1998:408) (Swed.) [Act on Prohibiting the Purchase of Sexual Services].

<sup>252</sup> See Stb. 1999, 464 (Neth.).

<sup>253</sup> Gunilla Ekberg, a former Swedish government advisor and anti-prostitution activist, wrote an article 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 1187 (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 as inseparable from the issue of sex trafficking. *Id.* at 1189-90.

<sup>254</sup> See WORKING GROUP ON THE LEGAL REGULATION OF THE PURCHASE OF SEXUAL SERVS., MINISTRY OF JUSTICE & THE POLICE, PURCHASING SEXUAL SERVICES IN SWEDEN AND THE NETHERLANDS: LEGAL REGULATION AND EXPERIENCES 9 (2004)

known whether the law resulted in an overall decrease in the number of women in prostitution.<sup>255</sup> Some suggest the law caused streetwalkers to rely on the Internet and cell phones to find clients, consistent with the trend “in other Western European and U.S. cities” toward conducting “the vast majority of prostitution activity . . . indoors.”<sup>256</sup> Indeed, because prostitution no longer takes place so openly on the streets, Swedish police have reported increased difficulty investigating trafficking.<sup>257</sup>

Apart from the Swedish law’s questionable impact on the number of women trafficked, and in prostitution generally, there remains the unaddressed question of the law’s potentially negative impact on the conditions under which prostitution takes place. The latter concern was of little interest to Swedish lawmakers: “[W]hen they were confronted with the possibility that the law might drive sex work underground and make sex workers more vulnerable to exploitation by profiteers, representatives consistently responded . . . that the purpose of the law was first and foremost to . . . ‘send a message’ that ‘society’ did not accept prostitution.”<sup>258</sup> But the decreased visibility of prostitution activities has made it more difficult for social outreach programs to assist prostitutes.<sup>259</sup> Prostitution has become more dangerous because it has become more difficult for a prostitute to judge *ex ante* whether a skittish client is simply fearful of getting caught or whether he is unstable and inclined to abuse her.<sup>260</sup> Because there are fewer clients, prostitutes have had to drop their prices and often cannot afford to reject unstable or dangerous clients; they have also increasingly used pimps for protection and to find clients.<sup>261</sup> Moreover, studies suggest that it has actually been more difficult to prosecute pimps and

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(Nor.) [hereinafter NORWEGIAN STUDY] (noting a total of 2500 prostitutes in Sweden at the time the law was enacted, 650 of whom worked on the streets); Don Kulick, *Sex in the New Europe: The Criminalization of Clients and Swedish Fear of Penetration*, 3 ANTHROPOLOGICAL THEORY 199, 200 (2003) (noting that “the total number of street prostitutes in all of Sweden has never numbered more than about 1000”).

<sup>255</sup> See BERNSTEIN, *supra* note 7, at 153 (reporting Swedish sex workers’ insistence that the law has only driven prostitution underground).

<sup>256</sup> *Id.*; see also NORWEGIAN STUDY, *supra* note 254, at 11 (reporting a 41% decrease in the number of street prostitutes in Sweden between 1998 and 2003); Kulick, *supra* note 254, at 204 (describing the drop—but also return—in the number of street prostitutes in Sweden).

<sup>257</sup> NORWEGIAN STUDY, *supra* note 254, at 52.

<sup>258</sup> Kulick, *supra* note 254, at 203-04.

<sup>259</sup> *Id.* at 204; see also NORWEGIAN STUDY, *supra* note 254, at 53.

<sup>260</sup> See NORWEGIAN STUDY, *supra* note 254, at 13 (explaining that the women have less time to judge a client’s character and conduct before deciding to be alone with him).

<sup>261</sup> See *id.* at 13, 19; Kulick, *supra* note 254, at 204.

traffickers because of clients' reluctance to cooperate, given their own criminality.<sup>262</sup>

This critique of the Swedish approach does not suggest that the Dutch approach is any better for migrant sex workers or those trafficked into the sex sector. In fact, in her path-breaking study of the Swedish and Dutch approaches, sociologist Elizabeth Bernstein exposes these wildly divergent approaches' 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>263</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>264</sup> It was also a response to Sweden's entry into the European Union, aiming to "stabilize cultural and geopolitical boundaries."<sup>265</sup> The potential entry of migrant prostitutes was a motivating concern, because under E.U. 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>266</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.<sup>267</sup>

In a 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 approximately fifty to sixty percent of the sex trade.<sup>268</sup> Notwithstanding these difficulties, the number of migrant prostitutes is apparently rising again because the

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<sup>262</sup> NORWEGIAN STUDY, *supra* note 254, at 53; Kulick, *supra* note 254, at 204.

<sup>263</sup> BERNSTEIN, *supra* note 7, at 146.

<sup>264</sup> *Id.* at 149-51; Kulick, *supra* note 254, at 200.

<sup>265</sup> BERNSTEIN, *supra* note 7, at 150.

<sup>266</sup> *Id.* at 151 (quoting Swedish Prostitution Commission member Sven Azel Månsson).

<sup>267</sup> *Id.* at 159.

<sup>268</sup> *Id.* at 157.

economic incentives to migrate are sufficient to justify the risks.<sup>269</sup> Because of their precarious status, migrant prostitutes are “now far more likely to become reliant on criminal networks for fake passports and identification papers.”<sup>270</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.

### C. *Ideology Versus Evidence*

In each of the examples discussed above, qualitative and quantitative data suggest that neo-abolitionist interventions have had questionable effectiveness with respect to combating trafficking and, indeed, prostitution. Yet neo-abolitionism has evinced a deep resistance to acknowledging, much less addressing, adverse data, a characteristic commonly found in movements that take on the cast of a moral crusade. As sociologist Ronald Weitzer explains, moral crusades “define a particular condition as an unqualified evil, and see their mission as a righteous enterprise whose goals are both symbolic (attempting to redraw or bolster normative boundaries and moral standards) and instrumental (providing relief to victims, punishing evildoers).”<sup>271</sup>

One of the key drawbacks of moral crusades is that ideology comes to substitute for evidence, with moral certainty precluding critical self-assessment. The 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 neo-abolitionist policymaking.

Indeed, close scrutiny of the Bush Administration’s belief, as expressed in the U.S. State Department Fact Sheet, that “prostitution . . . fuels trafficking in persons”—and which in large part caused “[t]he U.S. Government [to] adopt[] a strong position against legalized prostitution”<sup>272</sup>—reveals a disturbing lack of data in support of this core assumption and policy prescription. The sources cited in the

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<sup>269</sup> See *id.* at 163.

<sup>270</sup> *Id.*

<sup>271</sup> Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 POL. & SOC’Y 447, 448 (2007).

<sup>272</sup> 2004 FACT SHEET, *supra* note 104, at 1.

Fact Sheet consist of either journalistic accounts or sources whose studies have been discredited in academic literature for their methodological flaws.<sup>273</sup> As Weitzer notes, “[i]n no area of the social sciences has ideology contaminated knowledge more pervasively than in writings on the sex industry,” where “[t]oo often . . . the canons of scientific inquiry are suspended and research deliberately skewed to serve a particular political agenda.”<sup>274</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>275</sup> These include sampling bias,<sup>276</sup> reliance on disturbing, graphic anecdotes as evidence of trends while ignoring the count-

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<sup>273</sup> A cursory comparison between the claims made on the Fact Sheet against the handful of sources cited is revealing. The Fact Sheet broadly asserts that “89 percent of women in prostitution want to escape,” *id.*, but the source cited in support—and there was in fact only one source, as the two sources listed in the footnote were reprints of each other—only examined prostitution in nine countries. *See id.* at 2 n.1 (citing Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS (Melissa Farley ed., 2003)). The Fact Sheet claimed that “where prostitution has been legalized or tolerated, there is an increase in the demand for sex slaves.” *Id.* at 2 (emphasis omitted). However, the Fact Sheet relies on a journalistic account, *see id.* at 2 n.7 (citing VICTOR MALAREK, *THE NATASHAS: INSIDE THE NEW GLOBAL SEX TRADE* (Arcade Publishing, Inc., 2004) (2003)), that has been criticized for “proving little” despite “all [its] anger and bluster.” Mark Athitakis, *From Russia Without Love: Sex Slaves; Muckraking Canadian Journalist Pens Angry Report on an International Scandal*, CHI. SUN-TIMES, Oct. 17, 2004, at 12, available at 2004 WLNR 15530276 (reviewing the Malarek book and noting the need for “a careful, considered, and thorough piece of reporting, an exposé with more rigor and less rant”).

<sup>274</sup> Ronald Weitzer, *Flawed Theory and Method in Studies of Prostitution*, 11 VIOLENCE AGAINST WOMEN 934, 934 (2005) (emphasis omitted).

<sup>275</sup> In *Flawed Theory*, Weitzer examines articles published by Raymond and Farley. *See id.* at 940-41. Farley, whose work is cited in the 2004 FACT SHEET, is director of the staunch anti-prostitution organization, Prostitution Research & Education. *See* Prostitution Research & Education, About Prostitution Research & Education, <http://www.prostitutionresearch.com/about.html> (last visited Apr. 15, 2010). Raymond is coexecutive director of CATW. *See* Coal. Against Trafficking in Women, Biography of Janice Raymond, [http://www.catwinternational.org/bio\\_JaniceRaymond.php](http://www.catwinternational.org/bio_JaniceRaymond.php) (last visited Apr. 15, 2010). A major objective of one of the Raymond studies was to create a profile of “prostitute users” and to gather information on “men’s attitudes and treatment of women in prostitution.” Raymond, *supra* note 141, at 1167. As Weitzer points out, however, Raymond “did not interview even one customer” and “cite[d] not one academic study published in a scholarly journal” in support of her findings, “despite the fact that there is a growing body of academic research on customers.” Weitzer, *supra* note 274, at 940. 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.” *Id.*

<sup>276</sup> Weitzer, *supra* note 274, at 940-41.

erevidence;<sup>277</sup> nondisclosure of the interview questions;<sup>278</sup> and failure to situate findings in related (and adverse) scholarly literature.<sup>279</sup>

Indeed, when pressed by a group of human rights activists, lawyers, and researchers regarding the Fact Sheet's sources,<sup>280</sup> the then-GTIP director responded, "It is obvious to us, as stated in the fact sheet, that prostitution 'fuels' the increase in sex trafficking. Where prostitution thrives, so does sex trafficking!"<sup>281</sup> The fact that Germany, the Netherlands, Australia, and New Zealand—where prostitution is either legalized or decriminalized—have consistently ranked in the highest tier in the State Department's own Trafficking in Persons reports did not alter this assumption.<sup>282</sup>

The policy prescription that follows from the core assumption of a link between prostitution and trafficking—that is, a focus on eradicating prostitution writ large—has also gone largely unexamined by U.S. policymakers. This omission reflects and sustains the general trend, spotlighted in multiple U.S. Government Accountability Office reports, of a troubling lack of independent assessment of U.S. anti-trafficking

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<sup>277</sup> *Id.* at 942.

<sup>278</sup> *Id.* at 940.

<sup>279</sup> *Id.* As Weitzer states, "[b]iased procedures beget foregone conclusions." *Id.* Sampling biases include selecting as interview subjects street prostitutes approached in the street (as opposed to including women working in indoor venues), prostitutes who had contacted service agencies (and thus were likely in distress), or prostitutes interviewed in jail. *Id.* at 938. In one study, interviews were conducted by former prostitutes who had been victims of assault and thus could believe that prostitution itself is a form of violence against women. *See id.* The introduction to the 2003 Farley study cited in the Fact Sheet reveals the bias of the researchers, stating that "[p]rostitution dehumanizes, commodifies and fetishizes women . . . . In prostitution, there is always a power imbalance . . . . Prostitution excludes any mutuality of privilege or pleasure." Farley, *supra* note 273, at 34. In 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 prostitution." *Id.* at 37 (emphasis added). The fact that the interviews were conducted by the study's authors raises the question whether the interview questions—which were not fully disclosed—were neutrally phrased and presented. *See generally id.* at 41-42, 51 tbl.8.

<sup>280</sup> *See* Letter from Ann Jordan, Initiative Against Trafficking in Persons, Global Rights, et al., to Ambassador John Miller, Dir., Office to Monitor and Combat Trafficking in Persons, U.S. Dep't of State (Apr. 21, 2005) (on file with author).

<sup>281</sup> E-mail from Ambassador John Miller, Dir., Office to Monitor and Combat Trafficking in Persons, U.S. Dep't of State, to Ann Jordan et al. (May 27, 2005, 16:57) (on file with author).

<sup>282</sup> *See, e.g.,* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT, *supra* note 211, at 49-50 (reporting that these countries are fully compliant with the requirements of the TVPA).

foreign interventions<sup>283</sup>—programs in which the United States has already invested almost a half-billion dollars.<sup>284</sup> Close scrutiny of the impacts of anti-prostitution funding restrictions, rescue campaigns, and criminalization of demand on their target and other vulnerable populations casts serious doubt on whether neo-abolitionist approaches are appropriate solutions to the problem of trafficking.

If anything, the comparison of the Swedish and Dutch approaches illustrates that prostitution-reform strategies generally—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 (for example, in pornography, escort-agency prostitution, and stripping).<sup>285</sup> On the other hand, regulating the sex sector (or any other sector, for that matter) “does nothing, in itself, to counter-act racism, xenophobia and prejudice against migrants and ethnic minority groups” in the industry and can actually “reinforce existing racial, ethnic and national hierarchies” in the sector.<sup>286</sup>

Neither the Swedish nor Dutch prostitution-reform strategy addresses the complex mix of socioeconomic factors, including poverty and discrimination, that leads 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, regardless of industry, invariably at the lower end of the labor-market hierarchy and thus the last to benefit from labor pro-

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<sup>283</sup> See GAO, BETTER DATA, *supra* note 212, at 37 (“The United States has provided about \$375 million in antitrafficking assistance since 2001 . . .”); Frank Laczko, *Introduction*, 43 (1/2) INT’L MIGRATION (Special Issue) 5, 6 (2005) (“[I]n 2003 the US Government alone supported 190 anti-trafficking programmes in 92 countries, totaling US\$ 72 million . . .”).

<sup>284</sup> Cf. GAO, BETTER DATA, *supra* note 212, at 37; Laczko, *supra* note 283, at 6.

<sup>285</sup> See BRIDGET ANDERSON & JULIA O’CONNELL DAVIDSON, INT’L ORG. FOR MIGRATION RESEARCH SERIES NO. 15, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY 43 (2003) (“Clamping down on demand for street prostitution does nothing to address—and may even strengthen—demand in other segments of the market . . .”); see also BERNSTEIN, *supra* note 7, at 144 (“[W]hile street-based sex workers and their clients were driven off the streets . . . , new kinds of commodified intimate relations were being fostered behind closed doors.”); Vidyamali Samarasinghe, *Confronting Globalization in Anti-trafficking Strategies in Asia*, 10 BROWN J. WORLD AFF. 91, 102 (2003) (noting that while the Swedish decriminalization law reduced demand for prostitutes in Sweden, demand increased in neighboring countries because the male clients went abroad to satisfy their desires).

<sup>286</sup> ANDERSON & O’CONNELL DAVIDSON, *supra* note 285, at 44.

tections—to the extent such protections even apply.<sup>287</sup> And neither strategy ultimately addresses the demand for trafficked or easily exploited services or labor.

What these strategies do tell us, however, is that human trafficking is an enormously complicated problem for which there is no easy fix. Knowing how even to approach the task of finding better practices requires understanding the trafficking phenomenon in all its complexity and situating it in the broader context of labor migration in our globalized economy. Part of this calculus requires that policymakers pay much closer attention to the unintended and negative consequences of their policymaking rather than rely on the “message” these interventions send. As Radin explains, “[t]here is always a gap between the ideals we can formulate and the progress we can realize.”<sup>288</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 nonideal.

#### CONCLUSION

While there are no easy solutions to the problem of human trafficking, assessing the impacts of neo-abolitionist anti-trafficking policymaking offers critical insights into possible avenues toward more effective solutions. The insights call into question the exclusive resort to criminal justice paradigms and underscore the need to address trafficking as a problem rooted in the broader structural issues of poor migration management, ineffective labor protections for poor and unskilled workers, and endemic gender, race, and class discrimination that sustains demand for exploited labor.

Although trafficking is in one sense an act, or series of acts, of 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 to address the root causes of any social ill seems idealistic, it is

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<sup>287</sup> Tellingly, treaties designed to protect migrant workers' rights have abysmal ratification rates. Not a single major destination country has signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. See United Nations Treaty Collection, Status of Treaties, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-13&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-13&chapter=4&lang=en) (last visited Apr. 15, 2010).

<sup>288</sup> Margaret Jane Radin, *Contested Commodities*, in *RETHINKING COMMODIFICATION*, *supra* note 191, at 81, 85.

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 socioeconomic 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.

One area that requires further exploration as a vulnerability factor contributing to trafficking is alternative migration avenues. 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>289</sup>—there remains little political will to liberalize migration, at least among destination countries. The considerable public and political resistance is linked to popular but mistaken concerns about the negative impact of immigration flows on employment, national security, welfare systems, and national identity.<sup>290</sup> But “[i]nstead of tackling xenophobic reactions to the issue of migration, many governments have sought political advantage by . . . promoting more restrictive immigration policies.”<sup>291</sup> This is not to suggest that liberalizing migration is the cure-all to trafficking,<sup>292</sup> but further research into expansion of legal migration avenues is long overdue, even if it is simply limited to more extensive provision of permanent residency status to trafficked persons.

Another aspect of the trafficking phenomenon that requires further exploration is the application of labor-protection frameworks to vulnerable populations, particularly in the informal sector. Neo-abolitionist discourse has resisted a labor approach to avoid lending legitimacy to the prostitution-as-work paradigm. And while sex-work advocates have argued for application of labor protections to the sex

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<sup>289</sup> See generally High-Level Dialogue on International Migration and Development, United Nations General Assembly, 14-15 September 2006, <http://www.un.org/migration> (last visited Apr. 15, 2010).

<sup>290</sup> See CHRISTINA BOSWELL & JEFF CRISP, U.N. UNIV. WORLD INST. FOR DEV. ECON. RESEARCH, POL’Y BRIEF NO. 8, POVERTY, INTERNATIONAL MIGRATION AND ASYLUM 18-20 (2004) (discussing the political aspect of immigration restrictions in “receiving countries”).

<sup>291</sup> KAYE, *supra* note 9, at 13.

<sup>292</sup> Indeed, studies suggest that only a proportion of migration flows can be absorbed by expanded legal migration schemes. 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 290, at 28.

sector, determining how to make them meaningful protections for migrants in the sector requires further study. As ethnographic studies have found, a sex worker's status as a migrant can potentially interfere—legally and culturally—with her access to, or indeed her desire to avail herself of, these protections.<sup>293</sup> With respect to non-sex sectors, there has been little attention paid to labor trafficking interventions, much less in-depth studies of possible labor reforms, given the intense focus on the sex sector. 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 have been difficult to implement,<sup>294</sup> making application of affirmative labor-rights protection all the more critical.

Finally, efforts to address the “demand” side of trafficking require a greater depth of approach. As British sociologists Bridget Anderson and Julia O'Connell Davidson 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>295</sup> The vulnerability and lack of choice that result from their migrant (and possibly foreign and undocumented) status foster the perception, if not the reality, that they are more “flexible” and “cooperative” with respect to poorer working conditions and more vulnerable to “molding” to the requirements of the job.<sup>296</sup> Moreover, their racial “otherness” makes it easier to “dress up a relation of exploitation as one of paternalism/maternalism” toward the impoverished “other.”<sup>297</sup> As Anderson and O'Connell Davidson conclude, 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.<sup>298</sup>

Neo-abolitionist advocacy has favored a reductive approach to the problem of trafficking, simplifying a complex phenomenon into a seemingly more manageable problem. But it is in the broader complexities of the trafficking phenomenon—in the underlying gender, race, and class discrimination, the inadequate migration avenues, and the socioeconomic policies that increase vulnerability to exploita-

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<sup>293</sup> See, e.g., Agustín, *supra* note 185.

<sup>294</sup> See *supra* note 139 and accompanying text.

<sup>295</sup> See ANDERSON & O'CONNELL DAVIDSON, *supra* note 285, at 31-32.

<sup>296</sup> *Id.* at 30.

<sup>297</sup> *Id.* at 32.

<sup>298</sup> *Id.* at 46-47.

tion—that long-term solutions are more likely to be found. Moreover, in moving beyond the divisive moral debates over prostitution reform, attention to these underlying causes may provide common ground upon which neo-abolitionists and non-abolitionists can advocate for prevention of trafficking and protection of its victims.