

# SEX TRAFFICKING AND THE SEX INDUSTRY: THE NEED FOR EVIDENCE- BASED THEORY AND LEGISLATION

RONALD WEITZER\*

## I. INTRODUCTION

Under U.S. law, sex trafficking is defined as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”<sup>1</sup> To be punishable, the offense must involve a “severe form” of trafficking involving (1) a person under age eighteen who has been induced to perform a commercial sex act or (2) an adult who has been so induced by the use of “force, fraud, or coercion.”<sup>2</sup> Adults who sell sex willingly, with some kind of assistance, are not considered trafficking victims under U.S. law.<sup>3</sup> Trafficking that involves underage persons or adults subjected to force, fraud, or coercion is a serious violation of human rights, and the growing international awareness of the problem and efforts to punish perpetrators and assist victims are welcome developments.

But there is also a parallel story—a robust *mythology* of trafficking. While no one would claim that sex trafficking is fictional, many of the claims made *about* it are wholly unsubstantiated. This Article offers a critique of the paradigm responsible for this mythology, a perspective that has become increasingly popular over the past decade. This *oppression*

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\* Professor of Sociology, George Washington University. Ph.D., University of California, Berkeley, 1985; B.A., University of California, Santa Cruz, 1975.

<sup>1</sup> Trafficking Victims Protection Act of 2000 § 103(9), 22 U.S.C. § 7102(9) (2006) [hereinafter, TVPA].

<sup>2</sup> *Id.* § 103(8)(A), 22 U.S.C. § 7102(8)(A). Persons convicted of involvement in the trafficking of adults where force, fraud, or coercion is involved or where the victim was under fourteen years of age are subject to a penalty of a fine and/or imprisonment for any term between fifteen years and life. For victims between the ages of fourteen and eighteen, traffickers are subject to a fine and/or imprisonment for a term between ten years to life. 18 U.S.C. §§ 1591(b)(1)–(2) (2006 & Supp. II 2008).

<sup>3</sup> Consensual migration with third-party assistance is often called “smuggling” instead of trafficking. For a good discussion of the differences between trafficking and smuggling, see ALEXIS ARONOWITZ, HUMAN TRAFFICKING, HUMAN MISERY 8 (2009).

*paradigm* depicts all types of sexual commerce as institutionalized subordination of women, regardless of the conditions under which it occurs.<sup>4</sup> The perspective does not present domination and exploitation as variables but instead considers them core ontological features of sexual commerce.<sup>5</sup> I will contrast this monolithic paradigm with an alternative—one that is evidence-based and recognizes the existence of substantial variation in sex work. This *polymorphous paradigm* holds that there is a broad constellation of work arrangements, power relations, and personal experiences among participants in sexual commerce. Polymorphism is sensitive to complexities and to the structural conditions shaping the uneven distribution of workers' agency and subordination. Victimization, exploitation, choice, job satisfaction, self-esteem, and other factors differ between types of sex work, geographical locations, and other structural conditions. Commercial sexual exchange and erotic entertainment are not homogeneous phenomena.<sup>6</sup>

A growing number of researchers have challenged the oppression model's claims, yet their criticisms have yet to gain serious attention from American lawmakers. This Article (1) analyzes the claims made by those who embrace the oppression model, (2) identifies some legal and policy implications of this paradigm, and (3) offers an evidence-based alternative.<sup>7</sup> The analysis pertains to both sex trafficking and to sexual commerce more

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<sup>4</sup> See Ronald Weitzer, *Sex Work: Paradigms and Policies*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* 1, 5 (Ronald Weitzer ed., 2d ed. 2010) [hereinafter Weitzer, *Paradigms and Policies*]; Ronald Weitzer, *Sociology of Sex Work*, 35 ANN. REV. SOC. 213, 214 (2009).

<sup>5</sup> Published material based on the oppression paradigm will be cited throughout the Article. Key theoretical works include KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* (1995); ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); SHEILA JEFFREYS, *THE IDEA OF PROSTITUTION* (1997); CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988). For a recent defense of the oppression paradigm, see Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729 (2010).

<sup>6</sup> Such heterogeneity is amply documented. See, e.g., MINDY S. BRADLEY-ENGEN, *NAKED LIVES: INSIDE THE WORLDS OF EXOTIC DANCE* (2009); JULIA O'CONNELL DAVIDSON, *PROSTITUTION, POWER AND FREEDOM* (1998); Feona Attwood, *The Paradigm Shift: Pornography Research, Sexualization, and Extreme Images*, 5 SOC. COMPASS 13 (2011); C. Harcourt & B. Donovan, *The Many Faces of Sex Work*, 81 SEXUALLY TRANSMITTED INFECTIONS 201 (2005); Ine Vanwesenbeeck, *Another Decade of Social Scientific Work on Sex Work: A Review of Research 1990–2000*, 12 ANN. REV. SEX RES. 242 (2001); Weitzer, *Paradigms and Policies*, *supra* note 4; Weitzer, *Sociology of Sex Work*, *supra* note 4.

<sup>7</sup> For other critiques of the oppression literature, see Ronald Weitzer, *The Mythology of Prostitution: Advocacy Research and Public Policy*, 7 SEXUALITY RES. & SOC. POL'Y 15 (2010) [hereinafter Weitzer, *Mythology of Prostitution*]; Ronald Weitzer, *Pornography's Effects: The Need for Solid Evidence*, 17 VIOLENCE AGAINST WOMEN 666 (2011) [hereinafter Weitzer, *Pornography's Effects*].

generally.

## II. THE OPPRESSION PARADIGM

Many of the leading proponents of the oppression paradigm are affiliated with organizations committed to eradicating the entire sex industry, such as Prostitution Research and Education, Standing Against Global Exploitation (SAGE), Stop Porn Culture, and the Coalition Against Trafficking in Women (CATW).<sup>8</sup> What unites them is their staunch advocacy of the oppression paradigm and political commitment to prohibition of all sexual commerce and adult entertainment.

Oppression writers have been roundly criticized for violating standard canons of social science inquiry and for viewing sex work through a monochromatic lens.<sup>9</sup> Despite this criticism, proponents rigidly adhere to the central tenets of their paradigm, even when confronted with compelling counter-evidence.<sup>10</sup> Moreover, most oppression writers restrict their citations to writings of like-minded authors and ignore research findings that contradict the pillars of their paradigm.<sup>11</sup> Such inconvenient findings are plentiful.<sup>12</sup> Scientific advancement depends on researchers' due diligence in weighing findings and arguments that challenge their own: It is standard practice to situate a study within the related scholarly literature. Oppression writers' neglect of relevant research is a radical departure from conventional scholarly writings. And on those rare occasions when contrasting work is cited, the findings have sometimes been distorted or

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<sup>8</sup> Melissa Farley founded Prostitution Research & Education; Janice Raymond and Dorchen Liedholdt were the co-directors of the U.S. branch of the CATW, now headed by Norma Ramos; Gail Dines created Stop Porn Culture; and Norma Hotaling founded SAGE. Some of the key players are affiliated with universities, e.g., Janice Raymond, Donna Hughes, and Gail Dines.

<sup>9</sup> See, e.g., Frances M. Shaver, *Sex Work Research: Methodological and Ethical Challenges*, 20 J. INTERPERSONAL VIOLENCE 296 (2005); Weitzer, *Mythology of Prostitution*, *supra* note 7; Weitzer, *Pornography's Effects*, *supra* note 7.

<sup>10</sup> See Melissa Farley, *Prostitution Harms Women Even if Indoors: Reply to Weitzer*, 11 VIOLENCE AGAINST WOMEN 950 (2005); Ronald Weitzer, *Flawed Theory and Method in Studies of Prostitution*, 11 VIOLENCE AGAINST WOMEN 934 (2005) [hereinafter Weitzer, *Flawed Theory*]; Weitzer, *Mythology of Prostitution*, *supra* note 7.

<sup>11</sup> Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1721 (2010) (noting that these authors have shown "a deep resistance to acknowledging, much less addressing, adverse data"). An example of this is Raymond's article on prostitutes' clients, where not one academic journal article is cited. Janice G. Raymond, *Prostitution on Demand: Legalizing the Buyers as Sexual Consumers*, 10 VIOLENCE AGAINST WOMEN 1156 (2004).

<sup>12</sup> See, for instance, these comprehensive literature reviews: Shaver, *supra* note 9; Vanwesenbeeck, *supra* note 6; Weitzer, *Paradigms and Policies*, *supra* note 4; Weitzer, *Sociology of Sex Work*, *supra* note 4.

even inverted by the author.<sup>13</sup>

The oppression model is grounded in a particular branch of feminist thinking: radical feminism. It differs from the religious right's objections to commercial sex, which center on the threat it poses to marriage, the family, and society's moral fiber.<sup>14</sup> The oppression paradigm's central tenet is that sexual commerce rests on structural inequalities between men and women and that male domination is intrinsic to sexual commerce.<sup>15</sup> Women would not be compelled to sell sexual or erotic services if they had the same socioeconomic opportunities as men. Moreover, the very existence of prostitution suggests that men have, according to Carole Pateman, a "patriarchal right of access to women's bodies," thus perpetuating women's subordination to men.<sup>16</sup> Another writer declares that prostitution

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<sup>13</sup> For example, Farley claims that prostitutes' regular customers "strongly endorsed rape myths," citing research by Martin Monto and Norma Hotaling to support this statement. Affidavit of Dr. Melissa Farley at 43, *Bedford v. Att'y Gen. of Canada*, No. 07-CV-329807PD1 (Can. Ont. Sup. Ct. J. 2008) [hereinafter *Farley Affidavit*]. Monto and Hotaling reported only that repeat customers were more likely than other customers to accept rape myths, not that either group strongly endorsed them. Martin A. Monto & Norma Hotaling, *Predictors of Rape Myth Acceptance Among Male Clients of Female Street Prostitutes*, 7 VIOLENCE AGAINST WOMEN 275, 288 (2001). Moreover, Farley failed to mention the most important finding of this study: clients as a whole were *not* inclined to endorse rape myths. Monto and Hotaling found "low levels of rape myth acceptance" among the large sample of clients studied. *Id.* at 275.

In trying to make the case that indoor prostitution victimizes women to the same extent as street prostitution, Farley claims that a British study found that workers in indoor venues (e.g., private residences and saunas) reported more attempted rapes than street workers. Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 121 n.76 (2006) [hereinafter *Farley, Prostitution, Trafficking, and Cultural Amnesia*] ("[W]omen prostituting in the street more frequently report being slapped, punched, or kicked—while those indoors more frequently report attempted rape."). In fact, the British study reported the *opposite* regarding attempted rape: 28% of street workers said they had ever experienced an attempted rape, compared with 17% of indoor workers. Moreover, Farley failed to mention that street prostitutes were eleven times more likely to have *actually been raped* (vaginally): 22% of the street sample compared with only 2% of the indoor sample had ever been vaginally raped while at work. Stephanie Church et al., *Violence by Clients Towards Female Prostitutes in Different Work Settings*, 32 BRIT. MED. J. 524, 525 (2001). This is a clear case of both inverting and ignoring findings that contradict one's arguments.

<sup>14</sup> An article in *Christianity Today*, for instance, states: "When sex becomes commerce, the moral fabric of our culture is deeply damaged." Timothy Morgan, *Sex Isn't Work*, CHRISTIANITY TODAY, Jan. 2007, at 10, 10; *see also infra* text accompanying note 110.

<sup>15</sup> *See* BARRY, DWORKIN, JEFFREYS, PATEMAN, *supra* note 5.

<sup>16</sup> "When women's bodies are on sale as commodities in the capitalist market . . . the law of male sex-right is publicly affirmed, and men gain public acknowledgment as women's sexual masters—that is what is wrong with prostitution." PATEMAN, *supra* note 5, at 199, 208.

“dehumanizes, commodifies and fetishizes women . . . . In prostitution, there is *always* a power imbalance, where the john has the social and economic power to hire her/him to act like a sexualized puppet. Prostitution excludes *any* mutuality of privilege or pleasure . . . .”<sup>17</sup> Oppression theorists argue that these fundamental harms will endure no matter how prostitution, pornography, or stripping are governed; legalizing these practices (where currently illegal) in order to reduce harms will not lessen the gender inequality that is intrinsic to sexual commerce. Domination will persist simply by virtue of men’s paid access to women’s bodies.<sup>18</sup>

Champions of the oppression paradigm frequently make extravagant claims about commercial sex as an institution, the participants in paid sex transactions, the nature of sex trafficking, and the effects of different kinds of laws. To drive home the seriousness of the problem, advocates often link prostitution to a host of violent crimes—calling it “domestic violence,”<sup>19</sup> “torture,”<sup>20</sup> and paid rape<sup>21</sup>—and demonizing customers as violent misogynists:

- “Sexual exploitation includes sexual harassment, rape, incest, battering, pornography and prostitution.”<sup>22</sup>
- “This naming [as sex predators] is important since it places men who buy sex in the same category as rapists, pedophiles, and other social undesirables.”<sup>23</sup>
- “The difference between pimps who terrorize women on the street and pimps in business suits who terrorize women in gentlemen’s clubs is a difference in class only, not a difference in

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<sup>17</sup> Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. TRAUMA PRAC. 33, 34 (2003) (emphasis added). Camille Paglia offers an intriguing counterpoint to Pateman and Farley: “The feminist analysis of prostitution says that men are using money as power over women. I’d say, yes, that’s all that men *have*. The money is a confession of weakness. They have to buy women’s attention. It’s not a sign of power; it’s a sign of weakness.” WENDY CHAPKIS, *LIVE SEX ACTS: WOMEN PERFORMING EROTIC LABOR* 22 (1997) (quoting Camille Paglia).

<sup>18</sup> See Kathy Miriam, *Stopping the Traffic in Women: Power, Agency and Abolition in Feminist Debates over Sex-Trafficking*, 36 J. SOC. PHIL. 1, 13 (2005) (“[M]en’s right to demand access to women is the central conception of male power at stake for the feminist movement to abolish prostitution.”).

<sup>19</sup> Farley Affidavit, *supra* note 13, para. 16.

<sup>20</sup> Farley, *Prostitution, Trafficking, and Cultural Amnesia*, *supra* note 13, at 112.

<sup>21</sup> Janice G. Raymond, *Prostitution Is Rape That’s Paid For*, L.A. TIMES, Dec. 11, 1995, at B5.

<sup>22</sup> *An Introduction to CATW*, COALITION AGAINST TRAFFICKING IN WOMEN, <http://www.catwinternational.org/about/index.php> (last visited Sept. 21, 2011).

<sup>23</sup> JAN MACLEOD, MELISSA FARLEY, LYNN ANDERSON & JACQUELINE GOLDING, *CHALLENGING MEN’S DEMAND FOR PROSTITUTION IN SCOTLAND* 27 (2008).

woman hating.”<sup>24</sup>

Some advocates of the oppression paradigm simply make pronouncements, like the above, without offering any empirical evidence.<sup>25</sup> Other oppression writers, however, try to support their claims with some kind of evidence. Both approaches are present in the oppression-based literature on sex trafficking.

### III. SEX TRAFFICKING

#### A. THE POLITICS OF TRAFFICKING

In order to further discredit the practice of prostitution and delegitimize systems where prostitution is legal and regulated by the government, oppression writers have fused prostitution with sex trafficking.<sup>26</sup> Donna Hughes claims that “most ‘sex workers’ are or originally started out as trafficked women and girls.”<sup>27</sup> She then calls for “re-linking trafficking and prostitution, and combating the commercial sex trade as a whole.”<sup>28</sup> There is no evidence that “most” or even the majority of prostitutes have been trafficked. It is important to recognize that as recently as fifteen years ago, trafficking was not a routine part of the discourse regarding prostitution.<sup>29</sup> Today, several analysts argue that

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<sup>24</sup> Melissa Farley, “*Bad for the Body, Bad for the Heart*”: *Prostitution Harms Women Even if Legalized or Decriminalized*, 10 VIOLENCE AGAINST WOMEN 1087, 1101 (2004). It is not clear what Farley means by the highly-charged term “terrorize” in the context of strip clubs; “pimps in business suits” are presumably club owners and managers.

<sup>25</sup> Dempsey, for instance, says that the “harms often suffered by prostituted people are the kind that tend to sustain and perpetuate patriarchal structural inequality,” without indicating what these “harms” comprise. This is because Dempsey defines prostitution as intrinsically harmful, apparently obviating the need to document the harms themselves. Dempsey, *supra* note 5, at 1735.

<sup>26</sup> See the report funded by CATW and European Women’s Lobby, MONICA O’CONNOR & GRAINNE HEALY, *THE LINKS BETWEEN PROSTITUTION AND SEX TRAFFICKING: A BRIEFING HANDBOOK* (2006), and an article by a CATW leader, Dorchen A. Leidholdt, *Prostitution and Trafficking in Women: An Intimate Relationship*, 2 J. TRAUMA PRAC. 167 (2004).

<sup>27</sup> Donna M. Hughes, *Accommodation or Abolition?*, NAT’L REV. ONLINE (May 1, 2003), <http://www.nationalreview.com/articles/206761/accommodation-or-abolition/donna-m-hughes>.

<sup>28</sup> Donna M. Hughes, *Wolves in Sheep’s Clothing: No Way to End Sex-Trafficking*, NAT’L REV. ONLINE (Oct. 9, 2002), <http://old.nationalreview.com/comment/comment-hughes100902.asp>.

<sup>29</sup> An exception, dating from the 1970s, was Barry’s attempt to link prostitution, trafficking, and sexual slavery. KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979). In the late nineteenth to early twentieth century, prostitution and trafficking were linked in the international movement against “white slavery,” but this discourse faded when this movement collapsed. The “white slavery” phenomenon was later found to be largely fictional, and it has been argued that “today’s stereotypical ‘trafficking victim’ bears as little

prostitution has been *socially constructed* in a particular way through the trafficking prism and that there is no objective equivalence between the two.<sup>30</sup> Prostitution involves a commercial transaction and trafficking is a process whereby a third party facilitates an individual's involvement in sexual commerce. There is plenty of prostitution by independent operators that does not involve trafficking.<sup>31</sup> And such independent enterprises may be growing with the help of internet-facilitated connections between sex workers and clients.

Some oppression writers are quite candid about their political reasons for linking trafficking with prostitution. Melissa Farley declares, "A false distinction between prostitution and trafficking has hindered *efforts to abolish prostitution* . . . . Since prostitution creates the demand for trafficking, the sex industry in its totality must be confronted."<sup>32</sup> The first

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resemblance to women migrating for work in the sex industry as did her historical counterpart, the 'white slave.'" Jo Doezema, *Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women*, GENDER ISSUES, Winter 2000, at 23, 24. The turn-of-the-century campaign had humanitarian motives but, according to Limoncelli, was co-opted by the state: "[S]tate officials selectively used reforms as mechanisms to realize their own interests in maintaining and controlling women's mobility and sexual labor." STEPHANIE A. LIMONCELLI, THE POLITICS OF TRAFFICKING: THE FIRST INTERNATIONAL MOVEMENT TO COMBAT THE SEXUAL EXPLOITATION OF WOMEN 3 (2010). A mid-century example is the 1949 United Nations 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. The Convention conflates trafficking and prostitution, declares prostitution "incompatible with the dignity and worth of the human person," and advocates criminalization of all third-party facilitation of prostitution. *Id.* at 272, 274. The Convention was never widely ratified because its "sweeping conception of prostitution as exploitation would have required states to make such deep legal changes that many felt it was incompatible with their Constitutions and legal codes." Penelope Saunders & Gretchen Soderlund, *Threat or Opportunity? Sexuality, Gender and the Ebb and Flow of Trafficking as Discourse*, 22 CAN. WOMAN STUD., nos. 2-3, 2003, at 16, 19.

<sup>30</sup> See Melissa Ditmore, *Trafficking in Lives: How Ideology Shapes Policy*, in TRAFFICKING AND PROSTITUTION RECONSIDERED 107 (Kamala Kempadoo ed., 2005); David A. Feingold, *Trafficking in Numbers: The Social Construction of Human Trafficking Data*, in SEX, DRUGS, AND BODY COUNTS: THE POLITICS OF NUMBERS IN GLOBAL CRIME AND CONFLICT 46, 51 (Peter Andreas & Kelly M. Greenhill eds., 2010); Ronald Weitzer, *The Movement to Criminalize Sex Work in the United States*, 37 J.L. & SOC'Y 61 (2010) [hereinafter Weitzer, *Movement to Criminalize*]; Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 POL. & SOC'Y 447 (2007) [hereinafter Weitzer, *Social Construction*].

<sup>31</sup> One form of prostitution, however, is now defined as criminal sex trafficking in U.S. law: that involving *minors*. Under the 2000 TVPA, anyone under the age of eighteen who is induced to sell sex is categorized as a victim of sex trafficking, irrespective of whether the individual consented or whether third-party facilitation took place. TVPA § 103(8)(A), 22 U.S.C. § 7102(8)(A) (2006).

<sup>32</sup> Farley, *Prostitution, Trafficking, and Cultural Amnesia*, *supra* note 13, at 141-42 (emphasis added).

sentence reveals that the ultimate goal is not the elimination of trafficking but rather the elimination of prostitution. Regarding the second sentence—asserting that “prostitution creates the demand for trafficking”—there is no compelling reason why prostitution would necessarily “demand” *trafficked* participants (if trafficking is defined as involving deception or force) or even willing migrants, and why it could not draw from a local pool of workers instead. In some places the local pool may be shallow and require migrants to meet demand, but this would not be sufficient to justify Farley’s claim regarding prostitution in general.

Despite the problematic way in which oppression writers have constructed trafficking, they have been remarkably successful in rebranding trafficking in a way that implicates all sex work. As one analyst wrote, the prohibitionists have “successfully transformed the ‘anti-trafficking’ movement into a modern, worldwide moral crusade against prostitution.”<sup>33</sup> The prostitution–trafficking connection was fully embraced by the Bush administration, illustrated by the State Department’s webpage *The Link Between Prostitution and Sex Trafficking*, which claimed, *inter alia*, that prostitution “fuels trafficking in persons” and “fuel[s] the growth of modern-day slavery.”<sup>34</sup> The prohibitionist portrayal of trafficking clashes with an alternative, socioeconomic model that views trafficking as “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>35</sup> Oppression writers often ignore socioeconomic forces and instead focus on individual actors: pimps, traffickers, clients, and female victims.

How is trafficking itself presented in oppression writings? Melodramatically. In an article representative of this literature (and published in this *Journal*), Iris Yen perceives a “pandemic of human trafficking.”<sup>36</sup> She writes that sex trafficking is “appropriately” described as “sexual slavery” and that the individuals involved are “essentially slaves,”<sup>37</sup> despite the fact that many of those who are trafficked are not held in slave-like conditions.<sup>38</sup> She claims, without evidence, that “[t]raffickers

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<sup>33</sup> Chuang, *supra* note 11, at 1683.

<sup>34</sup> U.S. DEP’T OF STATE, *THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING* (2004), available at [http://www.defense.gov/home/features/2008/0608\\_ctip/docs/Prostitution%20Fact%20Sheet.pdf](http://www.defense.gov/home/features/2008/0608_ctip/docs/Prostitution%20Fact%20Sheet.pdf).

<sup>35</sup> Chuang, *supra* note 11, at 1683.

<sup>36</sup> Iris Yen, *Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand Through Educational Programs and Abolitionist Legislation*, 98 J. CRIM. L. & CRIMINOLOGY 653, 654 (2008).

<sup>37</sup> *Id.* at 656.

<sup>38</sup> Julia O’Connell Davidson, *Will the Real Sex Slave Please Stand Up?*, FEMINIST REV., Aug. 2006, at 4.

*routinely* beat, rape, starve, confine, torture, and psychologically and emotionally abuse the women.”<sup>39</sup> The magnitude of the problem is said to be “alarming,” but the figures Yen cites—14,500 to 100,000 trafficked into the U.S. every year—are incredibly wide-ranging and thus rather dubious.<sup>40</sup> Yen then extrapolates from trafficking to prostitution: “Thus, contrary to the erroneous perception that prostitution is a victimless crime . . . too many victims have paid for their crime of poverty with devastated lives.”<sup>41</sup> Bias is particularly evident in her emotive language, e.g., “the ugly truth of the commercial sex industry” and “egregious human rights abuses from the sex trade.”<sup>42</sup>

These images of prostitution and trafficking abound throughout the writings of oppression theorists, but their accuracy is belied by their sweeping, unequivocal nature. Each of the above claims has been challenged by other analysts and by a body of research findings cited throughout this Article. The experiences of trafficked persons, in the migration process and in their working conditions, range along a broad continuum. Some individuals’ experiences fit the oppression model well, while others’ cluster at the opposite end. Many of those who migrate are responding to push factors such as the lack of economic opportunities in their home countries or the desire to provide a better life for family members, rather than the pull factor of nefarious traffickers.<sup>43</sup>

And there may be other incentives as well. In her summary of research on the motives of migrant sex workers, Laura Agustín writes, “Many people are fleeing from small-town prejudices, dead-end jobs, dangerous streets, and suffocating families. And some poorer people *like* the idea of being found beautiful or exotic abroad, exciting desire in others.”<sup>44</sup> In other words, there may be benign motivations for migration, apart from third-party deception and coercion. For example, a study of Vietnamese migrants who were working in Cambodian brothels found that their motivations consisted of “economic incentives, desire for an independent lifestyle, and dissatisfaction with rural life and agricultural labor.”<sup>45</sup> And a study of

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<sup>39</sup> Yen, *supra* note 36, at 659–60 (emphasis added).

<sup>40</sup> *Id.* at 658.

<sup>41</sup> *Id.* at 660.

<sup>42</sup> *Id.* at 660–61, 676.

<sup>43</sup> Regarding other push and pull factors in the migration field, see ARONOWITZ, *supra* note 3, at 11–12.

<sup>44</sup> LAURA MARÍA AGUSTÍN, *SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY* 45–46 (2007).

<sup>45</sup> Joanna Busza, Sarah Castle & Aisse Diarra, *Trafficking and Health*, 328 *BRIT. MED. J.* 1369, 1370 (2004). See also the similar findings in a report for the U.S. Agency for International Development: THOMAS M. STEINFATT, *MEASURING THE NUMBER OF TRAFFICKED WOMEN AND CHILDREN IN CAMBODIA: A DIRECT OBSERVATION FIELD STUDY* 24

Russian women who sold sex in Norway found that the women stressed their own agency:

[T]he wish to improve the financial status of oneself and one's family emerged as a central theme in the interviews we conducted . . . . In their self-representations, responsibility and individualized experiences came to the fore, and in this way the women distanced themselves from the stereotype of the passive victim . . . . They represented [prostitution] as something that provided both economic and experiential resources that helped them grow as individuals, to act responsibly toward themselves and others, and as a means to ensure independence and equality in their social relationships . . . . They talked about their actions in terms of intentions, choices, and desires.<sup>46</sup>

Given the current state of knowledge, we cannot dismiss such motives and experiences as mere exceptions to the rule. The point here is that there is sufficient empirical evidence, from various parts of the world, to challenge the image of the stereotypical "victim" that is a staple of oppression writings.

Similarly, the traffickers themselves range tremendously—from predatory exploiters to brokers who simply offer assistance, whether for profit or not. As David Feingold points out, "[t]here is no standard profile of traffickers. They range from truck drivers and village 'aunties' to labor brokers and police officers. Traffickers are as varied as the circumstances of their victims."<sup>47</sup> Rebecca Surtees concurs that traffickers are "far more diverse" than conventionally thought. By way of contrast, Surtees reports that most Moldovans in her study were recruited by strangers, whereas 80% of Albanians knew their recruiters, a high percentage of whom were boyfriends, fiancés, or husbands.<sup>48</sup> Another European study, based on interviews with seventy-two women, found that most recruiters were friends, acquaintances, or family members. The facilitators made travel arrangements, obtained necessary documents, and provided women with money to purchase necessities.<sup>49</sup> Prostitutes themselves may be involved in

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(2003).

<sup>46</sup> Christine M. Jacobsen and May-Len Skilbrei, *Reproachable Victims? Representations and Self-Representations of Russian Women Involved in Transnational Prostitution*, 75 *ETHNOS* 190, 198–99, 201 (2010).

<sup>47</sup> David A. Feingold, *Human Trafficking*, *FOREIGN POL'Y*, Sept./Oct. 2005, at 26, 28.

<sup>48</sup> Rebecca Surtees, *Traffickers and Trafficking in Southern and Eastern Europe: Considering the Other Side of Human Trafficking*, 5 *EUR. J. CRIMINOLOGY* 39, 44, 52 (2008). Surtees documents diversity in other areas as well: "The level of organization and number of criminal groups in trafficking differs substantially from one country to another as well as within countries." *Id.* at 47.

<sup>49</sup> Judith Vocks & Jan Nijboer, *The Promised Land: A Study of Trafficking in Women from Central and Eastern Europe to the Netherlands*, 8 *EUR. J. CRIM. POL'Y & RES.* 379, 384 (2000). Few of the interviewees were coercively trafficked: "[F]or most of the women, economic motives were decisive. The opportunity to earn a considerable amount of money

recruitment. For example, some Eastern European women who sell sex in Western Europe recruit their girlfriends in the home country to work with them in the West.<sup>50</sup> These intermediaries may have a radically different relationship with workers than do predators, who recruit persons by deception or force and engage in severe economic exploitation of them. Such *variation* is the key to all dimensions of trafficking and prostitution, as the evidence-based polymorphous paradigm holds.

#### B. THE MAGNITUDE OF THE PROBLEM: MYTHICAL NUMBERS

When it comes to estimating the magnitude of any illicit vice (be it drug sales, illegal gambling, or prostitution), it is crucial that analysts carefully examine the quality of the data sources and the procedures used to arrive at figures.<sup>51</sup> Unfortunately, many of those writing about sex trafficking ignore this scientific canon and recapitulate potentially bogus claims regarding the scale of the phenomenon, uncritically accepting figures that should be questioned. With human trafficking, as with drug and arms trafficking and other illicit global enterprises, “the numbers are often highly suspect but nevertheless popularized and rarely critically scrutinized, and . . . there are strong incentives [e.g., for governments, activists, and media interests] to accept and reproduce rather than challenge and critique them.”<sup>52</sup>

According to many oppression writers and the government officials they influence,<sup>53</sup> sex trafficking has reached epidemic levels worldwide, victimizing “hundreds of thousands” or “millions” of people every year. But not only is trafficking said to be a *mammoth* problem worldwide, its incidence has also *skyrocketed* in recent years. In her book, *Sex Trafficking*, Kathryn Farr boldly asserts: “The sex trafficking industry is voluminous, and it is expanding at an ever-accelerating rate . . . . [O]ver 1 million are trafficked into the sex industry, and the volume just keeps increasing.”<sup>54</sup>

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in a short period of time was found to be irresistible.” *Id.* at 383.

<sup>50</sup> Interviews with eighty-five Bulgarian women involved in prostitution in Western Europe found that 75% had experienced no coercion in the process of relocating to the West. Girlfriends were the recruiters of 15% of the women, and other recruiters included relatives (8%) and boyfriends (17%). GEORGI PETRUNOV, *SEX TRAFFICKING AND MONEY LAUNDERING: THE CASE OF BULGARIA* 20–22 (2010).

<sup>51</sup> See Peter Andreas, *The Politics of Measuring Illicit Flows and Policy Effectiveness*, in *SEX, DRUGS, AND BODY COUNTS*, *supra* note 30, at 23.

<sup>52</sup> *Id.* at 33.

<sup>53</sup> On the influence of anti-prostitution activists on U.S. government officials, and the institutionalization of the former’s discourse, claims, and demands in official policy, see Weitzer, *Movement to Criminalize*, *supra* note 30; Weitzer, *Social Construction*, *supra* note 30.

<sup>54</sup> KATHRYN FARR, *SEX TRAFFICKING* 3 (2005). Farr’s sources are activists and certain

Yen agrees that things are only getting worse: Sex trafficking is “mushrooming,” child prostitution is increasing at “alarming rates,” and “sex trafficking victims are getting increasingly younger.”<sup>55</sup>

There are reasons why the problem *may* have grown over time in certain regions—for example, due to more porous borders in Europe in the aftermath of the breakdown of the Soviet empire and the growing freedom of movement resulting from the expansion of the European Union after 2004. But this does not mean that the problem is actually increasing worldwide as claimed. Writers who make such assertions provide no solid evidence to support these grandiose claims. In fact, the numbers and trends asserted are impossible to substantiate, given two fundamental evidentiary problems: (1) the clandestine nature of trafficking,<sup>56</sup> and (2) the lack of a baseline from which to measure changes over time.<sup>57</sup> Data are simply not available for drawing macro-level conclusions.<sup>58</sup> While some writers make such claims perhaps naïvely, simply reiterating others’ assertions, other writers acknowledge their political motivations. High numbers are designed to alarm the public and convince governments to commit greater resources to fighting prostitution, to fund rescue operations, and to enhance penalties against traffickers and clients. As two critics suggest, the human trafficking issue has become “a battleground for different positions on prostitution, immigration, and the position and status of women.”<sup>59</sup>

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U.S. government agencies—precisely the sources that critics find highly dubious.

<sup>55</sup> Yen, *supra* note 36, at 656, 666–67.

<sup>56</sup> Guri Tyldum & Anette Brunovskis, *Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking*, INT’L MIGRATION, Jan. 2005, at 17, 18 (“[M]ost of the populations relevant to the study of human trafficking, such as prostitutes, traffickers, victims/survivors, or illegal migrants constitute so-called *hidden populations* . . . . [M]embership in hidden populations often involves stigmatized or illegal behavior, leading individuals to refuse to cooperate, or give unreliable answers to protect their privacy.”).

<sup>57</sup> For well-documented critiques of popular claims regarding trafficking and the thin evidence in support of these claims, see Sophie Day, *The Re-Emergence of ‘Trafficking’: Sex Work Between Slavery and Freedom*, 16 J. ROYAL ANTHROPOLOGICAL INST. 816 (2010); Sheldon X. Zhang, *Beyond the “Natasha” Story—A Review and Critique of Current Research on Sex Trafficking*, 10 GLOBAL CRIME 178 (2009); Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence*, WASH. POST, Sept. 23, 2007, at A1; sources cited *supra* note 30.

<sup>58</sup> The paucity of solid data is discussed in INT’L ORG. FOR MIGRATION, SECOND ANNUAL REPORT ON VICTIMS OF TRAFFICKING IN SOUTH-EASTERN EUROPE 12 (2005); Anette Brunovskis & Rebecca Surtees, *Untold Stories: Biases and Selection Effects in Research with Victims of Trafficking for Sexual Exploitation*, INT’L MIGRATION, Aug. 2010, at 1; Elzbieta M. Gozdziaik & Elizabeth A. Collett, *Research on Human Trafficking in North America: A Review of the Literature*, INT’L MIGRATION, Jan. 2005, at 99; Markon, *supra* note 57; Tyldum & Brunovskis, *supra* note 56; Weitzer, *Movement to Criminalize*, *supra* note 30; Weitzer, *Social Construction*, *supra* note 30.

<sup>59</sup> Galma Jahic & James O. Finckenauer, *Representations and Misrepresentations of*

Claims regarding a growing worldwide epidemic are contradicted by the U.S. government's own figures. Over the past decade, the State Department's annual *Trafficking in Persons* report has steadily reduced its figures on the magnitude of both transnational and domestic trafficking. In 2002, the maximum transnational figure was 4 million.<sup>60</sup> The following year, the figure was put at 800,000–900,000 victims, falling to 600,000–800,000 in 2004.<sup>61</sup> Subsequently, the estimate has stabilized at 800,000 trafficked across national borders.<sup>62</sup>

These figures on trafficking between countries are “in addition to the far larger yet indeterminate number of people trafficked within countries,” according to the 2004 *Trafficking in Persons Report*.<sup>63</sup> Four years later, the State Department was making a similar claim: the 2008 report asserts that “approximately 800,000 people are trafficked across national borders, which does not include millions trafficked within their own countries.”<sup>64</sup> These claims are remarkable for their (a) fuzzy elasticity, (b) shock value, (c) implication that the between-nations figures are *not themselves* “indeterminate” and lacking in reliability, and (d) failure to recognize that if something is “indeterminate” it may not be “far larger” than the (already problematic) international figures.

Further undermining the U.S. government's assertions of an “indeterminate” but huge domestic trafficking problem, official domestic U.S. figures have plummeted over the past decade. The TVPA states that “Congress finds that . . . [a]pproximately 50,000 women and children are trafficked into the United States each year.”<sup>65</sup> This figure was repeated in the State Department's *Trafficking in Persons* report for 2002.<sup>66</sup> But just one year later, the State Department's figure fell to 18,000–20,000,<sup>67</sup> and in 2004 the figure was further reduced to 14,500–17,500 per year.<sup>68</sup> Apart from the lack of transparency in how officials arrived at these figures, when

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*Human Trafficking*, TRENDS IN ORG. CRIME, Mar. 2005, at 24, 32.

<sup>60</sup> DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 1 (2002) [hereinafter DEP'T OF STATE 2002] (“[A]s many as four million men, women, and children worldwide were bought, sold, transported, and held against their will in slave-like conditions.”).

<sup>61</sup> DEP'T. OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2004) [hereinafter DEP'T OF STATE 2004]; DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2003) [hereinafter DEP'T OF STATE 2003].

<sup>62</sup> DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2008) [hereinafter DEP'T OF STATE 2008].

<sup>63</sup> DEP'T OF STATE 2004, *supra* note 61, at 6.

<sup>64</sup> DEP'T OF STATE 2008, *supra* note 62, at 7.

<sup>65</sup> TVPA § 102(b)(1), 22 U.S.C. § 7101(b)(1) (2006).

<sup>66</sup> DEP'T OF STATE 2002, *supra* note 60, at 2.

<sup>67</sup> DEP'T OF STATE 2003, *supra* note 61, at 7.

<sup>68</sup> DEP'T OF STATE 2004, *supra* note 61, at 23.

we compare the 2000 figure (50,000) with the lower figure for 2004 (14,500), we see an *astonishing 71% decrease* in the estimate in just five years. Such dramatic downscaling should give pause to researchers and policymakers alike. More recent reports have substituted vague language for numerical estimates of the domestic situation. The 2008 *Trafficking in Persons* report, for instance, simply declared that “thousands” of people are trafficked into the U.S. every year.<sup>69</sup>

Some researchers have attempted to “resolve” the numbers problem through a meta-analysis of figures from a variety of sources. A recent analysis of 207 estimates concluded that a figure of 5,166 annual victims of all kinds of trafficking “provides a more reliable, although still flawed, estimate of the minimum number of trafficking victims in the United States.”<sup>70</sup> But the authors qualify this with numerous cautions. The studies consulted offer estimates that

range from 1,349 to 46,849 victims of labor trafficking and from 3,817 to 22,320 victims of sex trafficking . . . . [T]he highest estimate from a type of source for any of the identified types of trafficking (labor trafficking, sex trafficking of adults, and sex trafficking of children) is greater than the lowest estimate for that type of trafficking by at least 400 percent, suggesting that there is enormous uncertainty about the national scope of the problem . . . .<sup>71</sup>

Given these serious problems, one might also question the 5,166 figure, which the authors concede is “flawed.” As the saying goes, “bad data are worse than no data,” and I would question whether any of the 207 estimates were based on what social scientists would consider genuine “data” to begin with. For these reasons, I do not think there is any logic in the analysts’ claim that, “[d]espite the limitation of the data, however, this

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<sup>69</sup> DEP’T OF STATE 2008, *supra* note 62, at 51. The report claimed that 63% of the victims were trafficked into non-sexual labor situations. *Id.* This is consistent with an increasing focus, under the Obama administration, on victims trafficked into labor arenas outside the sex sector, as reflected in the two most recent *Trafficking in Persons* reports. The 2010 report, for example, stated that “the majority of human trafficking in the world takes the form of forced labor.” DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 8* (2010) [hereinafter DEP’T OF STATE 2010]. The Bush administration took the opposite view. The 2004 *Trafficking in Persons* report, for example, states: “Of the 600,000–800,000 people trafficked across international borders every year, 70 percent are female and 50 percent are children. The majority of those women and girls fall prey to the commercial sex trade.” DEP’T OF STATE 2004, *supra* note 61, at 15. And, unlike the Bush administration’s conflation of trafficking and prostitution (including legal prostitution), the Obama administration appears to take a different view: “Prostitution by willing adults is not human trafficking regardless of whether it is legalized, decriminalized, or criminalized.” DEP’T OF STATE 2010, *supra*, at 8.

<sup>70</sup> AMY FARRELL ET AL., *REVIEW OF EXISTING ESTIMATES OF VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES AND RECOMMENDATIONS FOR IMPROVING RESEARCH AND MEASUREMENT OF HUMAN TRAFFICKING*, at vi (2010).

<sup>71</sup> *Id.* at iv, vi.

research enables us to say more about the scope and character of human trafficking in the United States than is currently accepted as fact.”<sup>72</sup> Instead, their report leads to quite the opposite conclusion: that it is not possible to count the number of victims involved in an illicit, clandestine underground economy at the macro level, nationally or internationally. The wildly varying estimates, based on numerous problematic assumptions, testify to the futility of this exercise. Estimating the size of the problem is only possible at the micro level (e.g., in a city or small region of a country) and then only insofar as the data pertaining to this limited arena are reliable, which is rare.

A related issue is the discrepancy between the claimed magnitude of the problem and the number of victims identified and assisted by authorities. No one would claim that the latter should roughly match the former, given the obstacles to locating victims in black markets, but a huge disparity between the two should at least raise questions about the alleged scale of victimization. The State Department recently reported that only 0.4% of the estimated number of victims worldwide have been officially “identified.”<sup>73</sup> And domestically, the Justice Department took issue in 2005 with the “stark difference” between the estimated number of victims trafficked into the U.S. for that year (14,500–17,500) and the number of victims located (611 over the four years from 2001 to 2004).<sup>74</sup> The 2008 *Trafficking in Persons* report provides updated figures: between 2001 and mid-2008, 1,379 trafficking victims in the U.S. were identified.<sup>75</sup> This figure remains but a tiny fraction of the number of persons allegedly trafficked into the U.S. during this time period (14,500 x 7.5 years = 108,750; 17,500 x 7.5 years = 131,250).

Data on the 2008–2010 period show a similarly wide discrepancy between the alleged magnitude of the problem and the number of confirmed cases. Between January 2008 and June 2010, law enforcement authorities investigated 2,065 suspected incidents of sex trafficking (with a suspected “incident” defined as an alleged act of sex trafficking or another crime involving some element of sex trafficking).<sup>76</sup> Only a minority of the

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<sup>72</sup> *Id.* at iii.

<sup>73</sup> DEP’T OF STATE 2010, *supra* note 69, at 7.

<sup>74</sup> DEP’T OF JUSTICE, EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2004, 5 (2005). Between FY 2001 and FY 2004, the Justice Department prosecuted 131 persons for sex trafficking offenses and obtained 99 convictions. See ATT’Y GEN., REPORT TO CONGRESS ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2004, at 20 (2005).

<sup>75</sup> DEP’T OF STATE 2008, *supra* note 62, at 51.

<sup>76</sup> DUREN BANKS & TRACEY KYCKELHAHN, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS 2008–2010, at 3 (2011).

reporting agencies (eighteen out of forty-two) engaged in what analysts at the U.S. Bureau of Justice Statistics considered “high-quality” data collection and reporting; confining the analysis to these eighteen agencies, 31% of the alleged sex trafficking incidents (consisting of 218 cases) were confirmed as bona fide trafficking, 37% were not confirmed, and the remainder were pending.<sup>77</sup> Taking into account the challenges involved in identifying and substantiating such cases, the 218 figure is far below what we might expect from the claimed number of victims. For sex and labor trafficking combined, 257 incidents were confirmed,<sup>78</sup> a figure that stands in stark contrast to official claims about the number of victims in the U.S. during this time period: 14,500 x 1.5 years = 21,750. In other words, only 1.2% of the estimated number of victims resulted in confirmed incidents. Again, recognizing the difficulties in locating victims and building cases against perpetrators, the disparities in the numbers presented here should at least raise serious questions about the alleged magnitude of the trafficking problem.

A similarly huge disparity characterizes the official figures in Britain. Despite repeated claims in the British press that there are thousands of trafficking victims in the U.K.—25,000 according to one newspaper report—only fifty-nine persons were convicted of trafficking women into prostitution between 2004 and 2009.<sup>79</sup> An analysis by investigative journalist Nick Davies of the *Guardian* newspaper carefully traced the sources of figures cited in the media and by government officials. Davies found that the original estimates were often much lower than those subsequently presented; moreover, the initial estimates typically contained important qualifications that were ignored in subsequent accounts. Figures presented as maximums were frequently repackaged as minimums and stripped of the cautions attached by the primary analysts.<sup>80</sup> Davies

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<sup>77</sup> *Id.* at 5, 8.

<sup>78</sup> *Id.* at 8.

<sup>79</sup> Nick Davies, *Sex, Lies and Trafficking—The Anatomy of a Moral Panic*, *GUARDIAN*, Oct. 20, 2009, at 6. Davies cites a 2005 *Daily Mirror* article, entitled *25,000 Sex Slaves on the Streets in Britain*, a figure repeated in debates in the House of Commons. According to Davies, the headline figure was mythical: the body of the article made no reference to it and instead proffered a much lower figure: 2,000–6,000. Davies’s analysis raised major questions about the latter figures as well. *Id.*

<sup>80</sup> For instance, one team of researchers reported in 2003 a figure of 3,812 trafficking victims in the U.K. The researchers warned that this figure should be “regarded as an upper bound,” and noted that their data was “very poor” and their estimate was “very approximate,” subject to “a very large margin of error.” But the government and non-governmental organizations (NGOs) ignored these cautions and inflated the figures. Davies writes:

Home Office minister Vernon Coaker ignored the speculative nature of the assumptions behind the figure, stripped out all the caution, headed for the maximum end of the range and then

concludes that “the trafficking story is a model of misinformation” and that the issue has become a “moral panic” in Britain.<sup>81</sup> As in the U.S., there have been few substantiated cases, yet the British media and government officials have magnified the problem and generated public alarm via gross distortion of figures that were unreliable in the first place.<sup>82</sup>

In 2006, the U.S. Government Accountability Office (GAO) published a report that was highly critical of the prevailing figures. The GAO highlighted serious “methodological weaknesses, gaps in data, and numerical discrepancies”; determined that “country data are generally not available, reliable, or comparable”; and concluded that neither the U.S. nor other governments had “established an effective mechanism for estimating the number of victims.”<sup>83</sup> The GAO added that many countries lump smuggling and illegal migration into the trafficking category, while others separate the figures.<sup>84</sup> Independent analysts concur with these assessments, citing the lack of a standard definition of “victims” as a basis for estimates,<sup>85</sup> the “lack of methodological transparency” and source documentation for the figures,<sup>86</sup> and the practice of extrapolating from a few cases of identified victims who may be quite unrepresentative of the victim population.<sup>87</sup> In some reports, all “migrant sex workers are defined as trafficking victims regardless of consent and conditions of labour, while other reports emphasize abusive conditions of employment or deceptive

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rounded it up, declaring to an inquiry into sex trafficking by the Commons joint committee on human rights: “There are an estimated 4,000 women victims.”

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The Salvation Army went further, [claiming that] “there were *at least* 4,000 trafficked women residing in the UK. This figure is believed to be a *massive underestimation* of the problem.” Anti-Slavery International joined them, converting what the Home Office researchers had described as a “very approximate” estimate into “a very conservative estimate.”

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In March 2007, [the Home Office] produced the UK Action Plan on Human Trafficking and casually reproduced the figure of 4,000 without any of the researchers’ cautions.

*Id.* (emphasis added).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> GOV’T ACCOUNTABILITY OFFICE, GAO-06-825, HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD 2, 10 (2006).

<sup>84</sup> *Id.* at 16 (criticizing the “intermingling of trafficking, smuggling, and illegal migration in official statistics”).

<sup>85</sup> Gozdziaik & Collett, *supra* note 58, at 103.

<sup>86</sup> Liz Kelly, “*You Can Find Anything You Want*”: A Critical Reflection on Research on Trafficking in Persons Within and into Europe, INT’L MIGRATION, Jan. 2005, at 235, 237.

<sup>87</sup> Tyldum & Brunovskis, *supra* note 56, at 24.

recruitment policies.”<sup>88</sup>

We are left with a hodgepodge of numbers that hardly lend themselves to evidence-based policymaking. The United Nations Educational, Scientific, and Cultural Organization’s (UNESCO) Bangkok office was quite blunt in explaining how well-intentioned concerns can trump evidence in this sphere: “When it comes to statistics, trafficking of girls and women is one of several highly emotive issues which seem to overwhelm critical faculties.”<sup>89</sup> Unfortunately, numbers gain a life of their own after frequent repetition in the media and publication in government reports. Jahic and Finckenauer state the matter eloquently:

[I]t is in the best interests of groups and NGOs, both national and international, to push these unreliable and most likely vastly overstated estimates . . . . Once the problem has been presented and accepted to be on a certain scale, new information that does not support this notion is dismissed. The estimates have become the “received wisdom” . . . .<sup>90</sup>

NGO figures are typically formulated for purposes of advocacy, not derived from careful research. It is well known that research is not the forte of most NGOs involved in assisting victims or of interest groups pushing specific policies. Unfortunately, many scholars recapitulate the NGO and government numbers, ignoring the standard caution against uncritical acceptance of official statistics.<sup>91</sup> A review of over 100 academic journal articles found that the claims of government agencies (especially American) and global organizations (such as the United Nations) were treated as evidence, even though most of these agencies had failed to reveal their data sources or methods.<sup>92</sup> The most quoted source was the annual *Trafficking in Persons* report by the State Department; very few of the academic articles were based on independently collected data.<sup>93</sup>

If claims regarding a growing worldwide problem are evidence-thin and inherently unverifiable, data on specific localities can be more reliable. An example is trafficking from Eastern to Western Europe. The breakup of the Soviet empire and declining living standards for many of its inhabitants have made such migration both much easier and more compelling than in the past, and there is no doubt that in the post-Soviet period many women

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<sup>88</sup> Gozdziaik & Collett, *supra* note 58, at 108.

<sup>89</sup> *Trafficking Statistics Project*, UNESCO BANGKOK, <http://cms2.unescobkk.org/index.php?id=1022> (last visited Sept. 19, 2011). UNESCO’s Trafficking Statistics Project is an ongoing effort to assess the scale of the problem. See Feingold, *supra* note 30, at 51–52.

<sup>90</sup> Jahic & Finckenauer, *supra* note 59, at 31.

<sup>91</sup> John I. Kitsuse & Aaron V. Cicourel, *A Note on the Uses of Official Statistics*, 11 SOC. PROBS. 131, 132 (1963).

<sup>92</sup> Zhang, *supra* note 57, at 181, 185.

<sup>93</sup> *Id.* at 182.

have migrated to Western Europe.<sup>94</sup> But there are two important caveats: First, an increase in *migration* or the subset *assisted migration* (or smuggling) should not be equated with a growing number of *coercively trafficked* persons (i.e., those subjected to what the TVPA calls “force, fraud, or coercion”<sup>95</sup>). Although both of these phenomena have been documented in this part of the world, the available figures on each type of relocation are sketchy at best. Second, an increase in trafficking during the 1990s after the demise of the Soviet empire does not mean that trafficking is growing now throughout that region of the world. States within that region may vary in whether trafficking has (a) stabilized, (b) increased, or (c) decreased in recent years. Regarding (a), a report by the International Organization for Migration concluded that the number of trafficked persons in southeastern Europe who were officially identified and assisted leveled off in the mid-2000s.<sup>96</sup> Market saturation is just one of the reasons why stabilization may occur in any given region. Regarding (b), it is widely reported that trafficking or migration of women from places like Bulgaria and Romania increased in the latter half of the 2000s, whereas in category (c) Albania witnessed a decline in emigration.<sup>97</sup>

In short, changes in the magnitude of trafficking in any part of the world must be documented with the best evidence available; it should not be assumed, as many activists assert, that trafficking is steadily increasing and doing so universally. Some nations, as just noted, appear to have experienced a reduction in trafficking in recent years. Cambodia is another example: A carefully conducted study, funded by the United Nations, reported a decrease in the number of individuals trafficked into the sex trade (from 2,488 in 2002 to 1,058 in 2008) at the same time that the overall number of prostitutes in Cambodia was increasing (from 20,829 in 2002 to 27,925 in 2008).<sup>98</sup> If these figures are even roughly accurate, they suggest that trafficking can decrease over time even where prostitution is

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<sup>94</sup> See, e.g., PETRUNOV, *supra* note 50, at 18; Jo Goodey, *Sex Trafficking in Women from Central and East European Countries: Promoting a ‘Victim-Centered’ and ‘Woman-Centered’ Approach to Criminal Justice Intervention*, 76 FEMINIST REV. 26 (2004); Louise Shelley, *The Trade in People in and from the Former Soviet Union*, 40 CRIME L. & SOC. CHANGE 231, 232 (2003).

<sup>95</sup> TVPA § 103(8)(A), 22 U.S.C. § 7102(8)(A) (2006).

<sup>96</sup> INT’L ORG. FOR MIGRATION, SECOND ANNUAL REPORT ON VICTIMS OF TRAFFICKING IN SOUTH-EASTERN EUROPE 12 (2005).

<sup>97</sup> According to one report, the top three countries of origin of migrant sex workers in Western Europe in 2008 were Romania, Russia, and Bulgaria. TAMPEP, SEX WORK IN EUROPE: A MAPPING OF THE PROSTITUTION SCENE IN 25 EUROPEAN COUNTRIES 20 (2009).

<sup>98</sup> THOMAS M. STEINFATT & SIMON BAKER, MEASURING THE EXTENT OF SEX TRAFFICKING IN CAMBODIA—2008, at 40 (2011). Trafficked victims were defined as individuals who were underage, indebted, or unable to leave the sex trade. *Id.*

increasing.

The numbers problem is also apparent in claims regarding the financial proceeds from trafficking. It is frequently claimed that human trafficking is the second- or third-largest criminal enterprise in the world, after drug trafficking and firearms trading,<sup>99</sup> but it is impossible to substantiate this claim given the clandestine nature of all three phenomena. Estimates of the profits are similarly dubious. For instance, one author boldly states: “Only 4.2 percent of the world’s slaves are trafficked sex slaves, but they generate 39.1 percent of slaveholders’ profits.”<sup>100</sup> To sustain such precise claims about the proportion who are sex slaves and the profits derived from them would require hard evidence on both dimensions—which absolutely does not exist. Similarly, the source for the claim, made a decade ago, that trafficking is a \$5–\$7 billion annual business has been dissected and discredited as “guesswork” by Jahic and Finckenauer.<sup>101</sup> Nevertheless, since then the asserted profits from human trafficking have ranged between \$7 and \$12 billion annually, although some writers put the figure even higher.<sup>102</sup> For the same evidentiary reasons described by Jahic and

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<sup>99</sup> Zhang, *supra* note 57, at 183 (citing several authors who assert that sex trafficking ranks third behind the drug and arms trades).

<sup>100</sup> SIDDHARTH KARA, *SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY* 19 (2010).

<sup>101</sup> Jahic & Finckenauer, *supra* note 59, at 29 (pointing out that “the author of the estimate was operating with a number of unknowns” and relied on several “rough guesses”).

<sup>102</sup> Zhang, *supra* note 57, at 183 (“The US government estimated that human trafficking generated \$9.5 billion annually. [Donna] Hughes claimed that human traffickers around the world made off between \$7 and \$12 billion annually in profit.”). KARA, *supra* note 100, at 19, claims that the exploitation of “trafficked sex slaves generated \$51.3 billion in revenues in 2007”; after costs, the yield was “\$35.7 billion in profits.” His calculations are based on a host of dubious assumptions, which are further undermined by the numerous fallacies elsewhere in his book. For instance, he equates brothel workers with “slaves” and asserts that the “contemporary sex trafficking industry involves the systematic rape, torture, enslavement, and murder of millions of women and children”—offering no sources to support these notions. *Id.* at 13, 15. Similarly, his attempt to discredit the Netherlands’ system of legal prostitution is full of errors. He claims, for instance, that police “rarely” conduct visits to legal brothels in Holland “primarily because of bribes paid to the relevant mayor.” *Id.* at 104. No evidence, aside from the claim of an unnamed “local expert,” is offered as evidence that such bribery takes place. Moreover, *contra* Kara, the Dutch police *routinely* visit legal sex businesses to check each woman’s passport and interview them about their working conditions and links to third parties. (During my research in Amsterdam, I accompanied a team of plainclothes police officers as they made their rounds visiting the window-prostitution rooms in the main red-light district, visits that are conducted frequently.) Kara claims that he saw “pimps” loitering in Amsterdam’s red-light district but does not say how he knew they were pimps. *Id.* at 101–03. He equates foreign prostitutes with trafficking victims and claims that trafficking is pervasive in Amsterdam. *Id.* at 101 (stating that the “majority” of foreign prostitutes are “trafficking victims,” but citing only an unnamed “local trafficking expert”). He then goes on to say that “[d]espite the lack of

Finckenauer, these figures are nothing more than conjecture.

#### IV. TRAFFICKING AND OTHER SEX WORK ARENAS

I noted above how activists and government officials have conflated sex trafficking and prostitution.<sup>103</sup> But they have also attempted to link trafficking to other kinds of commercial sex. In fact, the campaign against trafficking has steadily expanded its targets over time. Prohibitionists now associate sex trafficking with *all* sexual commerce—prostitution, pornography, and strip clubs. Fusing trafficking with other commercial sex practices arguably makes it easier to condemn and criminalize them—which is precisely the prohibitionists’ ultimate objective.

##### A. PORNOGRAPHY

Oppression writers now link trafficking to pornography. For example, Yen writes: “Pornography is often a stepping stone for trafficked women who eventually end up in prostitution.”<sup>104</sup> It is not clear what is meant here by “stepping stone” but it is clear that Yen seeks to associate pornography, prostitution, and trafficking. Donna Hughes’s report for the State Department claims that the producers of pornography “often rely on trafficked victims.”<sup>105</sup> And Patrick Trueman, chief of the Justice

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conclusive data, observations from local experts indicate that, if anything, sex trafficking in Amsterdam increased after brothels were legalized.” *Id.* at 104. Government agencies with expertise on trafficking have reached quite different conclusions. A report by the Ministry of Justice noted that “it is likely trafficking in human beings has become more difficult, because the enforcement of the regulations has increased” since prostitution was legalized in 2000. A.L. DAALDER, MINISTRY OF JUSTICE, PROSTITUTION IN THE NETHERLANDS SINCE THE LIFTING OF THE BROTHEL BAN 84 (2007), *available at* [http://wodc.nl/images/ob249a\\_fulltext\\_tcm44-83466.pdf](http://wodc.nl/images/ob249a_fulltext_tcm44-83466.pdf). And the government’s Rapporteur on Trafficking states:

“It is often said in the media that the lifting of the general ban on brothels [in 2000] has led to more THB [trafficking in human beings]. This is not a correct conclusion. Before the lifting of the general ban on brothels, THB and other (criminal) abuses were taking place in all sectors of prostitution. Some of these sectors are now under control and can be assumed to have rid themselves of their former criminal excesses, or are doing so . . . . It is possible that THB is increasing in the illegal, non-regulated or non-controlled sectors. If this were to be the case, it still cannot be assumed that the extent of THB is now at the same or even above the ‘old’ level it was at before the ban on brothels was lifted. It is in fact likely that this is not the case . . . .”

ANNA G. KORVINUS ET AL., BUREAU OF THE DUTCH NAT’L RAPPOREUR ON TRAFFICKING IN HUMAN BEINGS, TRAFFICKING IN HUMAN BEINGS: THIRD REPORT OF THE DUTCH NATIONAL RAPPOREUR 91 (2005) (emphasis omitted). For a detailed discussion of the Dutch and other legal prostitution systems, see RONALD WEITZER, LEGALIZING PROSTITUTION: FROM ILLICIT VICE TO LAWFUL BUSINESS (2012).

<sup>103</sup> See *supra* text accompanying notes 26–35.

<sup>104</sup> Yen, *supra* note 36, at 673.

<sup>105</sup> DONNA HUGHES, THE DEMAND FOR VICTIMS OF SEX TRAFFICKING 26 (2005).

Department's obscenity unit from 1988 to 1992 and now legal counsel for the Family Research Council, provided written testimony at a Congressional hearing, claiming that "pornography is closely linked to an increase in prostitution, child prostitution, and human trafficking."<sup>106</sup> Echoing this notion at the hearing was Senator Sam Brownback, who declared that "we are seeing people trafficked into the pornography industry for porn."<sup>107</sup> Melissa Farley adds:

Pornographers are indistinguishable from other pimps. Both exploit women and girls' economic and psychological vulnerabilities and coerce them to get into and stay in the industry. Both take pictures to advertise their "products," suggest specific abuses for johns to perpetrate against women, and minimize the resulting harms.<sup>108</sup>

Or consider Catharine MacKinnon's tautological reasoning and conflation of pornographic materials with persons:

[T]he pornography industry, in production, creates demand for prostitution, hence for trafficking, because it is itself a form of prostitution and trafficking.

....

[E]ach time the pornography is commercially exchanged, the trafficking continues as the women and children in it are transported and provided for sex, sold, and bought again. Doing all these things for the purpose of exploiting the prostitution of others—which pornography intrinsically does—makes it trafficking in persons.<sup>109</sup>

In 2007, over fifty major players in the anti-pornography movement signed a letter to President Bush, urging him to intensify enforcement against pornography. The signatories were alarmed at the "explosive increase in the availability of pornography," which they associated with a litany of dangers: "trafficking in women and children" is "linked to the spread of obscenity" and pornography "corrupts children, ruins marriages, contributes to sex crimes against children and adults, and undermines the right of Americans to live in a decent society."<sup>110</sup> The letter demanded

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<sup>106</sup> *Obscenity Prosecution and the Constitution: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Prop. Rights of the Comm. on the Judiciary*, 109th Cong. 31 (2005) (statement of Patrick Trueman, Senior Legal Counsel, Family Research Council).

<sup>107</sup> *Id.* at 11. Senator Brownback cited, as evidence, an article in the *Los Angeles Times*, but that article made no mention of pornography, stating instead that some individuals in the Los Angeles area had been trafficked into prostitution. *Id.*; Steve Hymon, *Probes Link Human Trafficking to Sex, Slave Trade*, L.A. TIMES, Mar. 5, 2005, at B4.

<sup>108</sup> Farley, *Prostitution, Trafficking, and Cultural Amnesia*, *supra* note 13, at 126–27.

<sup>109</sup> Catharine A. MacKinnon, *Pornography As Trafficking*, 26 MICH. J. INT'L L. 993, 999, 1004 (2005).

<sup>110</sup> Letter from Robert Peters, Pres. of Morality in Media, et al., to President George W. Bush (Sept. 10, 2007), available at [http://www.moralityinmedia.org/full\\_article.php?article\\_no=145](http://www.moralityinmedia.org/full_article.php?article_no=145). The letter was signed by, among others, Donna Hughes, Patrick Trueman, Morality in Media, Family Research Council, Concerned Women for America, Focus on the Family, American Family Association, American Decency Association, and Citizens for

vigorous and expanded prosecution of pornography cases and asked Bush “to make fighting obscenity one of your top priorities.”<sup>111</sup> In the mid-2000s, the Justice Department launched a new crackdown on pornography, including greater targeting of adult pornography (previous practice centered on child porn).<sup>112</sup> The Department also created a new Obscenity Prosecution Task Force alongside the existing Child Exploitation and Obscenity Unit.<sup>113</sup>

## B. STRIP CLUBS

Prohibitionists have also sought to link trafficking to strip clubs. Sheila Jeffreys claims that “trafficking in women by organized crime groups has become a common form of supply of dancers. All over Europe and North America women and girls are brought into the clubs by deception, by force or, initially, by consent.”<sup>114</sup> No evidence is offered to support this sweeping charge. Donna Hughes’s report on trafficking (funded by the State Department) echoes this claim—that many women are trafficked to perform at strip clubs—despite the fact that Hughes found only six cases of this in the U.S. between 1998 and 2005.<sup>115</sup> Hughes maintains that strip clubs are “attractive to some criminals because they assume that since stripping is legal they will be less likely to be caught trafficking women into these markets.”<sup>116</sup> An alternative and more plausible argument is that most club owners would be averse to hiring trafficked or coerced dancers, for fear of attracting attention from law enforcement and perhaps losing their business license.<sup>117</sup> An interest in maintaining a lawful business is evident in the security measures taken by strip club owners to deal with disorderly customers and thwart criminal activity in the vicinity of the

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Community Values.

<sup>111</sup> *Id.*

<sup>112</sup> Julie Kay, *U.S. Attorney’s Porn Fight Gets Bad Reviews*, DAILY BUS. REV., Aug. 30, 2005, at A1, available at <http://www.law.com/jsp/article.jsp?id=1125318960389>.

<sup>113</sup> Press Release, U.S. Dep’t of Justice, Obscenity Prosecution Task Force Established to Investigate, Prosecute Purveyors of Obscene Materials (May 5, 2005); see also Richard B. Schmitt, *U.S. Plans To Escalate Porn Fight*, L.A. TIMES, Feb. 14, 2004, at A1.

<sup>114</sup> SHEILA JEFFREYS, *THE INDUSTRIAL VAGINA: THE POLITICAL ECONOMY OF THE GLOBAL SEX TRADE* 93 (2009).

<sup>115</sup> HUGHES, *supra* note 105, at 22. Hughes received a \$108,478 grant from the State Department to write this report. ATT’Y GEN., *supra* note 74, at 33.

<sup>116</sup> HUGHES, *supra* note 105, at 22.

<sup>117</sup> In interviews with seventy-two Mexican dancers working at strip clubs in San Diego, only one of them reported that she had been coerced into this work. Two-thirds sought out this work by themselves, while 27% were introduced to it by male or female friends. SHELDON ZHANG, *SEX TRAFFICKING IN A BORDER COMMUNITY: A FIELD STUDY OF SEX TRAFFICKING IN TIJUANA, MEXICO* 140 (2010).

club.<sup>118</sup>

Another attempt, by Farrell et al., to estimate the number of trafficking victims working in U.S. strip clubs is the following:

We made an *educated guess* that prostitution occurs in a minimum of 25 percent of strip clubs, based on *anecdotal evidence* from qualitative accounts of strip clubs and *news accounts of occasional* police arrests for prostitution in such clubs . . . . [W]e . . . rely upon Raphael and Ashley (2008) to assume that 35 percent of those providing prostitution in strip clubs are trafficked (3,028 x .35). Thus, we estimate that there are 1,060 sex trafficking victims in strip clubs throughout the United States.<sup>119</sup>

The authors estimated that 606 strip clubs “house prostitution,” reported that an average of twenty women work at each club (a total of 12,120 dancers), and “estimate[d] conservatively” that 25% of them sell sex “within the clubs”—yielding the 3,028 figure.<sup>120</sup> These are huge assumptions, based on nothing more than guesswork. “Anecdotal evidence” and “occasional” news reports are hardly sufficient to justify the claim that prostitution occurs in a minimum of one-quarter of U.S. strip clubs, just as there is no basis for the estimate that at least one-quarter of the dancers in these clubs sell sex. Moreover, there are many problems with the use of the Raphael and Ashley report cited: (a) it does not address criminal trafficking in persons (despite its title)—instead examining recruitment and current involvement in commercial sex, (b) nowhere does the Raphael and Ashley report state that 35% of those providing prostitution in strip clubs are trafficked, and (c) their report is based on interviews with 100 women working in the sex industry in a single city (Chicago), half of whom were accessed at a Christian-run exit agency—hardly a representative sample and likely biased by the fact that these respondents were clients of a court-mandated rehabilitation program.<sup>121</sup> In sum, the Farrell et al. report’s conclusions are entirely lacking in supporting evidence; instead they are based on a set of conjectures and on another report (Raphael and Ashley) that is misrepresented by the authors and is

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<sup>118</sup> A major study found that crime was more prevalent in the immediate vicinity of bars and gas stations than in the area near strip clubs, most likely because of the security measures taken by the strip clubs. Daniel Linz et al., *An Examination of the Assumption that Adult Businesses are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina*, 38 LAW & SOC’Y REV. 69, 99 (2004). See also the related study: Bryant Paul, Daniel Linz & Bradley Shafer, *Government Regulation of “Adult” Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL’Y 355 (2001).

<sup>119</sup> FARRELL ET AL., *supra* note 70, at 85 (emphasis added).

<sup>120</sup> *Id.*

<sup>121</sup> JODY RAPHAEL & JESSICA ASHLEY, DOMESTIC SEX TRAFFICKING OF CHICAGO WOMEN AND GIRLS 3 (2008).

itself flawed due to its highly skewed sample.<sup>122</sup> Therefore, the estimate of “1,060 sex trafficking victims in strip clubs” is totally lacking in credibility.

Linking strip clubs to trafficking may lead to increased police investigations in the future.<sup>123</sup> In Illinois, activists successfully lobbied the state legislature to pass the Predator Accountability Act in 2006, which allows sex workers to seek civil damages against individuals and businesses that can be tied to their involvement in sexual commerce, even if no criminal charges have been made.<sup>124</sup> The most radical feature of this law is the liability it imposes on businesses. A strip club, escort agency, website, or massage parlor is punishable if it “recruits, profits from, or maintains the victim in any sex trade act,” irrespective of whether the “victim” was coerced.<sup>125</sup> In addition, a business that “knowingly advertises or publishes advertisements for purposes of recruitment into sex trade activity” is punishable under this law.<sup>126</sup> The assets of such businesses make them lucrative targets for plaintiffs, and the statute is clearly motivated by prohibitionists’ interest in putting a dent in the sex industry.

#### V. TARGETING CUSTOMERS

Over time, the focus of the anti-prostitution campaign has expanded to include prostitutes’ customers, who are seen as the root cause of trafficking.<sup>127</sup> Today, customers are being vilified as much as traffickers. One writer, for example, declares that clients “are not just naughty boys who need their wrists slapped. They could be more accurately described as predators.”<sup>128</sup> A recent government-funded report on clients of prostitutes

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<sup>122</sup> Jody Raphael is a staunch advocate of the oppression paradigm. See my critique of her writings: Weitzer, *Flawed Theory*, *supra* note 10, at 939.

<sup>123</sup> In Mumbai, India, in 2005 the government banned bar dancing, where women dance seductively but fully clothed at clubs. A survey of 500 dancers found that none had been trafficked, yet the 2005 ban was based in part on the claim that trafficking was rampant. As a result of the ban, 75,000 dancers were thrown out of work. Prabha Kotiswaran, *Labors in Vice or Virtue? Neo-Liberalism, Sexual Commerce, and the Case of Indian Bar Dancing*, 37 J.L. & Soc’y 105, 110 (2010).

<sup>124</sup> 740 ILL. COMP. STAT. 128/1, /5 (2010).

<sup>125</sup> *Id.* at 128/15(b)(1).

<sup>126</sup> *Id.* at 128/15(b)(3). See the discussion of the statute in Shay-Ann Heiser Singh, *The Predator Accountability Act*, 56 DEPAUL L. REV. 1035 (2007). To date, no lawsuits have been filed under the act. Meribah Knight, *Campaign Against Sex Trafficking is Gaining*, N.Y. TIMES, Aug. 13, 2011, at 21A (Chicago ed.).

<sup>127</sup> The very title of Hughes’s report, *The Demand for Victims of Sex Trafficking*, seems to imply that customers are intentionally seeking sex with trafficked persons. HUGHES, *supra* note 105.

<sup>128</sup> Annie Brown, *Sex Industry in Scotland: Inside the Deluded Minds of the Punters*, DAILY REC. (Apr. 28, 2008), <http://www.dailyrecord.co.uk/news/scottish-news/2008/04/28/sex-industry-in-scotland-inside-the-deluded-minds-of-the-punters-86908-20397545> (quoting

in Scotland proclaims that “prostitution is best understood as a transaction in which there are two roles: exploiter/predator and victim/prey”; the report advocates putting customers “in the same category as rapists, pedophiles, and other social undesirables.”<sup>129</sup> The authors represent two staunch anti-prostitution organizations, which guaranteed that their report would reflect the oppression paradigm exclusively.<sup>130</sup>

Oppression writings present the customers of prostitutes (whether trafficked or not) in a one-dimensional, simplistic manner. For example, Yen imagines that “Johns feel their gender and money entitle them to have sex whenever, wherever, however, and with whomever they wish.”<sup>131</sup> This sweeping broadside is hardly data-driven. In fact, academic research documents tremendous variation among clients on key axes: demographic background, motivation, and behavior. There are several reasons why customers buy sexual services, and clients vary in the kinds of services they seek and in the settings and conditions under which they engage in this activity.<sup>132</sup> Moreover, research comparing clients with the larger male population finds few differences between them.<sup>133</sup> There is no evidence that most of them, as claimed, feel entitled to have sex “whenever, wherever, however, and with whomever they wish.”<sup>134</sup> Some men—both clients and other men—do indeed feel some sense of sexual entitlement,<sup>135</sup> but Yen’s all-encompassing claim is a caricature. Similarly, the notion that most clients are violent predators is not borne out empirically. Some act violently and some seek out underage prostitutes, but abusive clients appear

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Melissa Farley).

<sup>129</sup> MACLEOD ET AL., *supra* note 23, at 27, 30. The report was funded by the Glasgow City Council, the Scottish Government Equality Unit, and the Glasgow Health Board.

<sup>130</sup> The introduction to the report, for example, declares that “misogyny [stimulates and sustains prostitution as a social institution . . . . Acceptance of prostitution is one of a cluster of harmful attitudes that encourage and justify violence against women.” *Id.* at 5.

<sup>131</sup> Yen, *supra* note 42, at 669.

<sup>132</sup> Martin A. Monto, *Prostitutes’ Customers: Motives and Misconceptions*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* 233, 244–50 (Ronald Weitzer ed., 2d ed. 2010) [hereinafter Monto, *Prostitutes’ Customers*]; TEELA SANDERS, *PAYING FOR PLEASURE: MEN WHO BUY SEX* 38 (2008); John Lowman & Chris Atchison, *Men Who Buy Sex: A Survey in the Greater Vancouver Regional District*, 43 *CAN. REV. SOC. & ANTHROPOLOGY* 281, 288 (2006); Martin A. Monto & Nick McRee, *A Comparison of the Male Customers of Female Street Prostitutes with National Samples of Men*, 49 *INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 505 (2005); Martin A. Monto, *Female Prostitution, Customers, and Violence*, 10 *VIOLENCE AGAINST WOMEN* 160, 171 (2004).

<sup>133</sup> Monto & McRee, *supra* note 132.

<sup>134</sup> Yen, *supra* note 36, at 669.

<sup>135</sup> See, e.g., Monto, *Prostitutes’ Customers*, *supra* note 132; Eugene J. Kanin, *Date Rapists: Differential Sexual Socialization and Relative Deprivation*, 14 *ARCHIVES SEXUAL BEHAV.* 219 (1985).

to be in the minority.<sup>136</sup> In one study, only 8% of arrested customers had a previous conviction for a violent or sexual offense.<sup>137</sup> Some clients find distasteful the idea of buying sex from anyone who is vulnerable or desperate and say that if they met a trafficked victim they would try to help her escape or contact the police.<sup>138</sup>

A staple of the oppression literature is that “male demand” fuels sex trafficking. It goes without saying that consumer demand is a necessary condition for the survival of any market. What is missing in the “male demand” explanation is consideration of other factors that might lead people to move away from home and relocate in a place where they engage in sexual commerce. Some of these “push” and “pull” factors were sketched in Part III.A above. What is important here is that the “demand” thesis has been used quite successfully by advocates in lobbying government officials to target clients under trafficking statutes. The 2005 Trafficking Victims Prevention Reauthorization Act (TVPRA) authorized \$25 million for fiscal years 2006 and 2007 to state and local police departments for expanded targeting of those who “purchase . . . commercial sex acts.”<sup>139</sup> Efforts to link customers to trafficking and to fund local enforcement efforts against clients, as the TVPRA does, signal a broader shift toward federalizing prostitution enforcement, traditionally the domain of local authorities.

Sweden’s recent experience in combating “the demand” has served as the inspiration for changes in the law or enforcement practices in some other countries, including the United States.<sup>140</sup> It is therefore worth taking a

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<sup>136</sup> There is “no evidence to suggest that more than a minority of customers assault prostitutes” and “most clients do not hold views that justify violence against prostitutes.” Monto, *Prostitutes’ Customers*, *supra* note 132, at 243–44; *see also* Lowman & Atchison, *supra* note 132, at 290.

<sup>137</sup> BELINDA BROOKS-GORDON, *THE PRICE OF SEX: PROSTITUTION, POLICY AND SOCIETY* 198 (2006).

<sup>138</sup> BRIDGET ANDERSON & JULIA O’CONNELL DAVIDSON, *IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY* 24–25 (2003); *see also* SANDERS, *supra* note 132, at 53–55.

<sup>139</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 204(a)(1)(B)–(C), 119 Stat. 3558, 3571 (2005).

<sup>140</sup> After the Swedish law (described below) went into effect in January 1999, several other countries enacted similar if not identical measures. Finland in 2006 outlawed the act of buying sex from a trafficked woman, and in 2009 Norway and Iceland passed legislation quite similar to Sweden’s. In the same year, England and Wales criminalized the act of buying sex from someone who had been coerced into prostitution by a third party, a strict liability offense. In each country, advocates of the measures invoked the Swedish system as a model, and in some cases Swedish advocates personally lobbied politicians in these other nations. Wallace provides some examples of this cross-fertilization and points out that the “reason that so much is heard about the Swedish model internationally is that the Swedish Government is particularly eager to promote it to other countries as the panacea to

brief look at the outcomes in Sweden. In 1998, Parliament passed unprecedented legislation penalizing the buyers of sexual services but not the sellers.<sup>141</sup> After just a few years in operation, the law was proclaimed a resounding success by activists and by the government.<sup>142</sup> Yet several independent analysts, who have examined the effects of Sweden's crackdown, conclude that it has mainly driven prostitution underground, rendering the activity riskier.<sup>143</sup> And the National Board of Health and Welfare, in three evaluations of the law, concluded that it has not achieved its objectives. The Board's 2007 report states that street prostitution is on the rise after an initial decline and that many other prostitutes use the internet and mobile phones to arrange meetings.<sup>144</sup> Yet the Swedish government continues to claim that the law has reduced both prostitution and trafficking.<sup>145</sup>

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prostitution and to urge its adoption." BOB WALLACE, OFFICE OF THE PROSTITUTION LICENSING AUTH., (Queensland, Austl.); THE BAN ON PURCHASING SEX IN SWEDEN: THE SO-CALLED "SWEDISH MODEL" 3 (undated), available at <http://www.pla.qld.gov.au/Resources/PLA/reportsPublications/documents/THE%20BAN%20ON%20PURCHASING%20SEX%20IN%20SWEDEN%20-%20THE%20SWEDISH%20MODEL.pdf>.

<sup>141</sup> A Swedish government report describes the logic behind the law:

[Prostitution] is officially acknowledged as a form of exploitation of women and children and constitutes a significant social problem, which is harmful not only to the individual prostituted woman or child, but also to society at large. [C]ombating prostitution and human trafficking for sexual purposes is central to Sweden's goal of achieving equality between women and men . . . . [G]ender equality will remain unattainable as long as men buy, sell and exploit women and children by prostituting them . . . . Prostituted persons are considered the weaker party, exploited by both the procurers and the buyers . . . . By adopting [the legislation] Sweden has given notice to the world that it regards prostitution as a serious form of oppression of women, and that efforts must be made to combat it.

SWED. MINISTRY OF INDUS., EMP'T & COMMC'NS, PROSTITUTION AND TRAFFICKING IN WOMEN 1 (2004), available at <http://www.innovations.harvard.edu/cache/documents/1310/131041.pdf>.

<sup>142</sup> Gunilla Ekberg, *The Swedish Law that Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings*, 10 VIOLENCE AGAINST WOMEN 1187 (2004). Ekberg served as an advisor on prostitution in the Swedish government and is now co-executive director of CATW-International, based in Brussels.

<sup>143</sup> See Arthur Gould, *The Criminalization of Buying Sex: The Politics of Prostitution in Sweden*, 30 J. SOC. POL'Y 437, 445 (2001); Jane Scoular, *Criminalising Punters: Evaluating the Swedish Position on Prostitution*, 26 J. SOC. WELFARE & FAM. L. 195, 199–200 (2004); Susanne Dodillet & Petra Östergren, *The Swedish Sex Purchase Act: Claimed Success and Documented Effects* 19 (Mar. 3–4, 2011) (conference paper), available at <http://gup.ub.gu.se/records/fulltext/140671.pdf>; Victor Clausen, *An Assessment of Gunilla Ekberg's Account of Swedish Prostitution Policy* (Jan. 2007) (unpublished paper) (on file with author).

<sup>144</sup> ANNIKA ERIKSSON & ANNA GAVANAS, SWED. MINISTRY OF HEALTH & SOC. AFFAIRS, NAT'L BD. OF HEALTH & WELFARE, PROSTITUTION IN SWEDEN 2007, at 28 (2008).

<sup>145</sup> The Swedish Ministry of Justice reached this conclusion but presented little documentation to support it: "Our assessment shows that the ban on the purchase of sexual

If claims that prostitution and trafficking in Sweden have decreased are unsubstantiated, supporters of the law also claim that it has had a salutary symbolic impact: Yen believes that “criminalizing the purchase of sex has positively influenced the cultural values of Swedes . . . . [A] generation of young Swedes has grown up indoctrinated with the belief that prostitution is not socially desirable and is innately harmful to women . . . .”<sup>146</sup> Yet this symbolic dividend seems questionable in light of a commission’s conclusion that Swedish men’s attitudes toward women have changed little in recent years.<sup>147</sup>

## VI. CONCLUSION

Popular in some academic circles, the oppression paradigm also predominates in the media, in popular discourse, and in legislation in many countries. The mass media are saturated with stories highlighting prostitution’s worst cases, and news reports typically center on themes of violence, pimping, crime, disease, and immorality.<sup>148</sup> Regarding trafficking, a recent *Washington Post* editorial typifies the media’s widespread endorsement of the dominant discourse: “Thanks to a dedicated band of human rights advocates who have spread the gut-wrenching stories of victims, trafficking is understood today as a global phenomenon exceeding 20 million cases each year . . . .”<sup>149</sup> (The editorial writer seems oblivious to the investigative reporting of one of the *Post*’s own reporters, which cast doubt on both the numbers and those who propagate them.<sup>150</sup>) A content analysis of 2,462 newspaper articles on trafficking concluded that the media privilege victimization stories, ignore root causes, and increasingly present the problem as a major organized crime operation and even as a threat to national security.<sup>151</sup> Another content analysis of newspaper coverage of human trafficking in Britain, Canada, and the United States, drawing on 837 articles, found that a very narrow range of

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services has had the intended effect and is an important instrument in preventing and combating prostitution.” SWED. MINISTRY OF JUSTICE, *THE BAN ON THE PURCHASE OF SEXUAL SERVICES: AN EVALUATION 1999–2008*, at 40 (2010).

<sup>146</sup> Yen, *supra* note 42, at 679.

<sup>147</sup> Karen Leander, *Reflections on Sweden’s Measures Against Men’s Violence Against Women*, 5 *SOC. POL’Y & SOC’Y* 115, 120 (2006); *see also* Dodillet & Östergren, *supra* note 143, at 20 (reviewing Swedish public opinion of the law).

<sup>148</sup> Helga Kristin Hallgrimsdottir, Rachel Phillips & Cecilia Benoit, *Fallen Women and Rescued Girls: Social Stigma and Media Narratives of the Sex Industry in Victoria, B.C. from 1980–2005*, 43 *CAN. REV. SOC. & ANTHROPOLOGY* 265, 269 (2006).

<sup>149</sup> Editorial, *Name, Shame—and Prosecute*, *WASH. POST*, June 28, 2011, at A14.

<sup>150</sup> *See* Markon, *supra* note 57.

<sup>151</sup> Amy Farrell & Stephanie Fahy, *The Problem of Human Trafficking in the U.S.: Public Frames and Policy Responses*, 37 *J. CRIM. JUST.* 617, 621–22 (2009).

viewpoints was presented; that most stories relied exclusively on official sources; and that journalists rarely questioned the idea that the best way to counter trafficking is to build on current policy.<sup>152</sup> Simplistic claims and messages are also evident in documentaries on trafficking (e.g., MSNBC's *Sex Slaves in America*) and feature films (e.g., *Taken*).<sup>153</sup> The net effect of media coverage has been to marginalize alternative viewpoints and critiques of government policy, while legitimizing the views of anti-prostitution activists.

If government officials in most nations view prostitution through the oppression lens, the paradigm has been occasionally questioned in official circles. In the debate on a legalization bill in Western Australia in 2007–2008, the state parliament voted to legalize prostitution because of its harm-reduction potential.<sup>154</sup> In the course of this debate, John Hyde, Parliamentary Secretary to the Attorney General of Western Australia, contested the standard prohibitionist claim that legalization would increase the amount of trafficking and prostitution: “New Zealand and Australia have a low incidence of sex trafficking . . . . The size of the Australian sex industry has not expanded in the states and territories that have decriminalised or legalised the sex industry.”<sup>155</sup> Hyde also presented a detailed critique of other aspects of the oppression paradigm and of the Swedish system whereby clients exclusively are criminalized.<sup>156</sup>

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<sup>152</sup> Girish J. Gulati, *Media Representations of Human Trafficking in the United States, Great Britain, and Canada*, 10, 16 (2010) (unpublished paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1633574](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633574).

<sup>153</sup> *TAKEN* (20th Century Fox Home Entertainment 2009).

<sup>154</sup> The bill did not become law because the ruling Labor Party lost power in 2008 prior to official proclamation. The current Liberal-National Party coalition government is in the process of drafting a new bill that would legalize certain kinds of prostitution but is more limited than the previous Labor Party bill.

<sup>155</sup> WA, *Parliamentary Debates, Legislative Assembly*, 20 Sept. 2007, 5504 [hereinafter *Parliamentary Debates*] (John Hyde).

<sup>156</sup> Hyde began by refuting claims in an article by Janice Raymond:

Raymond also said in 2003 that legalisation and/or decriminalisation of prostitution is allegedly a gift to pimps, traffickers and the sex industry. The reality is that Australia does not have a culture of pimps involved in the sex industry [where it is legal] . . . . Raymond also claims that legalisation and/or decriminalisation of prostitution does not control the sex industry; it expands it. The reality is that the size of the Australian sex industry has not expanded in the states and territories that have decriminalised or legalised the sex industry . . . . Another claim is that legalisation and/or decriminalisation of prostitution increases clandestine, hidden, illegal and street prostitution . . . . New Zealand . . . is the only country that has used the decriminalised model that we are adapting in [Western Australia]—it created a good example of the outcomes of decriminalisation. The only authoritative study of New Zealand has shown that in its early stages there has been no increase in the number of street-based sex workers since the decriminalisation of the sex industry . . . . Another of Raymond's claims is that legalisation and/or decriminalisation of prostitution increases the demand for prostitution. She says it boosts the motivation of men to buy women for sex in a much wider and more permissible range of

In a successful challenge to the constitutionality of Canada's three main prostitution laws in 2010, the Superior Court of Ontario downgraded the testimony of three state's witnesses (Melissa Farley, Janice Raymond, and Richard Poulin), who testified in support of the existing laws, because of questions about their objectivity. In addition to ruling that the prostitution laws were unconstitutional because they had the effect of further endangering prostitutes, the judge stated:

I found the evidence of Dr. Melissa Farley to be problematic . . . . [H]er advocacy appears to have permeated her opinions. For example, Dr. Farley's unqualified assertion in her affidavit that prostitution is inherently violent appears to contradict her own findings that prostitutes who work from indoor locations generally experience less violence. Dr. Farley's choice of language is at times inflammatory and detracts from her conclusions. For example, comments such as, "prostitution is to the community what incest is to the family" and "just as pedophiles justify sexual assault of children . . . men who use prostitutes develop elaborate cognitive schemes to justify purchase and use of women" make her opinions less persuasive. Dr. Farley stated during cross-examination that some of her opinions on prostitution were formed prior to her research, including "that prostitution is a terrible harm to women, that prostitution is abusive in its very nature, and that prostitution amounts to men paying a woman for the right to rape her." Accordingly, for these reasons, I assign less weight to Dr. Farley's evidence. Similarly, I find that Drs. Raymond and Poulin were more like advocates than experts offering independent opinions to the court. At times,

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socially acceptable settings. Again, that is wrong . . . . Raymond [also claims] that legalisation and/or decriminalisation of prostitution does not promote women's health. Nothing could be further from the truth. Most studies in Australia have shown that sex workers enjoyed better sexual health than the general community and much lower rates of HIV-AIDS and sexually transmitted diseases.

*Id.* at 5504–05. The article to which Hyde is referring is Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 J. TRAUMA PRAC. 315 (2003). A government commission reported that "the number of sex workers in New Zealand has not increased as a result of passage of the [2003 Prostitution Reform Act]." PROSTITUTION LAW REVIEW COMM., REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003, at 29, 30–38 (2008); see also Gillian M. Abel, Lisa J. Fitzgerald & Cheryl Brunton, *The Impact of Decriminalisation on the Number of Sex Workers in New Zealand*, 38 J. SOC. POL'Y 515 (2009) (reporting a carefully conducted study that concurs with the government report).

Hyde also challenged claims about the success of Sweden's customer-targeted approach. In response to the opposition Liberal Party's use of Gunilla Ekberg's account of the "success" of Sweden's law (Ekberg, *supra* note 142), Hyde countered with Victor Clausen's research (Clausen, *supra* note 143):

An examination [by Clausen] of 11 of the specific claims that Ms Ekberg has reported shows that much of the article is a presentation of ideological positions. I have no truck with such people who are putting an ideological or a moral position, because such an argument should have population and health considerations, police support and objective information. The main failure in Ms Ekberg's position is that she is not able to specify any sources for her claims.

Parliamentary Debates, *supra* note 155, at 5505. For further analysis of the Western Australia debate, see Ronald Weitzer, *Legalizing Prostitution: Morality Politics in Western Australia*, 49 BRIT. J. CRIMINOLOGY 88 (2009).

they made bold, sweeping statements that were not reflected in their research.<sup>157</sup>

Prohibitionism and, by implication, the oppression paradigm have been challenged by some international bodies as well. In 2007, for example, the Parliamentary Assembly of the Council of Europe passed a resolution on prostitution that included, *inter alia*, the following principles:

Concerning voluntary adult prostitution, Council of Europe member states . . . must avoid double standards and policies which force prostitutes underground or under the influence of pimps, which only make prostitutes more vulnerable; instead they should seek to empower them, in particular by: . . . refraining from criminalising and penalising prostitutes and developing programmes to assist prostitutes to leave the profession should they wish to do so; . . . ensuring prostitutes have access to safe sexual practices and enough independence to impose these on their clients; . . . respecting the right of prostitutes who freely choose to work as prostitutes to have a say in any policies at national, regional and local level concerning them . . . .<sup>158</sup>

These are three important examples of state and international authorities rejecting—explicitly or implicitly—the oppression framework and the specific claims of its advocates.

Prostitution varies tremendously from place to place and in how it is practiced, organized, and experienced by participants. The same diversity characterizes the arena of trafficking and assisted migration. Migration patterns range from highly coercive and exploitative to cooperative, consensual, and mutually beneficial agreements between migrants and third parties. Some brokers are relatives, friends, or associates who recruit workers and facilitate migration—individuals who have a rather different relationship with workers than those who use force or deception. Such complexities, nuances, and variations are glossed over in the oppression paradigm, a perspective that disregards a wealth of social science research on the sex industry. It is imperative that future anti-trafficking laws be solidly evidence-based, utilizing the best social science data available, rather than being grounded—as most policy has been to date—in a monolithic and simplistic portrayal of sexual commerce.

Instead of funding organizations whose central goal is elimination of the entire sex industry—as the U.S. government has done—or launching crackdowns on currently legal forms of commercial sex—as some activists have demanded—a more sophisticated, evidence-based approach would focus state resources on identifying and assisting victims who have been

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<sup>157</sup> *Bedford v. Canada* (2010), 102 O.R. 3d 321, paras. 353–57 (Can. Ont. Sup. Ct. J.) (striking down the criminal code sections that outlawed keeping a bawdy house, living on the avails of prostitution, and communicating in a public place for the purpose of engaging in prostitution). The ruling is currently being appealed by the government.

<sup>158</sup> PARLIAMENTARY ASSEMBLY, COUNCIL OF EUR., RESOLUTION 1579: PROSTITUTION: WHICH STANCE TO TAKE? (2007).

trafficked by force, fraud, or coercion, and on prosecuting the perpetrators of such crimes. This means intensified targeting of unfree labor in agriculture, domestic service, and industry in addition to the sex trade, as trafficking in the former arenas appears to be much more sizeable than in the latter.<sup>159</sup> In addition, governments and activists should discontinue the fruitless practice of “estimating” the number of victims—numbers that vary wildly, are intrinsically unverifiable, and seem to be propagated for alarmist purposes.

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<sup>159</sup> See *supra* note 69.

