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***Trafficking in Persons:
How America Exploited the Narrative of Exploitation***

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Trafficking in Persons: How America Exploited the Narrative of Exploitation^{a1}

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There is still deep disagreement over the meaning of the term trafficking in persons, despite having had legal definitions for it for nearly 20 years. These disagreements continue to persist despite extensive scholarly attention and numerous calls to come to consensus for purposes of research and distribution of funding. This article offers two reasons for this endurance: First, trafficking is not an act in itself but a concept created to address social ills. It is not static, and the creative process continues to reshape what it means. Second, groups have been able to capitalize on the linguistic ambiguity to achieve certain political goals. This has provided incentive for them to keep using the language in contradictory ways. This article examines those incentives and the ways in which law has contributed to their creation. It reviews the history of the creation of anti-trafficking narratives and how they've been used to obscure potentially less palatable criminal and anti-immigration agendas. Given the expansiveness of U.S. global influence, the appearance of the categories "trafficked" and "not-trafficked" in its domestic and foreign policy has impacted not only legal landscapes but the ways in which groups of people are actually perceived and behave. U.S. laws and the narratives they reflect have resulted in activities that have harmed rather than benefited the marginalized groups often promoted as beneficiaries of anti-trafficking work. The purpose of the article is to clearly illustrate these processes in order to be able to identify and anticipate their effects in future initiatives. In that context it also draws attention to the construction of a new emerging trafficking narrative around the U.S.-Mexico border and its use as justification for punitive criminal law and the building of a wall to reduce migration.

INTRODUCTION

U.S. policymakers have been addressing the phenomenon known as *trafficking in persons* for nearly two decades now, yet there is still deep disagreement over the meaning of the term.¹ International organizations, government bodies and advocates have used the term to describe

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¹ See Jennifer M. Chacon, *Human Trafficking, Immigration Regulation, and Subfederal Criminalization*, 20 *New Crim. L. Rev.* 96, 97 (2017)[hereinafter Chacon 2017]: "There is deep disagreement over the meaning of the term "human trafficking" itself. This definitional uncertainty is reflected in the varying legal instruments and in the antitrafficking strategies pursued by various public and private actors.

forced prostitution, all prostitution, child marriage, child labor, sweatshop labor, smuggling, child sexual abuse, child sexual exploitation, chattel slavery, familial debt bondage, indentured servitude, and domestic work, among other things.² In contrast, it is rarely depicted in popular media as anything but the paradigmatic image of the kidnapped girl, forced into commercial sex, physically abused and desperate to escape her captor.³ Trafficking appears to stand for everything and nothing all at once,⁴ and I argue that various actors have been able to capitalize on this imprecision to further their own political agendas. In particular, switching between the legal and non-legal uses of the term has enabled anti-trafficking proponents to use broad human rights language to lobby for policies that have politically unpalatable objectives at their core. This article examines that slipperiness and the ways in which it has been used to further restrictive criminal and immigration policies. The purpose of the article is to clearly identify how this rhetoric has operated on law in order to provide a tool to understand its potential effect on current and future anti-trafficking initiatives proposed.

I argue that the malleability of the term “trafficking” stems from it having had no fixed meaning prior to its definition in law. Although it was used in ways that suggested it referred to a phenomenon that actually occurred in the world, the term was primarily used to *evoke a feeling* or trigger a response. Anxieties around different waves of global movement gave rise to various stories about how women were being lured away abroad to prostitution and young children were rampantly being kidnapped and abused.⁵ The terms used when these stories were told were “White Slavery” and “Trafficking” and a cache of narratives and representations built up in association with these words. The stories were largely untrue, or exceedingly rare, but their truth was never the point; they were used to evoke fear of something that *could* happen, not to describe something that did.⁶ Advocates drew on this imagery to urge fellow citizens to act and to lobby politicians for protective immigration, criminal and prostitution-related laws. When a series of laws were finally created in the early 2000s in response, it was those laws that truly defined trafficking as a

² See Jennifer M. Chacon *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *Fordham L. Rev.* 2977, 2982-2987 (2006)[hereinafter Chacon 2006]. See also: Lisa Kane Harnett, *Forced Marriage: A Form of Modern-day Slavery*, Human Trafficking Search (last visited Feb 25, 2019), http://humantraffickingsearch.org/forced_marriage/; Kimberly Mehlman-Orozco, *Consenting prostitutes or trafficked victims?*, *The Baltimore Sun*, June 19, 2016, <https://www.baltimoresun.com/news/opinion/oped/bs-ed-sex-trafficking-20160619-story.html>; *Indian Workers Win \$14m in US Labor Trafficking Case*, *Aljazeera America*, Feb 19, 2015, <http://america.aljazeera.com/articles/2015/2/19/indian-workers-win-14-million-in-us-labor-trafficking-case.html>; Lucilia Pellettieri, *Traumatized in Sweatshops, Trafficked People Often Find Little Help After Rescue or Escape*, *Global Press Journal*, Nov. 8, 2015, <https://globalpressjournal.com/americas/argentina/traumatized-in-sweatshops-trafficking-victims-often-find-little-help-after-rescue-or-escape/>.

³ See e.g. Mari De Angelis, *Narrative of Human Trafficking: Ways of Seeing and Not Seeing the Real Survivors and Stories*, 7(1) *Narrative Works* 44 (2017).

⁴ Joel Quirk, *When Human Trafficking Means Everything and Nothing*, in *Contemporary Slavery: The Rhetoric of Global Human Rights Campaigns*, 67 (Annie Bunting and Joel Quirk eds., 2018).

⁵ Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 18 *DIFFERENCES* 128, 134 (2007) [hereinafter Bernstein 2007]; Julia O’Connell Davidson, *De-canting ‘Trafficking in Human Beings’, Re-centring the State*, 51 *THE INTERNATIONAL SPECTATOR* 58, 60 (2016); Jo Doezema, *Sex Slaves and Discourse Masters, The Construction of Trafficking* (London: Zed Books, 2010).

⁶ Doezema, *id.* at 78.

phenomenon in-the-world. In crafting legal language, lawmakers necessarily had to circumscribe and define what acts would qualify as “trafficking” and who would be accorded benefits as victims.⁷

Thus, while securing legal prohibitions against trafficking was considered by many to be a success, it also narrowed what the term could mean, conflicting with the vast array of imagery that had come to be associated with its use. In the constant retelling of the trafficking stories, particularly in venues accorded legal authority, the picture of trafficking also became part of the legal landscape. Images of ideal victims and criminals filled intellectual conceptual gaps in imagination that were not detailed in the laws themselves. This all caused confusion around how the term should be defined, but also the opportunity for some to take advantage of that confusion. It allowed for broad claims of human rights to be made in support of laws that primarily restricted those rights and provided small benefit to an exceptional few. This article describes the processes by which those defining moments took place and the disconnect between anti-trafficking rhetoric and resulting legal acts. It focuses specifically on the role that U.S. law played in creating this tension and how different U.S. actors invoked both legal and non-legal uses of the term to obscure criminal and anti-immigration policies. It also draws attention to the construction of a new emerging trafficking “crisis” at the U.S.-Mexico border and how this rhetoric is once again being used in slippery ways to justify anti-immigrant law.

The article proceeds in three parts. Part I examines the role law has played in the development of the anti-trafficking movement and the stories told around trafficking that fed its development. The push to criminalize trafficking during the 19th and 20th centuries is revealed as a meaning-making endeavor, communicating messages about threats in new waves of global migration and in women’s independence. To highlight these operations, I draw upon critical discourse analysis⁸ and recent theory in legal history scholarship⁹ for guidance. I also incorporate critically-focused law and film theory¹⁰ to account for the role that popular media played in constructing the resulting laws. In Part II I describe how the process of creating “trafficking” took place. Given the amorphous nature of the term prior to its legal definition, the development of anti-trafficking laws within the ambit of criminal justice became an integral part in the understanding of what trafficking would come to be. I examine the role of various social and political actors and their use of anti-trafficking imagery to promote this criminal-justice agenda. I

⁷ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1466, 1466-91 (2000) (Codified as Amended at 22 U.S.C. §§ 7101-7110); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000. S. TREATY DOC NO. 108-16(2004), 2237 U.N.T.S. 319.

⁸ Pardis Mahdavi, *From Trafficking to Terror: Constructing a Global Social Problem (Framing 21st Century Social Issues)*(London: Routledge, 2014); Michel Foucault, *The Archaeology of Knowledge* (London: Tavistock Publications, 1972).

⁹ For this theoretical framework I build primarily upon recent work of Catherine Fisk and Robert Gordon: Catherine L. Fisk & Robert W. Gordon, *Foreword: "Law As...": Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519 (2011). See also Marianne Constable: *Law as Claim to Justice: Legal History and Legal Speech Acts*, 1 U.C. IRVINE L. REV. 631 (2011).

¹⁰ See Naomi Mezey, *The Image Cannot Speak for Itself: Film, Summary Judgment, and Visual Literacy*, 48 Val. U. L. Rev. 1 (2013); Rebecca Johnson, *Getting the Insider's Story Out: What Popular Film Can Tell Us About Legal Method's Dirty Secrets*, 20 Windsor Y.B. Access to Just 87 (2001).

also describe the effects of the operation of anti-trafficking law and the ways in which it contributes to the creation of trafficking itself.

Part III examines the ways in which American legal policy has influenced trafficking worldwide. U.S. political speech continues to impact both domestic and international legal landscapes and the U.S. monitors foreign legal systems through mechanisms such as its *Trafficking in Persons Report* (TiP Report).¹¹ I highlight the ways that U.S. funding and anti-trafficking narratives combine to impose legal requirements that harm rather than benefit aid-receiving states' marginalized groups. I argue that the U.S. has contributed to the creation of trafficking worldwide both conceptually and in-the-world through its monitoring and advocacy efforts. In the Conclusion I suggest that rhetoric around trafficking does not reach an end but reshapes to respond to changing perceived or constructed geopolitical threats. With each incarnation the trafficker takes on a slightly new form, but the rhetoric consistently maintains the components it needs to evoke fear. This serves to marginalize and criminalize the new group, ultimately allowing for their incarceration and the exclusion of them and others through law. In this context I discuss current trafficking rhetoric about Central American gang members and its use as justification for criminal justice policy and a wall spanning the U.S. Mexico border. Given the expansiveness of US influence, it is of continuing interest to interrogate the narratives it produces and the legal policies they feed into.

I – MEANING-MAKING

The term “trafficking” was not widely recognized prior to legislative enactments prohibiting it in the late 1990s. Because of this, the laws and the narratives that informed the creation of those laws would play enormous roles in constructing its meaning.¹² The definitions constructed at law would contribute to determining what would be counted as trafficking, how its story would be told, and how people would tell their own stories in relation to it. However, the prohibitions created against trafficking ultimately did not find new activities to criminalize, as trafficking was not something newly discovered, nor were the injustices encompassed within its framework.¹³ Kidnapping, prostitution, and rape were already generally regarded as criminal and unjust. Laws against trafficking simply combined and rebranded them in their own peculiar way. These acts, among other injustices, would be called “trafficking” when committed under certain conditions, by certain people, but there was no consensus as to what this phenomenon was, since it was not one thing commonly understood. The development of “trafficking” as a concept was a rebranding process that took already-familiar phenomena and heightened the perceived injustice attached to

¹¹ Required by s.104 of the TVPA. See for example U.S. Department of State, *Trafficking in Persons Report* (2018), available at <https://www.state.gov/documents/organization/282798.pdf>.

¹²Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609, 613 (2014).

¹³ Amy Farrell et al., *New Laws but Few Cases: Understanding the Challenges to the Investigation and Prosecution of Human Trafficking Cases*, 61 CRIME, LAW AND SOCIAL CHANGE 139, 140 (2014).

them. Thus, decisions around which phenomena would be included in the ambit of the trafficking concept became of great importance to those invested in its meaning.

Beginning in the Progressive Era in the late 19th to early 20th centuries, advocates built on fears around racial integration and breakdown of gender norms to create myths about foreign criminality and the dangers white women faced if they left home. Proponents of these myths sought to incorporate them into domestic and international legal texts, focusing on prostitution and unrestrained migration as twin evils to be stopped.¹⁴ Acts previously regulated through medical or social welfare regimes now resulted in the creation of criminals, both in courtrooms and in the public imagination. And while these laws had only marginal effects at the time, they set the stage for the revival of similar, more successful laws when analogous fears re-erupted in the late 20th century. The criminalization of trafficking contributed to the myth through lending moral and social legitimacy to representations of particular kinds of villains (traffickers) and particular kinds of victims (the trafficked). Law provided justice-seeking platforms to those seeking remedy – any remedy – on those hapless victims’ behalf. It was this phenomenon that was then exported internationally with little to no scrutiny and transplanted into criminal justice programs worldwide. This exporting and the dominance of the U.S. in foreign-relations structures has had far-reaching consequences for the understanding and existence of trafficking as a series of social problems.

Fear and Loathing

During the 19th and early 20th centuries, new mass movements of people provoked growing anxieties in the U.S. and U.K. around the consequences it would have on established gender, racial, and class norms. This included both global movement from colonies to colonizing countries, and increasing urbanization in the shift from rural to city living.¹⁵ The U.S. in the early twentieth century was awash in both anti-immigrant and racist sentiment, visible in numerous social and legal regulations, including the passage of immigration laws premised on racial eugenics.¹⁶ Unease grew in Britain and Canada at the growing ability of Chinese and South Asian men to migrate outside the traditional indentured labor programs (the “Coolie” system) that had upheld existing hierarchies and kept unwanted populations in check. This shift in demography also included uneasiness with the uncontrolled movement of women to and within cities and the gender norms this undermined.¹⁷ Some commentators have suggested that this movement also made prostitution more visible, linking the two in the public imagination.¹⁸ The beginning of mass, independent travel of both dark-skinned non-westerners and women during this period provided

¹⁴ Doezeza, *supra* note 5, at 78.

¹⁵ O’Connell Davidson, *supra* note 5, at 60.

¹⁶ Edwin Black, *War Against the Weak: Eugenics and America’s Campaign to Create a Master Race* 78-79; Abstracts of Reports of the Immigration Commission (1907-1910), Harvard University Library Open Collections Program, (last visited February 25, 2019) <https://curiosity.lib.harvard.edu/immigration-to-the-united-states-1789-1930/catalog/39-990014299020203941>.

¹⁷ O’Connell Davidson, *supra* note 5, at 60.

¹⁸ Doezeza, *supra* note 5, at 78.

fertile soil for fusing both anxieties, and prostitution became a useful proxy symbol for the threats associated with uncontrolled movement in general.¹⁹ It encapsulated fears around women's sexuality, the dangers of women's independence, women's subjugation and the darkness and temptation of city streets. And though disparate in their political inclinations, feminists, temperance groups, religious groups, medical professionals, journalists, policy and law makers found they were able to uniformly unite behind the cause of abolishing prostitution in order to achieve their respective goals.²⁰

Prior to this era, while potentially viewed as a moral ill, prostitution had not been generally categorized as a crime in American states or in the U.K. The English feminist Jospheine Butler vehemently fought against child prostitution, putting the issue squarely in the public eye, but largely opposed any measures that led to surveillance and detention of adult women engaging in the trade.²¹ However, as the cause of white slavery gained popularity in the late 19th and 20th centuries, abolitionists found the language they were looking for to by addressing fears surrounding the “foreigner” in prostitution. “Purity reformers” (those seeking to “rid the world of vice”), “regulationists” (those “who believed that the necessary evil of prostitution should be controlled by stringent state regulation”) and “proto-feminists” (those explicitly seeking women's equality) suddenly all found they could also use the cause of white slavery to address their issues. They soon discovered the impact this language had on middle-class audiences, adopting the discourse of ‘protecting women’ while simultaneously vilifying the men they came into contact with.²² It provided avenues both for the criminalization of foreigners and protective measures for the women themselves. The term “trafficking” began to take shape in public imagination through the promotion of this fusion, with the language of white slavery buttressing the abolitionist cause.

For both evangelical women and for feminists, the fight against White Slavery served as a useful stepping stone and surrogate for a host of additional causes, from social purity and moral reform to temperance and suffrage:

Such narratives conjured scenarios of seemingly irrefutable moral horror: the widespread abduction of innocent women and girls who, en route to earn respectable livelihoods in metropolitan centers, were seduced, deceived, or forced into prostitution, typically by foreign-born men. ... [The] fight against White Slavery served as a socially acceptable

¹⁹ *Id.* at 18.

²⁰ *Id.*

²¹ William F. McDonald, *Explaining the Under-Performance of the Anti-Human-Trafficking Campaign: Experience from the United States and Europe*, 61 *CRIME, LAW AND SOCIAL CHANGE* 125, 134 (2013).

²² When referring to “discourse” I use the term to mean constructed meanings of a term that become familiar and accepted as real, or “true”, either through repeated use or historical institutionalization:

When people use the term they are often referring to socially agreed upon or mainstream imaginings of an issue—the constructed nature of discourse must be underscored. By default, because discourse is defined as the majority viewpoint, other views that may not fit within the dominant version of the conversation may be excluded. Discourses can become paradigms, reflective of a certain moment that defines the mainstream. The concept is particularly useful in that it reminds us that dominant versions (or discourses) about an issue are always constructed.

Mahdavi, *supra* note 8, at 16. See also Frederick Grittner, quoted in Doezema, *supra* note 5, at 60.

vehicle in which bourgeois women could channel their frustrations with the sexual double standard and an increasingly legitimate commercial sexual sphere.²³

In the wake of this rise in the use of white slavery rhetoric, Britain criminalized brothels and other related activity in 1885. This came on the heels of William T. Stead's lurid and violent accounts of child prostitution in the *Pall Mall Gazette*.²⁴ In 1910, the U.S. passed the *Mann-Elkins White Slavery Act* preventing interstate traffic in prostitution and related offenses.²⁵ Newly-formed immigration laws also contributed to the fusion of prostitution and the "foreign" in U.S. public discourse, as they provided that anyone even *suspected* of engaging in prostitution would be prohibited from entering the country.²⁶ These laws soon prohibited almost all Chinese women from being able to enter the U.S., based solely on their inherent potential for sexually corrupting US society.²⁷

Authors including Jo Doezema, Laura Agustín, Kamla Kempadoo and Ronald Weitzer have carefully parsed the rhetoric of this time, detailing descriptions in abolitionist campaigns of white female innocence, dark foreign infiltration, and the dangers of faraway lands for women who choose to leave the safety of their homes.²⁸ Several themes have emerged from these descriptions, but one emphasis is notable for purposes of its legal regulation. Clear distinctions form between "innocent" and "prostitute" in all of the different kinds of speech. While purity reformers were sympathetic to the "lost innocents sacrificed by white slavers, they were severe in their judgement of girls and women whose immodest behaviour led them into a life of shame."²⁹ These women then became suitable subjects for punishment and removal from society. Regulationists supported the protection of innocent women and girls, but "once fallen, it was society that needed protection from the immoral woman."³⁰ Campaigns for regulating prostitution suggested that "[t]he best way to protect society ... was to register and medically control prostitutes."³¹ Those who refused or escaped detection could and would be subject to punishment. Proto-Feminists of the era did not explicitly categorize women into innocent or prostitute, but in order to refrain from doing so they had to dispense with the concept of agency altogether in

²³ Bernstein 2007, *supra* note 5, at 134.

²⁴ Criminal Law Amendment Act, 1885 48 and 49 Vict., c. 69, s.4 (U.K.) formal title: *Act to make further provisions for the protection of women and girls, the suppression of brothels, and other purposes*.

²⁵ White-Slave Traffic Act ("Mann Act"), 18 U.S.C. §§ 2421–24 (1910). In *Hoke v. United States*, 227 U.S. 308 (1913) the U.S. Supreme Court held that only inter-state prostitution could be regulated under the Mann Act; the regulation of prostitution *per se* was a matter reserved for the states.

²⁶ Page Act, ch. 141, 18 Stat. 477 (1875) (repealed 1974).

²⁷ Pooja R. Dadhania, *Deporting Undesirable Women*, 9 UC Irvine Law Review 53, 57 (2018).

²⁸ Doezema, *supra* note 5; Laura María Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (Zed Books: London, 2007); Kamla Kempadoo, *Introduction*, in *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (Kempadoo et al. eds., 2005); Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35(3) *Politics and Society* 447 (2007).

²⁹ Doezema, *supra* note 5 at 60.

³⁰ This approach was epitomized by the passing of the Contagious Diseases Act in Britain that allowed for detention and examination of prostitutes found infected with a 'social disease'. See Doezema, *supra* note 5 at 18 for further discussion on this topic.

³¹ *Id.*

transactional sex. These early feminists based their work on the assumption that no woman *could* voluntarily enter prostitution, thus providing a basis of innocence for all. However, the corollary of this classification for feminists was that all third-parties involved were labeled pimps and traffickers and were left to bear the sin for luring these innocents into immorality.

What these dichotomies have in common foreshadows what Elizabeth Bernstein labels *carceral feminism*: the commitment of abolitionist feminists to a law and order agenda, and a drift from the welfare to the carceral state as the enforcement apparatus for feminist goals.³² The suggested solutions to the ills of prostitution become couched not in protection and social safeguards but in incarceration, with all roads leading to the detention of *someone*. The willing prostitute must be removed from society as a social contaminant, the lecherous kidnapper must be incarcerated as a threat to female purity, and even the innocent rural dame must be kept from traveling, frightened into staying inside where she may perform her safe, designated, role. Control and punishment language would come to frame³³ the narrative around prostitution, also dovetailing with the newly-created immigration regulations in the U.S.³⁴ Chinese, Indian, and Southern European men had been castigated as threats not only to U.S. jobs, but to the very existence of the American ideal of purity. These bogeymen formed part of the symbolic threat to white womanhood that sounded the alarm against women's self-determination. The image of the villainous white slaver ultimately became the common foil for all of these anxieties, with one crusader describing them as: "human vultures who fatten on the shame of innocent young girls. ... recruited from the scum of the criminal classes of Europe. ... low, vile, depraved and cunning – *organically* a criminal."³⁵ [Emphasis mine]

The immigrant victim also played a role in creating the mythological threat of foreign prostitution, with her situation being in part attributed to the backwardness of her home culture. Though a sympathetic figure used by labor and housing advocates to improve urban conditions, an immigrant woman's inability to "adapt" was viewed as contributing to her downfall.³⁶ This perceived ignorance combined with traditional narratives of dark-skinned sexual immorality to cast these potential victims as corrupting influences themselves.³⁷ This myth of immigrant prostitution provided a basis for levying public concern without affording the women it put forward as "victims" any actual tangible benefit. The stereotypical focus on the immorality of the

³² Bernstein 2007, *supra* note 5, at 143.

³³ Amy Farrell & Stephanie Fahy, *The Problem of Human Trafficking in the U.S.: Public Frames and Policy Responses*, 37 *Journal of Criminal Justice*, 617,618 (2009):

Problems, generally, are less likely to be embraced by the public and touted by politicians if there are no identifiable policy solutions. Criminalization, however, is a fairly easy and popular policy solution. Problems defined as crimes have numerous ready-made solutions—there are perpetrators to identify and arrest, victims to rescue and restore, and justice that can be served. Defining problems as crimes also diverts attention away from social conditions such as inequality, poverty, or racism that are more difficult to solve. Framing social problems as crimes has proven to be a useful strategy for securing public support and prompting swift governmental responses.

³⁴ See reports from the Dillingham Commission and the National Origins quotas, *supra* note 16.

³⁵ E. A. Bell, *Fighting the Traffic in Young Girls*, 16 (Chicago: G. S. Ball, 1910).

³⁶ Doezeema, *supra* note 5, at 90.

³⁷ Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 *Colum. L. Rev.* 641, 650 (2005).

female body of color mapped easily on to the narratives around white slavery, and this allowed for the conceptual linking of crime in general to prostitution and foreign criminal depravity.³⁸

Simultaneously, racial anxieties in the U.S. were mapping onto fears around rampant urbanization and industrialization, perpetuating a belief about the increasing control of (black) pimps over prostitution and the “commercialization” of the industry.³⁹ In the narrative constructed in the public imagination during this period, “‘racially other’ men were charged with perpetrating a vast immoral network which threatened not only innocent American girlhood, but the very moral fibre of the nation... The role of virtue’s downfall was very often played by immigrant men and freed male slaves.”⁴⁰ The threat that black, male skin posed to white feminine purity was clearly exposed in film, in miscegenation laws, and in ubiquitous images published across the U.S. at the time.⁴¹ The *Mann Act’s* use against free black men like boxer Jack Johnson exemplified this fusion. He was charged under the act as he traveled across state lines with his white girlfriend. “White slavery” became fused with fears around black emancipation, revealing the perversity of anti-trafficking campaigns that were ultimately used to incarcerate men of color, resting on the outrage engendered by anti-slavery discourse.⁴² Thus, though very few cases were ever actually identified of white Europeans being coerced into prostitution abroad, or of white women forcibly prostituted across state borders by black men, it mattered little to the anti-trafficking movement and those who fought for the *Mann Act* or the closure of Britain’s brothels. These ephemeral figures existed, as they do in fairytales and folklore – as warning, or allegory. They set the stage for legal concepts to be introduced to represent these myths, and for laws to be created within those representative frameworks.

Rebranding and the creation of Illegality

The various abolitionist groups took their efforts to the international stage at the turn of the 20th century to create criminal prohibitions recognizing white slavery’s transnational character. A legal prohibition against trafficking would ultimately draw worldwide attention to the issue, offering legitimacy to their moral crusades and providing a platform for discussing prostitution in the context of criminal justice. This rhetoric of seeking *justice* for victims through criminal law would be key to transforming a nebulous set of anxieties into what would become modern-day “trafficking”.⁴³ Particularly in the case of trafficking, the term’s relative obscurity prior to

³⁸ Doezema, *supra* note 5, at 138.

³⁹ *Id.* at 102-103.

⁴⁰ *Id.* at 83.

⁴¹ See *Loving v. Virginia*, 388 U.S. 1 (1967); *The Birth of a Nation* (D.W. Griffith, 1915); J.R. Browning, *Anti-Miscegenation Laws in the United States*, 1(1) *Duke Bar Journal* 26 (1956).

⁴² Doezema, *supra* note 5, at 89.

⁴³ Marianne Constable analyzes law and legal acts not as acts of justice, but rather *claims* about justice. Law makes a particular claim of authority when it speaks, in that it is an act of “justice-seeking”. It is that act of communication that makes the act recognizable as law.

Implicit in both the rules and institutions of Western law and in the claims of those who would contest aspects of that law are appeals to justice. The most authoritative spokespersons of law are called “justices.”

becoming legally defined meant that those laws became central focal points for the concept itself. The specific justice-claims made about trafficked victims shaped programming, funding, migration patterns, representations, and even individuals' relationship to their own experiences. The legal construction of trafficking influenced not only how the concept emerged, but how incidents actually occurred, and how they became identified and counted. As such, the choice to house this perceived problem in the criminal sphere had significant impacts on what would be counted and who would be represented as deserving of justice. Injustice became located in individual acts of criminality rather than in state or global structures, and ultimately the term "criminal" could be employed against a variety of changing threats. This process began with the internationalization of the call for justice for (particular) victims and coalesced with a similar call nearly a century later.

The anxieties around the global upheaval of migration and industrialization in the early 20th century spurred this first wave of international cooperation. The 1904 *International Agreement for the Suppression of White Slave Traffic* aimed to draw attention to the kidnapping and sale of white women into prostitution, prohibiting their recruitment and hire as long as they had not "fallen prey to the 'procuration ... with a view to their debauchery in a foreign country'".⁴⁴ In this first incarnation, the instrument focused on distinguishing between those who had fallen and those who had not, drawing a stark line between victim and prostitute. The injustices brought upon the innocent victim were the platform on which this document was created. This imagery was further solidified in the 1910 *International Convention for the Suppression of White Slave Traffic* which focused on criminalizing the recruitment, hire and transportation of women for "immoral purposes".⁴⁵ Like the 1904 document, women already taken to have "fallen prey" to prostitution were not the subject of this instrument, only those recruited coercively or kidnapped. In 1933, the *International Convention on the Suppression of the Traffic of Women of Full Age* began to shift the focus to regulating consensual prostitution as well, mirroring the increased attention on abolitionism in the social purity campaigns.⁴⁶ It defines trafficking as: "Any person who, in order to gratify the passions of another person, procures, entices or leads away, *even with her consent*, a woman or a girl of full age for immoral purposes to be carried out in another country."⁴⁷ [Emphasis mine] During this era of regulation it became clear that spaces of sin were no longer to be carved out for women consenting to prostitution or the men who sought their company.

But claims of law and appeals to justice are made no less by those who would contest a given law. Claims on behalf of and within the "system," as well as claims made against it, appeal however silently, however strategically, however hypocritically, to justice. Those claims bind law to justice even-or perhaps especially-when law is *unjust*. Neither a God nor a higher law, but the claiming that goes on in legal speech acts, binds us to issues of justice.

Constable, *supra* note 9 at 636.

⁴⁴ International Agreement for the Suppression of White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; Nora V. Demleitner, Forced Prostitution: Naming an International Offense, 18 Fordham Int'l L.J. 163, 167 (1994).

⁴⁵ International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 98 U.N.T.S. 101.

⁴⁶ International Convention for the Suppression of Traffic in Women of Full Age, Oct 11, 1933, 150 L.N.T.S. 431.

⁴⁷ *Id.* art 1, Demleitner, *supra* note 44, at 167.

The 1949 *Convention on the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others* expanded its requirements to include regulating prostitution in the domestic sphere in addition to the previous transnational prohibitions.⁴⁸ This post-war treaty came in the wake of increasing restrictions on prostitution in the U.S. that attempted to limit military interaction with sex workers during WWII. Though this document is said to have had little legal effect, in that few states formally adopted its provisions or instituted the principles directly, it marked a notable turn in international focus.⁴⁹ Abolishing domestic prostitution was now squarely the focus of anti-trafficking efforts, shifting away from exploitative recruitment practices to the act of sex itself. The treaty required states to punish anyone who “to gratify the passions of another”, “procures, entices or leads away, for the purposes of prostitution, another person, even with the consent of that person.”⁵⁰ The focus of the document was explicitly on prostitution’s eradication, using the rhetoric of protecting women to provide it with moral justification. Its preamble holds explicitly that “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community”.⁵¹ Though this final Convention received only lukewarm support, it solidified the merging of trafficking and prostitution in the public imagination and set the stage for the development of anti-trafficking criminal law. The criminal framework appeared the natural choice when similar calls for victim justice arose again later in the century.

This resurgence took place during the 1980s and 1990s when a new wave of global movement appeared to startle the West. Prostitution as injustice had fallen off the public radar to a large degree between WWII and the early 1990s. It had been criminalized throughout the United States as a form of “vice” during WWI and WWII but was not the focus of sustained feminist attention. Feminism had turned to issues of employment equity and women’s liberation once the post-war honeymoon subsided, and abolishing prostitution slowly became viewed as a somewhat antiquated issue.⁵² Nevada went so far as to legalize and regulate prostitution in 1971. However, outside of the disputes fought over Nevada’s act, feminism came to view abolition as a somewhat ancillary issue.⁵³ In the 1990s though it once again became a hot topic as another new wave of global movement started taking shape. The Berlin wall was dismantled and communist regimes began to disband. With the break-up of the Soviet Union came the free movement of Russian citizens across Europe and into the U.S. Deadly wars in Yugoslavia drove both men and women

⁴⁸ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force July 25, 1951).

⁴⁹ Barbara Sullivan, *Trafficking in Women*, 5(1) International Feminist Journal of Politics 67, 69 (2003). The 1949 Convention (*id.*) went so far as to place obligations on states to refrain from regulating prostitution or prosecuting prostitutes themselves, measures that have become contentious in current anti-trafficking debates.

⁵⁰ 1949 Convention, *supra* note 48, art. 1.

⁵¹ *Id.*, preamble.

⁵² Melissa Gira Grant, *Beyond Strange Bedfellows: How the ‘War on Trafficking’ was Made to Unite the Left and Right*, Summer 2018, The Public Eye 11, 12, available at https://www.politicalresearch.org/wp-content/uploads/2018/08/PE_Summer18_Grant-1.pdf.

⁵³ Elizabeth Bernstein, *Sex, trafficking and the politics of freedom*, Unpublished manuscript, Paper Number 45 (2012), [hereinafter Bernstein 2012] available at <https://www.sss.ias.edu/files/papers/paper45.pdf>.

from the region at unprecedented rates.⁵⁴ Correspondingly, young women from former Eastern Bloc countries became a particular flashpoint for anti-trafficking advocates. Julia O’Connell Davison highlights the connection between the modern anti-trafficking movement and rising Western liberal border anxieties, noting that alliances between state, feminist and faith-based groups were forged on similar grounds to those in the wake of the early 20th century upheavals:

Freer movement was perceived as a potential threat to [Western powers’] legitimate economies and political institutions, and indeed to national sovereignty and security. THB [Trafficking in Human Beings] re-entered policy consciousness through the lens of these disquiets. Initially, media and policy attention continued the discourse of White Slavery with a strong focus on cases in which women and girls were forced into prostitution. This provided the basis for strong alliances between governmental actors in states that had already adopted a prohibitionist stance on prostitution (especially the US and Sweden) and religious and feminist activists and non-governmental organisations (NGOs) lobbying the suppression of prostitution.⁵⁵

A number of critics have commented on these alliances in the U.S., noting the rather strange bedfellows that appeared around the anti-trafficking cause at this time. Political scholar Allan Hertzke has traced the development of this feminist-evangelical alliance from its very beginning, having been asked specifically by its founders to publicize the movement.⁵⁶ He draws attention to the express goals of the Christian Right in adopting anti-trafficking work as a way to increase social visibility. Political influencers on the right had “dreams of organizing Christian activists around winnable social issues”, specifically then seeking out alliances with “liberal” feminists opposed to prostitution as both groups’ agendas had diminished in popularity by the 1990s. This was “a chance to adopt a new identity: neither preachers nor scolds, but defenders of human rights.”⁵⁷ This coalition-building measure came on the heels of a similar push by Christian activists to internationalize evangelical presence through alliances with the left. In the early to mid-1990s it was religious freedom that was used to place Christians in this internationalist position, with the same influencers attempting to use the persecution of Christians abroad as an issue to place evangelical issues on the international stage. By framing Christian-specific goals as a quest for religious freedom for all, it was hoped that evangelical interests could be aligned with various religious groups and allies on the left.⁵⁸ This new issue could appeal to defenders of both women’s rights and women’s purity, and the international human rights framework provided a legal platform through which to act.

Both anti-prostitution feminists and evangelicals recognized the opportunity to reassert authority on the world stage, particularly with the support of the incoming Bush administration in

⁵⁴ See for example, *U.S. policy towards Bosnia: hearing before the Committee on International Relations, House of Representatives, One Hundred Fourth Congress, first session, November 30, 1995, Volume 4.*

⁵⁵ O’Connell Davison, *supra* note 5 at 60.

⁵⁶ Grant, *supra* note 52 at 12.

⁵⁷ *Id.*

⁵⁸ Allen Hertzke, *Freeing God’s Children: The Unlikely Alliance for Human Rights* (Lanham, MA: Rowman and Littlefield, 2004).

2000. The coalition was an ideal method of widening both groups' appeal and a means of having their "moral authority" recognized both in the U.S. and internationally. "[S]o they began, first by declaring war on what came to be known as 'human trafficking,' and then by dedicating themselves to defining what this war would mean so that their aims and authority were always at its center."⁵⁹ Michael Horowitz, a key driving force behind the coalition, proclaimed: "You've got soccer moms and Southern Baptists, the National Organization for Women and the National Association of Evangelicals on the same side of the issue."⁶⁰ Laura Lederer and Donna Hughes were instrumental in bringing feminists to the table, with Lederer drawing in key groups like Equality Now, a group closely associated with Gloria Steinem. Hughes was a feminist neoconservative contributor to the *National Review* who had been writing about such alliances as fruitful in the fight against what she saw as Islamic and other (non-Christian) religious fundamentalist misogyny. She pushed feminists to recognize the value of compromising with the right in order to achieve necessary goals:

In the past, when faced with choosing allies, feminists made compromises. To gain the support of the liberal left, feminists acquiesced in the exploitation of women in the pornography trade—in the name of free speech. The issue of abortion has prevented most feminists from considering working with conservative or faith-based groups. Feminists are right to support reproductive rights and sexual autonomy for women, but they should stop demonizing the conservative and faith-based groups that could be better allies on some issues than the liberal left has been... Human rights work is not the province of any one ideology. Saving lives and defending freedom are more important than loyalty to an outdated and too-limited feminist sisterhood.⁶¹

The "strange bedfellows" generated by these compromises has been the source of both laudatory and critical scrutiny. Most commentators have either suggested that these coalitions were able to form because apolitical concern could prevail where such horrors were involved, or that there was an underlying unspoken shared commitment to "traditional" ideals of female sexuality between radical feminists and the religious right.⁶² However, sociologist Elizabeth Bernstein suggests that while perhaps these descriptions are partly true, there was more at stake than what those analyses reveal. She points to a shift in feminist sensibilities during the 1980s and 90s that paved the way for these partnerships to be able to form. During this period, feminist groups began highlighting issues related to gender-based *violence*, including rape, battered women, and, ultimately, "sex trafficking". This moved American feminism away from structural issues of inequality to individual incidents of violence not carried out by the state or covered by state-made laws.⁶³ This shift can be seen both domestically and internationally as international human rights discourse began to focus on violence against women in the private sphere.⁶⁴ Bernstein argues that

⁵⁹ Grant, *supra* note 52 at 12.

⁶⁰ *Id.*

⁶¹ *Id.* at 13.

⁶² See Bernstein 2012, *supra* note 53 at 1.

⁶³ *Id.* at 6.

⁶⁴ *Id.* at 8: "[B]y the early 2000s, the sexual violence agenda of feminism was increasingly being exported as part of U.S. human rights policy, solidifying the carceral imperative within feminism domestically and spreading the paradigm of feminism-as-crime-control across the globe."

this reflects a shift away from traditional feminist priorities around redistributive justice to remedies that primarily focused on the criminal justice system and to neoliberal forms of redress.⁶⁵

At the same time, younger evangelicals were distancing themselves publicly from traditional sexual politics and embracing the language of women's rights. This new expressly conservative Christian approach to social justice (which feminist groups then adopted) eschewed the redistributive state, favoring the "beneficence of the privileged rather than empowerment of the oppressed."⁶⁶ It is rooted in a capitalist worldview that promotes the free market as the solution rather than contributory cause of labor exploitation, and it ensures that the harms highlighted are those committed by individuals, not the state. Businesses and government are allies in the fight against evildoers rather than perpetrators of injustice themselves. The International Justice Mission, one of the key global players in the fight against trafficking, has adopted this approach wholesale: "Our real goal is to bring people out of slavery into the free market." Relying on that goal, the Mission transformed Cambodia's Svay Pak district into a "nice tourist town".⁶⁷

In this approach only individuals are scrutinized and transnational economic structures that push low-income women into risky migration are not.⁶⁸ Those structures are viewed only as solutions to harms caused by the individuals taking advantage of vulnerabilities - or working to migrate around them. Women deemed to be in jeopardy from the backwardness of the men they spend time with are to be led out of sex work into entry-level food service or factory jobs, fueling these businesses with their low-paid labor instead of contributing to informal economies. This was a significant change for both feminists and faith-based groups who had previously sought state accountability for inequities. Bernstein points to this shift in priorities promoted by the new neoliberal Christian: "Whereas antiglobalization activists during the 1990s had argued that the daily practices of capitalism created sweat-shop conditions of labor that were unacceptable, 'modern-day abolitionists' ... identify such practices with the very definition of 'freedom'." ⁶⁹ The framework for these actions locates gender-based harms in deviant individuals, primarily in the third-world. Walk Free Foundation has suggested the need for "raising unprecedented levels of capital to drive change", not only leaving capitalist structures of hierarchy untouched, but "giving them a boost".⁷⁰ The free market and the benevolence of capitalist philanthropy is touted as the way to "end modern slavery" and bring victims out of poverty. This allows evangelical Christian groups to continue positioning themselves as missionaries saving women from the "backwards traditionalism of third-world cultures", while simultaneously upholding the structures that

⁶⁵ *Id.* Bernstein refers to political theorist Kristin Bumiller in this context, who in her 2008 work "demonstrated the ways in which a myopic feminist focus on the criminalization of rape and domestic violence during the 1990s contrasted with grassroots and early second-wave feminist concerns about women's social and economic empowerment." Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Durham: Duke University Press, 2008).

⁶⁶ Bernstein 2007, *supra* note 5, at 137.

⁶⁷ *Id.* at 140.

⁶⁸ *Id.* at 137.

⁶⁹ *Id.* at 141.

⁷⁰ Kempadoo Revitalizing imperialism: p.11

contribute to the persistence of those conditions.⁷¹ It also allows western feminists to take up their role as third-world caretaker, bringing (predominantly brown) women into the new world of capitalist economy. In line with what Barbara Heron titles the Western “helping imperative”, these groups’ desire to “do Something over there” about third-world women at the hands of third-world men, primarily “bolsters the women’s own subjectivity, identity and self-esteem.”⁷² It manifests what is in essence a “colonial continuity of a sense of Western/Northern entitlement and obligation”.⁷³

The legal ramifications of this approach were wide-reaching. It created a space for deployment of justice-themed interventions in both poor urban and third world territories, encouraging strategies “reminiscent of imperial interventions into the lives of the native subject and which represent the ‘Eastern’ woman as a victim of a ‘backward’ and ‘uncivilized’ culture.”⁷⁴ Legal interventions emanating from this framework have been premised on the use of state law enforcement and even military to save victims from the backwards men who harm them. These interventions are called for in the name of justice, with state failure to write this victimhood into law decried as *unjust*. In a distinct break from earlier feminist waves, the police in this story become allies in the fight for women’s rights instead of components of the structural systems of injustice so many had previously fought against.⁷⁵ By focusing on criminalizing violence, legal remedies are no longer viewed in terms of eliminating structural disadvantage. Instead, feminists in this movement embraced neoliberal strategies of social control, or what Bernstein refers to as “carceral feminism”.⁷⁶ In this neoliberal story of global free markets, exceptional spaces of concern are carved out for a small group of deserving victims of egregiously exploited victims. They are deemed in these cases to have encountered the extraordinary in what is otherwise viewed as a fundamentally fair legal migratory process. Both “Carceral feminists” and faith-based groups could rally behind these interventions without upending their place within neoliberal structures, ensuring their moral authority continued to be a primary influence on corporate and government powers constructing legal policy.

In the 1990s, abolitionists such as Kathleen Barry and the Coalition Against Trafficking in Women (CATW) focused this energy on advocating for laws categorizing prostitution as exploitation. They sought to include users of sexual services and those who benefited from women’s sexual labor in the category of criminal.⁷⁷ They and other groups such as Equality Now played essential roles in the determination of trafficking as a legal concept, lobbying for language in both US and international legal documents alongside the faith-based groups that had garnered

⁷¹ Bernstein 2007 at 140

⁷² Kamala Kempado, *Revitalizing Imperialism: Contemporary Campaigns Against Sex Trafficking and Modern Slavery*, *Cadernos Pagu* no. 47, 7, <https://doi.org/10.1590/18094449201600470008>.

⁷³ *Id.*

⁷⁴ Ratna Kapur, *The ‘Other’ Side of Globalization: The Legal Regulation of Cross-Border Movements*, 22(3/4) *Canadian Women’s studies* 6, 6 (2003).

⁷⁵ Bernstein 2007, *supra* note 5 at 143.

⁷⁶ *Id.*

⁷⁷ Kathleen Barry, *The Prostitution of Sexuality. The Global Exploitation of Women*, (New York: NYU Press, 1995). See Barbara Sullivan, *supra* note 49 at 69 for a more detailed review of Barry’s work.

their support. Framing prostitution in terms of human rights on the international stage provided a way to draw attention to the issue without occupying the traditional field of debate these groups had held.⁷⁸ This use of imagery around sexual slavery helped remove abolition feminists from their outdated role as opposition to sex-workers' rights groups, and it obscured the more puritanical motives of evangelical groups by describing interventions in terms of humanitarian, rather than moral concern.⁷⁹ Using international imagery and human rights discourse then allowed these groups to re-launch the abolition crusade at home in way that would be new, interesting, and palatable to U.S. public consciousness and U.S. law.

Representative Chris Smith (R-NJ) was part of the coalition-building process and a U.S. legislator at this time. In response to Senator Paul Wellstone's bill addressing trafficking in all forms of labor, Rep. Smith and the coalition exerted enormous public pressure on President Clinton to focus on sex slavery in a law.⁸⁰ The bill put forward by Smith draws upon unsubstantiated claims of "50,000" women and children forced into the international sex trade, and the testimony supporting what would become the *Trafficking Victims Protection Act* (TVPA) is full of stories of physical coercion, deception, kidnapping and abduction juxtaposed with images of sexual slavery, despite the absence of any clear evidence that such acts occurred with any frequency.⁸¹ Senator Brownback from Kansas stated:

International sex trafficking is the new slavery. It includes all the elements associated with slavery, including being abducted from your family and home, taken to a strange country where you do not speak the language, losing your identity and freedom, being forced to work against your will with no pay, being beaten and raped, having no defense against the one who rules you, and eventually dying early because of this criminal misuse.⁸²

These statements were introduced without reference or source, though even published statistics around trafficking are notoriously unreliable.⁸³ Given the repeated nature of such pronouncements though, they ultimately formed the basis for the preamble to the law and supported passage of the law itself.

Through the coalition's lobbying efforts, the victim image created during the Progressive Era took on modern aspect and reappeared in just slightly new garb. The circumstances of her

⁷⁸ Grant, *supra* note 52 at 12.

⁷⁹ Bernstein 2012, *supra* note 53 at 7.

⁸⁰ Gretchen Soderlund, *Running from the Rescuers: New U.S. Crusades Against Sex Trafficking and the Rhetoric of Abolition*, 17 NWSA J. 64, 73 (2005).

⁸¹ Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. Pa. L. Rev. 1655, 1695 (2010); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. Rev. 157, 170 (2007).

⁸² *International Trafficking in Women and Children: Hearings Before the Subcomm. on Near E. and S. Asian Affairs*, 106th Cong. 72 (2000).

⁸³ Frank Laczko and Elzbieta Godziak, *Introduction, Data and Research on Human Trafficking: A Global Survey*, (2005) 43 (1/2) 43 (1/2) *International Migration* 1, 12 (2005). There appears to be a widespread use of unverified data among anti-trafficking advocates, with Kamala Kempadoo noting that there is "[i]n some cases ... an underutilization or lack of reliance on some sources and an overreliance on others." Kempadoo 2005, *supra* note 28 at xx.

appearance were so similar that Jo Doezema refers to it as “a macabre ‘zombie magic’, rousing the corpses of the Victorian imagination from their well-deserved rest.”⁸⁴ Based almost exclusively on this imagery and the coalition’s calls for justice, the TVPA was passed in 2000. It was concluded without Congress having concretely identified the harm or extent of the incidents that required such immediate criminal intervention; the imagery and rhetoric were enough. Its preamble creates links between organized crime and prostitution, claiming that traffickers “lure women and girls into their networks through false promises ... , buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.”⁸⁵ It goes on to link national security to this chain by describing trafficking as “increasingly perpetrated by organized, sophisticated criminal enterprises ... the fastest growing source of profits for organized criminal enterprises worldwide.”⁸⁶ No basis is provided for the claim that *it* (trafficking) is the “fastest growing” source of funding for any group, nor what exactly *it* is that was meant to be counted as trafficking in this story. However, to secure the country from this nebulous but ominous and *quickly growing* threat, wide-reaching criminal and immigration restrictions were established and foreign policy was designed.

It was through the law itself that trafficking became defined, though broadly. It included several activities from receiving benefit from a commercial sexual exchange to the transportation of workers one knows to have been threatened with deportation:

“Sex trafficking” is defined as:

the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.⁸⁷

"Severe forms of trafficking in persons" are defined as

(a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or

(b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.⁸⁸

This merging of consensual commercial sexual activity, users of commercial sexual services, and trafficking in these definitions both reflects and confirms the conceptual links between trafficking and prostitution in law. No distinction is made between adult and child labor outside of the sex industry, and “trafficking” that is not severe is conceived of only in terms of sexual exchanges. The TVPA also provided for the U.S. to assess other states’ compliance with U.S.-framed efforts

⁸⁴ Doezema, *supra* note 5 at 77.

⁸⁵ TVPA § 102(b)(4).

⁸⁶ TVPA § 102(b)(8).

⁸⁷ TVPA § 103(9)

⁸⁸TVPA § 103(8)

to eradicate trafficking defined in the legislation.⁸⁹ U.S. foreign assistance would be dependent on states' efforts to eradicate whichever activities fell within that spectrum.

To be designated a victim of a "severe form of trafficking" under the Act, and thus to receive the concomitant medical, housing or immigration benefits, adults must be certified by the Secretary of Health and Human Services. The benefits are tied to the federal criminal provision, as victims must be "willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking."⁹⁰ They must also be "a person whose continued presence in the United States the Attorney General is ensuring in order to effectuate prosecution of traffickers in persons."⁹¹ These requirements were created explicitly in response to concerns around border integrity and the perception that mass migration flows corrupt American sovereignty. The Congressional Debate record indicates that their purpose was to "prevent hundreds of thousands of people claiming to be trafficking victims . . . [leading] to a massive amnesty for illegal aliens."⁹² The TVPA was able to thus restrict immigration and place conditions on foreign aid, while carving out only small spaces of benefit for the victims spoken about so eloquently in its preamble. What the term "sex trafficking" ultimately provided was a legal narrative through which to tell stories of prostitution and women's migration. Though only "severe forms" engender direct individual benefit or penal sanction, this narrative became the legal basis for significant funding decisions, both domestic and international. It shaped the way trafficking was introduced into greater public discourse in the U.S., and the way it became identified, researched and quantified. Ultimately those designations decided the ways in which service providers and victims themselves narrated their experiences and the creation of trafficking itself.

Negotiating Meaning on the International Stage

While somewhat satisfied with the victory achieved through the creation of the TVPA in its initial form, the coalition had been seeking more explicit legal prohibitions against prostitution, both domestically and at the international level.⁹³ At this point in the anti-trafficking debate several other voices still held sway in garnering media and political attention in the U.S., including sex workers, migrant rights groups and progressive women's groups. Groups such as the Global Alliance Against Trafficking in Women (GAATW) advocated for some criminal sanction against traffickers, but they aimed to distinguish very clearly between voluntary and forced prostitution.⁹⁴

⁸⁹ TVPA § 104. ANNUAL COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES.

⁹⁰ TVPA § 107(e)(1).

⁹¹ TVPA § 107(e)(1).

⁹² Rep. Lamar Smith(R-TX) quoted in Wendy Chapkis, *Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants*, 17 *Gender & Soc'y* 923, 929 (2003). See also Jennifer Lobasz' detailed history of debate around the TVPA, including Smith's insistence on a limited number of visas for trafficking victims, given the likelihood that undocumented immigrants would "take advantage of the system and abuse the privilege. Jennifer Lobasz, *Constructing Human Trafficking: Evangelicals, Feminist, and an Unexpected Alliance*, 101 (Palgrave Macmillan, 2019); Lamar Smith, *Appointment of Conferees on H.R. 3244, Trafficking Victims Protection Act of 2000*, Washington, DC: U.S. House of Representatives, 2000.

⁹³ Grant, *supra* note 52 at 14.

⁹⁴ Chuang 2010, *supra* note 81 at 1675.

They also expressed concern about the potential dangers of the criminal system's involvement in migration-related activity. The Clinton Administration continued to listen to and to balance these various voices as it took the lead role in drafting the new international treaty on the issue. The treaty was to be negotiated under the auspices of the *United Nations Convention Against Transnational Organized Crime (Convention)*, the stated aim of which is "to promote inter-state cooperation in order to combat transnational organized crime more effectively."⁹⁵ States pointed to rhetoric put forward by advocates as proof that traffickers were dangerous criminals, and thus that criminal measures were necessary to protect victims. They expressed concern on this basis that a purely human rights framework would not adequately address the issue.⁹⁶ The protection of victims was thus melded with protection of the public at-large, both to be addressed through states' war on transnational organized crime.

The CATW worked in partnership with conservative women's organizations on the international front to influence the US government's stance in this arena. At first the government officials, including then First-lady Hillary Clinton, supported a clear distinction between trafficking and consensual prostitution. Charles Colson, a spokesperson for conservative Christians, publicly blamed Clinton for promoting prostitution as a result.⁹⁷ A group of leading U.S. feminists including Jessica Neuwirth, Gloria Feldt from Planned Parenthood and Gloria Steinem also signed a group letter urging the U.S. to include all prostitution in trafficking's definition. Without directly blaming the First Lady, it read: "The position taken by the administration suggests you do not consider prostitution of others to be a form of sexual exploitation... The definition would not only fail to protect a substantial number of trafficking victims, it would also shield many traffickers in the global sex trade from prosecution."⁹⁸ The group unequivocally claimed in its letter that prostitution was not a voluntary form of labor, and that "[t]his immoral policy would not help women. It would only increase the spread of HIV/AIDS, among other problems. Prostitution is degrading."⁹⁹ In the wake of this critique, the US Department of State issued a toolkit to clarify its position, including a document entitled "UN Trafficking Treaty: Myths/Facts" in which it firmly articulated an anti-prostitution stance not solidified prior to those negative lobbying efforts.¹⁰⁰

This change in stance and the placement of the treaty under the UN Office on Drugs and Crime, the body responsible for compliance with the convention related to transnational organized crime, set the framework for what trafficking would become. It ensured that the drafters of the definition were law enforcement officials rather than human rights advocates. Given the complete opacity of the term and lack of specificity of the phenomenon prior to these laws, the legal

⁹⁵ United Nations Convention Against Transnational Organized Crime, G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. No. 49, U.N. Doc. A/45/49 (Vol. I) (2001) 60, art. 3

⁹⁶ Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 978 (2001).

⁹⁷ Grant, *supra* note 52 at 13.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ US Department of State (archive), *UN Trafficking Treaty: Myths/Facts*, https://1997-2001.state.gov/global/women/fs_000118_myths.html.

definitions came to represent much more than benefit or sanction under law. By default, “trafficking in persons” *became* a crime perpetrated by organized criminal syndicates, and as such required aggressive criminalization of the perpetrators. Larger forces such as political instability and gendered economic disparities were removed from the discussion as factors propelling risky migration and instead they were framed¹⁰¹ as circumstances that make one “vulnerable” to being trafficked. This shift is important, as state migration policies would never again constitute a cause of trafficking, since they cannot in criminal frameworks. In the criminal law the state only provides solutions. Crime-control and border security measures became the expected remedies when seen through this lens and trafficking became a crime through the operation of this shift.

In her work on the negotiations, Jo Doezema draws attention to the linguistic conflation of trafficking and smuggling that permeated the discussions, as well as the focus on “illegality” in increasing cross-border movement. She identifies the ways in which these presumptions are expressed by the International Centre for Crime Prevention’s statement – the specific UN body under whose aegis the Protocol was negotiated:

Globalization has provided the environment for a growing internationalization of criminal activities. Multinational criminal syndicates have significantly broadened the range of their operations from drug and arms trafficking to money laundering. Traffickers move as many as 4 million illegal migrants each year generating gross earnings of between 5 and 7 billion US dollars.¹⁰²

The discussion moves seamlessly from organized crime to trafficking to migration without making the reasoning behind the links explicit, and all persons moving “illegal migrants” are classed in this statistic as “traffickers”. Political theorist Ernesto Laclau has named this rhetorical move “chains of equivalence”, whereby terms or *signifiers* are repeated together so often that “concepts become interchangeable, so when one is mentioned, the entire sequence is evoked.”¹⁰³ The development of this chain is clear in this segment: “globalization”, “multinational crime”, “drug trafficking”, “money laundering”, and “illegal migrants” become fused, with little explanation as to the link between them or their particular definitions in this context. A mythical “us” is created through these linguistic moves that needs protecting from “them”, as the very identity of the state is deemed to be at risk.

When applied to law, such concepts hold within them the narrative power to shape how law is formed and how it is justified. Here, the conflation of trafficking, crime, and migration sets

¹⁰¹ Farrell and Fahy (Farrell 2009, *supra* note 33 at 618) provide a useful description of “frames” and “framing” in their study on policy responses to trafficking:

Frames are cognitive structures that help define how one sees the world. ...[F]rames lead people to notice particular aspects of an interaction, event, or phenomenon at a subconscious level, which ultimately shapes how they interpret what is happening around them. ...[C]laims makers tailor the description of the nature and causes of the problem to invoke particular types of official responses. This process is known as problem framing.

¹⁰² Doezema, *supra* note 5 at 12.

¹⁰³ *Id.* at 131; See also David Rear, *Laclau and Mouffe’s Discourse Theory and Fairclough’s Critical Discourse Analysis: An Introduction and Comparison*, in *Discourse Analysis as Theory and Method* 24, 43 (Marianne Jorgenson & Louise Phillips eds, 2002).

the stage for justification of state fears around cross-border movement and, significantly, draws a bright line around the few in that movement who may be entitled to benefits. “The confusion between trafficking and smuggling is more than linguistic. It indicates the importance of the ideas of who deserves protection and who deserves punishment.”¹⁰⁴ Set into law it creates industries devoted to generating individuals entitled to either, or both. Some advocates at the time did express concern that this framework might be a “politically expedient means for governments to restrict immigration under the guise of protecting trafficked persons.”¹⁰⁵ Members of what would be known as the Human Rights Caucus (HRC) lobbied strenuously throughout the process, advocating for the protection of sex-worker rights and attempting to mitigate the effect of criminal sanctions on migrants and people of color.¹⁰⁶ Although sex worker networks had begun advocating against the use of anti-trafficking language entirely, maintaining that it had been used *against* sex workers rather than protective of them, they did not gain particular traction with Committee drafters in this regard. In the end, though members of the Network of Sex Workers Project (NSWP) continued to hold reservations about the use of the term, they joined forces with the HRC to try to moderate any potential damage.¹⁰⁷

Given the gap in consensus around the evils of sex work, the various feminist and religious alliances struggled to prioritize their concerns through the language the trafficking framework provided. In this process the larger concerns about how individual rights were being addressed were eclipsed, and victims’ rights were framed in terms of their links to effective prosecutions.¹⁰⁸ Compromises were ultimately made around the exact language to be included in the new Protocol to Prevent, Suppress and Punish Trafficking in Persons (Protocol). However, it was clear that prosecution and criminalization rather than rights or state policy would dominate the document. In the final version of the Protocol, state parties were required to criminalize trafficking as a discrete offence. Provisions around victim protection were framed in voluntary terms. States would be required only to “consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking”, and to “endeavour to provide for the physical safety of victims.” It suggested that states “consider adopting ... measures that permit victims of trafficking

¹⁰⁴ Doezema, *supra* note 5 at 121.

¹⁰⁵ Chuang 2010, *supra* note 81 at 1663.

¹⁰⁶ The International Human Rights Law Group and the Asian Women’s Human Rights Council formed the “Human Rights Caucus with GAATW. See Gallagher, *supra* note 96 at 1002.

¹⁰⁷ Jo Doezema, *Now You See Her, Now You Don’t: Sex Workers at the UN Trafficking Protocol Negotiation*, 14(1) *Social & Legal Studies* 61, 62 (2005)[hereinafter Doezema 2005]. See also Sullivan, *supra* note 49 at 72.

¹⁰⁸ See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 *HARV. J.L. & GENDER* 335, 389:

The battle among GFeminist [Governance Feminist] groups over consent probably not only distracted significantly from advocacy for strong commitments to concrete protections for sex laborers and other trafficked persons, but also obscured from view the strong political push to strengthen border control until it was too late. In this rather grim account, the NGOs involved in reform of the Protocol and in the drafting of the VTPA were so busy fighting over discursive control of women’s bodies that they forgot or did not see that one of the primary effects of these instruments will be to increase the control of the state over the location of those bodies.

in persons to remain in its territory,” but did not require it. Repatriation was to “preferably be voluntary,” with “due regard of the safety of that person.”

Trafficking was ultimately defined as:

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

Negotiators were unable to reach any agreement on what constituted “exploitation of the prostitution of others” or “sexual exploitation” in the end, as the states were not unanimous on either the abolitionist or rights-based approach. In addition, the line between exploitation and the indignities deemed *acceptable* for migrants to be subjected proved too difficult for negotiators to draw, and thus what constituted “exploitation” in general could not be determined. On the final day of negotiations, a compromise was reached to leave the terms undefined.¹⁰⁹ The Protocol and the TVPA had created a new discrete group of persons suddenly the subject of worldwide concern. The designation of an act as trafficking or *not*-trafficking would carry with it enormous power and normative value, including conferring either great benefit or great harm. Given that part of the meaning-making function of the Protocol was to delineate who would be viewed as victim and who would be criminal, the message that the line must be drawn was clear. However, where it would lie was left to the discretion of each state party.

The result was that the meaning of undefined terms would be filled in the public imagination by media representations, the influences of powerful states, and the concerns of particular governing administrations and Non-Governmental Organizations (NGOs). Interdiction of unwanted cross-border movement may have been the primary impetus for Western states to engage on the issue, but countries from the global South and East who experienced more out-migration benefited from remittances home and had different goals. Thus, ascribing meaning to each term in this context was always going to be a highly political act, serving to construct a platform to communicate value as much as a legally descriptive term. The same forces would continue to operate as trafficking laws were implemented domestically, ultimately structuring how the phenomenon would be understood, and its existence in the world itself.

Bringing the Story Back Home

¹⁰⁹ Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, GA 55th Sess, U.N. Doc A/55/383/Add.1 (2000) at para 64.

Neo-abolitionists sought to entrench the prostitution-trafficking paradigm into the U.S. system through “awareness” campaigns and training programs now legitimized and funded by the TVPA. In conjunction with these activities, groups continued to lobby for prostitution to be named as a specific harm in law, shifting focus back from the international arena in the post-Clinton era using the existing TVPA as their launching point. Using “the expressive role of criminal law” to stigmatize, faith-based and feminist groups promoted the criminalization of all third parties involved with women in the sex industry.¹¹⁰ By claiming that current laws did not adequately provide justice for victims, and with international eyes now focused on the issue, anti-prostitution and faith-based groups had visible new public platforms in the Protocol and TVPA to make their public case.

With the end of the Clinton presidency and the election of George W. Bush, neo-abolitionists were able to solidify the trafficking-prostitution link through presidential action. They promoted anti-trafficking as a faith-based humanitarian cause and President Bush responded by issuing National Security Presidential Directive 22.¹¹¹ Its language linked trafficking, prostitution and national security in the public consciousness, building upon support for humanitarian action to activate a national security solution. Anti-trafficking policy was from then on to be explicitly “based on an abolitionist approach”, the directive stated. The “United States Government opposes prostitution and any related activities, including pimping, pandering, or maintaining brothels, as contributing to the phenomenon of trafficking in persons. These activities are inherently harmful and dehumanizing.”¹¹² The Bush Administration supported expansive state-level anti-trafficking laws, as efforts to criminalize prostitution at the federal level through the TVPA had largely failed. His Department of Justice created model antitrafficking laws and within a few years all states had enacted state-level legislation.¹¹³ Significant amounts of money were allocated through the TVPA to support this effort, dedicated to both research and criminal programming initiatives.¹¹⁴

Coverage of the issue in the U.S. media also increased steadily after the introduction of the TVPA and the vast majority of articles focused on sex-sector trafficking, aiding neo-abolitionists and the new government in their cause. Media played an outsized role in the construction of trafficking worldwide and particularly in the U.S., rising so dramatically during the 2000s that the United Nations convened a panel to discuss its impact on potential policy-making.¹¹⁵ Coverage of trafficking in the U.S. increased both in terms of scale and in prominence after the TVPA became law, and despite insistence from the UN and other international agencies that trafficking

¹¹⁰ Chuang 2010, *supra* note 81 at 1669.

¹¹¹ National Security Presidential Directive 22 (NSPD-22), December 16, 2002, <https://ctip.defense.gov/Portals/12/Documents/NSPD-22.pdf>.

¹¹² *Id.*

¹¹³ Chacon 2017, *supra* note 1 at 105.

¹¹⁴ Research was to be conducted analyzing “sex trafficking and unlawful commercial sex acts in the United States” under (§ (a)(1)(A). Two separate studies were to be conducted, one to focus on “severe forms of trafficking in persons in the United States” (§ 201(a)(1)(B)(i)) and the other on “sex trafficking and unlawful commercial sex acts in the United States.” (§ 201(a)(1)(B)(i)).

¹¹⁵ Rachealle Sanford et al., *Framing Human Trafficking: A Content Analysis of Recent U.S. Newspaper Articles*, 2:2 *Journal of Human Trafficking*, 139, 141 (2016)

for other forms of forced labor had always been more prevalent, coverage and investigative journalism of sex trafficking predominated the news.¹¹⁶ Many reasons have been proffered for why this was, and still is, the case. Some argue that migrants on farms and restaurants are a daily part of U.S. life, whereas the threat to community from coercive sexual predators lends urgency to any advocacy effort.¹¹⁷ Others suggest that prostitution was the focus of policy-makers and lawmaking efforts, so media reported on those specific trials and successes.¹¹⁸ In addition, cases of sex trafficking have been increasingly investigated by law enforcement, and thus consequently covered by the media.¹¹⁹ Or media may be presenting stories they feel will attract the most attention and/or cater to existing public perceptions of what trafficking already is. Regardless of motivation, numerous studies have revealed the media's massively disproportionate focus on sex trafficking in contrast to other, more prevalent forms of labor exploitation.¹²⁰ This has particular ramifications for crime-related subject matters in the U.S., as the media plays a highly influential role in public interpretation of criminal problems. This in turn significantly influences the ways in which elected policymakers respond to those incidents – or to the reports and lawmakers' perceived public outrage over them. The media is a primary source of information for criminal issues given the public's limited personal interaction with crime.¹²¹ As such, media coverage significantly contributed to constructing the public narrative that trafficking is a crime about sex and primarily revolves around prostitution. This has served the carceral agenda and neo-abolitionist interests particularly well.

At the same time, language in scholarly, government and NGO reports slid back and forth between describing situations that had been identified as trafficking and making pronouncements about what trafficking *is*. Given the highly contested nature of the term at law, this slipperiness functioned to solidify the speaker's preferred definition without explicitly having to debate it. One such account reads: "trafficking victims *are likely* to be more disadvantaged than other migrants, and evidence indicates that *they are* disproportionately female and members of racial or ethnic

¹¹⁶ Farrell 2009, *supra* note 33 at 623:

In addition to the increase in the number of articles with a national security frame in this period, the tenor with which human trafficking was discussed in these news accounts increasingly highlights national security threats. During this period, government officials and antitrafficking advocates increasingly described human trafficking not only as a crime with harms to its victims, but also as a broader threat to the nation.

¹¹⁷ Chuang 2010, *supra* note 81 at 1698.

¹¹⁸ Sanford, *supra* note 115 at 146.

¹¹⁹ *Id.* at 147.

¹²⁰ Chuang 2010, *supra* note 81 at 1696.

¹²¹ Farrell 2009, *supra* note 33 at 618:

Media attention to and portrayal of a particular problem strongly affects how the public interprets and policymakers respond to problems. The role of the media is particularly influential in the case of criminal problems. For most people, the mass media serves as the basic source of information on crime and crime control policies. According to public surveys, an overwhelming majority of the general U.S. population (upwards of 95 percent) gets their primary information about crime and criminal problems from the mass media. Since most people have little, if any, personal experience with crime, it is not entirely surprising that media coverage shapes the public's attitudes and perceptions about crime problems and the most appropriate solutions to criminal problems.

minorities or other groups that suffer discrimination in the home country.”¹²² (Emphasis mine) In this instance, the author does not address the ways these characteristics described may have skewed their results. The very nature of the identification process leaves open the question whether the disadvantage, gender, and minority status are actually the *reason* these individuals were counted as trafficked. Necessarily then, the group “trafficking victims” would share these qualities. Commentators during the first decade of the TVPA and Protocol’s operation regularly described victims as isolated, helpless, almost entirely lacking in agency: “Most of the victims of trafficking *are usually not able to* speak the local language; they have no money, no papers and are under constant threat.”¹²³ (Emphasis mine) In these stories, victims commonly *are* illegal or *do* illegal things, further alienating them from the presumed protections of the state. “Trafficked women *tend* to be illegal immigrants or engaged in illegal activities – such as prostitution – and therefore are reluctant to lodge complaints with the authorities over labour issues or coercion.”¹²⁴ In this telling, it is assumed that what has been identified as trafficking is not itself circumscribed by the imagination of those doing the identifying. Instead, the “tendency” is inherent to the nature of trafficking rather than in the process of identifying who is trafficked.

Readers are told that typical trafficking scenarios have qualities involving deception, forced sex and captivity. For example, one author presents the following scenario as “typical”:

Deng volunteered to leave her home country of Thailand to work in Australia as a prostitute. When she arrived, traffickers took her passport and forced her to service hundreds of men to pay off a “debt” of over \$30,000. The traffickers locked Deng in a house, gave her little to eat, and forcibly brought her to work in a brothel seven days a week.¹²⁵

However, Deng and others like her are identified as trafficked by either law enforcement or aid workers because they *look* for trafficked victims in the field of transactional sex, in brothels and in nightclubs. Women are identified as a result of program priorities, access to employment venues, and funding, yet they are seamlessly transformed into the “typical” victim. Statistics are extrapolated from their existence, and what were initially characteristics of those *classified* as victims, become the characteristics used *to classify* future victims. The descriptive turns to normative without debate:

[V]ictims can be physically enslaved and imprisoned ... or a number of forms of leverage and coercion can be employed Victims *are often* given some of the money they generate in the sex industry ... [and] [v]ictims *often* perceive that public authorities are

¹²² Kinsey Aldan, *Globalization and National Sovereignty: From Migration to Trafficking*, in *Trafficking in Humans: Social, Cultural and Political Dimensions*, 58, 73 (Edward Newman and Sally Cameron eds, 2008).

¹²³ Sally Cameron and Edward Newman, *Introduction*, *Trafficking in Humans: Social, Cultural and Political Dimensions* 1, 5 (Edward Newman and Sally Cameron eds, 2008).

¹²⁴ *Id.* at 6.

¹²⁵ The author subsequently discusses trafficking more generally as an “exploitative form of irregular migration,” but the inclusion of the term “typical” in the initial description undermines the proposed nuance in later definitions. Anna Zalewski, *Migrants for Sale: The International Failure to Address Contemporary Human Trafficking*, 29 *Suffolk Transnat’l L. Rev* 113,114 (2005-2006)

unsympathetic, or they are afraid of approaching these authorities for fear of being prosecuted as a prostitute or illegal immigrant.¹²⁶ (Emphasis mine)

Speaking in the present tense allows the author to claim a generalized authority over the “typical” trafficking identity and the nature of identification itself is taken to be neutral and unassailable. This is who victims *are*. And more importantly, it establishes who victims are *to be*.

In 2011 an article published in the ABA’s *Criminal Justice* journal provided what it claimed to be “insight into what human trafficking currently looks like in the United States.”¹²⁷ It listed examples such as a case of “human trafficking and forced domestic servitude“ (carefully distinguishing between these two separate phenomena), “a scheme to transport individuals from Virginia and the District of Columbia to Maryland, forcing the victims into prostitution“, the charging of 29 people in Tennessee of crimes involving “sex trafficking of juveniles” and a “a Somali-run human trafficking organization where girls younger than 14 were forced into prostitution.“¹²⁸ It also referred to a “west side child prostitution ring,“ and a Rhode Island “sex trafficking ring“ that resulted in the arrest of all the male customers of a brothel. This sample is put forward as a representation of what trafficking *looks like* in the U.S. without including how identification through dedicated law enforcement operations may have skewed who was identified. Rather than accounting for the location and businesses law enforcement target to seek out cases of trafficking, it suggests that the characteristics are somehow common *to the phenomenon itself*. The author concludes:

As shown by the sample of recent cases, prosecutors and law enforcement need to be aware that human trafficking occurs daily in their jurisdictions, regardless of the size of the city. Frequently, traffickers seek women from small towns and rural areas, girls looking for a better life and the glamour of the big city. This is not a crime that can be ignored simply because the forced prostitution does not occur in a particular jurisdiction. Victims come from everywhere.¹²⁹

Through this call to action, the author essentially asks readers not to ignore what is in fact already being surveilled. And, given the placement of the article within a professional legal journal, these statements take on legal authority.

In 2013 the ABA also published an issue of its *Judges’ Journal* devoted entirely to trafficking. Some of the articles in this journal were more critical of human trafficking laws, noting the variety of state-level definitions and the conflation of smuggling and trafficking in some cases.¹³⁰ However, the critiques tended to be limited to the inadequacies of the laws to identify and protect victims, and continued to propose solutions that moved within criminal justice.¹³¹ The President of the ABA relayed familiar narratives and statistics in her contribution to the journal:

¹²⁶ Aldan, *supra* note 122.

¹²⁷ Sara Dill, *Human Trafficking*, 26 (1) *Criminal Justice* 18, 21 (2011).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Kelly Heinrich, Kavitha Sreeharsha, *The State of State Human-Trafficking Laws*, 52 *Judges’ J.*, 28 (2013).

¹³¹ Dorchen A. Leidholdt, *Human Trafficking and Domestic Violence A Primer for Judges*, 52 *Judges’ J.*, 16 (2013).

Human trafficking is estimated to be one of the fastest-growing and most profitable criminal enterprises. More than 100,000 U.S. citizens have been forced into sex or labor, and thousands more men, women, and children are illegally trafficked into the country each year. In Chicago alone, at least 16,000 young women are at risk for commercial sexual exploitation each year.

...[I]n the United States, modern slavery takes place every minute in metropolitan areas, wealthy suburbs, and rural regions. Traffickers can be family members, acquaintances, intimate partners, or strangers.¹³²

The introductory article, formerly available for free on the ABA website, refers to the work of the evangelical International Justice Mission and how it has helped “young Thai women” escape forced prostitution.¹³³ On that basis it somehow calls readers to act locally, as “victims are indeed hidden in plain sight in our communities”.¹³⁴ This journal specifically targets judges for its readership, and calls them to act in response to these images in the name of justice for victims:

If our justice system is to have integrity, judges must be advocates for justice. It is particularly important that, in our roles as presiding court officers and community leaders, we are well versed in the criminal enterprise known as human trafficking. Otherwise, the court systems that we lead are vulnerable to misidentifying victims as criminals and to unwittingly supporting the traffickers.¹³⁵

Throughout these various articles and in the neoabolitionist movement more generally, representations of international victims become enmeshed with calls to abolish prostitution at home. The language of the foreign is used as a call to justice here, providing an association between human rights protections and sanctions against criminal offenders. The ways in which trafficking grew became uniquely shaped by this rhetoric and the response to the calls to action was specifically engendered by the laws. Given the criminal framework in which the laws sat, trafficking ultimately developed as a means to incarcerate and exclude unwanted bodies. It provided only limited protections to a rare few individuals who met and agreed to display the criteria created for the ideal victim.

II - COUNTING AND CREATING

In the constant retelling of the trafficking story, particularly in venues accorded legal authority, the picture of trafficking becomes part of the legal landscape. Criminal and victim, illegal migration and organized transnational gangs are all background characteristics used to fill in conceptual gaps in imagination. As the outcry over trafficking increased throughout the 2000s and media coverage grew, the TVPA was revised in ways that reflected the priorities set through

¹³² Laurel G. Bellows, *ABA President Laurel G. Bellows on Human Trafficking*, 52 *Judges' J.*, 9,10 (2013).

¹³³ Judge Mary-Margaret Anderson, *Hidden in Plain Sight*, 52 *Judges' J.* 1 (2013).

¹³⁴ *Id.*

¹³⁵ *Id.*

this discourse. The legislation provided massive sources of funding for programming focused on anti-prostitution priorities, and situations that fell within those parameters continued to be identified as potential instances of trafficking. Moreover, individuals became encouraged to re-envision their own circumstances in light of these new parameters, and to view their relationships through the lens of the criminal law. And it is integral to understanding law's function to clarify that while this re-casting may appear to simply identify experiences latent in an individual's circumstance, the process ultimately *produces* much more than that. Funding and policymaking priorities have worked to encourage re-casting where that vision might not accurately represent the complexity of an individual's experience. This is particularly relevant where their own status, or an NGO's funding or a country's aid is dependent upon this assessment. The lens of trafficking is used to organize the world in black and white, rather than responding to the more complex particularities of time and place that exist. It is here where law's creative capacity is most visible.

The 2005 reauthorization of the TVPA established the "Program to Reduce Trafficking in Persons and Demand for Commercial Sex Acts in the United States" under Section 201, "Prevention of Domestic Trafficking in Persons."¹³⁶ Findings were added that reflected the dominant discourse of the period and the coalition's focus on domestic prostitution:

(2) The United States Government currently estimates that 600,000 to 800,000 individuals are trafficked across international borders each year An estimated 80 percent of such individuals are women and girls.

...

(4) Trafficking in persons also occurs within the borders of a country, including the United States.

(5) No known studies exist that quantify the problem. ... as many as 300,000 children in the United States are at risk for commercial sexual exploitation, including trafficking, at any given time.

(6) Runaway and homeless children in the United States are highly susceptible every day in the United States, between 1,300,000 and 2,800,000 runaway and homeless youth live on the streets.¹³⁷

The 2005 version also established "rehabilitative facilities" for victims of trafficking. (102(b)) The UN High Commissioner for Human Rights had specifically warned against using the term "rehabilitation" as it was associated with perpetrators rather than victims, and he suggested it be removed in the early drafts of the Protocol.¹³⁸ Nevertheless, the term was included in the 2005 reauthorization.

The reauthorization called for research analyzing "sex trafficking and unlawful commercial sex acts in the United States" in section 201(a)(1)(A). Two separate studies were to be conducted,

¹³⁶ TVPA reauthorization 201 from 2005 Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 103(a)(1), 119 Stat. 3558 (2005) [hereinafter TVPRA]. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222(d)(1), 122 Stat. 5044 (2008) [hereinafter TVPRA 2008].

¹³⁷ TVPRA § 301(6).

¹³⁸ Doezema, *supra* note 5 at 121.

one to focus on “severe forms of trafficking in persons in the United States” (201(a)(1)(B)(i)) and the other on “sex trafficking and unlawful commercial sex acts in the United States” (201(a)(1)(B)(ii)). This latter study would include not only coercive acts or those relating to underage victims but the numbers and demographic characteristics of persons involved in “commercial sex acts, including purchasers”, the value of the commercial sex economy, investigations, arrests and prosecutions of persons engaged in “unlawful commercial sex acts, and a description of the differences in the enforcement of “unlawful commercial sex” between states.

New funding was also provided to help law enforcement agencies investigate and prosecute commercial sexual transactions of all kinds:

[T]o investigate and prosecute acts of severe forms of trafficking in persons, *and related offenses*, which involve United States citizens, or aliens admitted for permanent residence, and that occur, in whole or in part, within the territorial jurisdiction of the United States;

(B) to investigate and prosecute persons who engage in the purchase of commercial sex acts;

(C) to educate persons charged with, or convicted of, purchasing or attempting to purchase commercial sex acts; and

(D) to educate and train law enforcement personnel in how to establish trust of persons subjected to trafficking and encourage cooperation with prosecution efforts.¹³⁹

A whopping \$25 million dollars was set aside for each fiscal year 2006 and 2007 for the Attorney General to make grants to states and local law enforcement agencies to address these acts of trafficking *and related offenses*, as well as the prosecution or education of anyone who purchases sexual services. Ten million was set aside for NGOs to assist victims of sex trafficking and severe forms of trafficking within the U.S, with priority given to service delivery organizations experienced with “persons who have been subjected to sexual abuse or commercial sexual exploitation.” (202(b))

Despite advocates’ claims about the overwhelming numbers of potential victims, prosecutions at the federal level did not rise dramatically during the first half of the 2000s. The Federal Department of Justice reported just 68 sex trafficking prosecutions from 2001 to 2005 and 23 labor trafficking prosecutions, up from 7 and 11 respectively for the years 1996-2000, pre-TVPA.¹⁴⁰ Now that financial and policy incentives encouraged continued focus on sex trafficking, the low rates were framed in terms of lack of prosecutorial enthusiasm or knowledge, problems with law enforcement implementation, or victims’ reluctance to identify themselves out of fear of repercussions from their traffickers.¹⁴¹ The prosecutorial mismatch was rarely read in ways that questioned the framework’s fundamental utility. Instead, state-level “domestic” prosecutions began to be counted as trafficking-related charges after the TVPA’s reauthorization heightened

¹³⁹ TVPRA § 204.

¹⁴⁰ Chuang 2010, *supra* note 81 at 1696, reporting an increase from seven sex trafficking cases to sixty-eight sex trafficking cases and from eleven labor trafficking cases to twenty-three labor trafficking cases between 2001-2005 according to the U.S. Department of State official reports.

¹⁴¹ Farrell 2013, *supra* note 13 at 141.

that focus in 2005. Bernstein suggests that the shift in attention to international sex slavery in the early 2000s then back to domestic trafficking a few years later “provided critical circuitry for the carceral feminist agenda.”¹⁴² The coalition could now promote imprisonment for prostitution-related offenses under the rubric of “domestic trafficking”, using the language of women’s human rights discourse they had been employing to highlight cross-border issues.

Unsurprisingly then, prosecutions rose in the latter half of the decade, but the overwhelming majority of those cases did not involve international actors as victims or perpetrators. The primary venues targeted for investigation were ones in which there was evidence of underage girls involved in transactional sex, now a focus under the TVPA. Police indicated that this is the best way to generate numbers,¹⁴³ and this became paramount given the incentives provided for laying charges and garnering prosecutions. The individuals arrested from those operations are charged with crimes occurring entirely within the U.S, but the numbers of those arrests are combined with international charges and reported under the same rubric of “trafficking”. The one number then sits alongside rhetoric on organized crime, money laundering and transnational smuggling, making the international aspect appear far more integral to the prosecutions than in is. State officials explain the crime as a product of transnational gang activity “even as they prosecute crimes related to commercialized sex that appear almost entirely domestic in nature.”¹⁴⁴ A call for justice on behalf of one group is used to justify interventions on behalf of another, even the solutions in reality would require radically different measures.

Throughout the 2000s antitrafficking program successes were measured primarily by “counting the numbers and types of arrests, prosecutions, and international victims who were certified as eligible to receive government assistance.”¹⁴⁵ Reports were generated to confirm compliance with the measures created by those laws, with those reports then circulated to the public and used to lobby for further legislative change. The end result was that the importance of the issues pre-determined by those laws was generally reinforced. One such report comes annually from the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons (PITF).¹⁴⁶ This task force was created by the TVPA of 2000 and established by Executive Order in 2002 as the primary inter-agency vehicle for the federal government to address trafficking.¹⁴⁷ It communicates goals, determines strategic objectives, and allocates funding to both domestic and

¹⁴² Bernstein 2012, *supra* note 53 at 6.

¹⁴³ *Id.* at 7.

¹⁴⁴ Chacon 2017, *supra* note 1 at 104.

¹⁴⁵ Farrell 2009, *supra* note 33 at 623.

¹⁴⁶ The PITF agencies include: Departments of State (DOS), Treasury (Treasury), Defense (DOD), Justice (DOJ), the Interior (DOI), Agriculture (USDA), Labor (DOL), Health and Human Services (HHS), Transportation (DOT), Education (ED), and Homeland Security (DHS), as well as the Office of Management and Budget (OMB), the Office of the U.S. Trade Representative (USTR), the Office of the Director of National Intelligence (ODNI), the National Security Council (NSC), the Domestic Policy Council (DPC), the U.S. Agency for International Development (USAID), the Federal Bureau of Investigation (FBI), and the U.S. Equal Employment Opportunity Commission (EEOC). The Senior Policy Operating Group (SPOG), which consists of senior officials designated as representatives of the PITF agencies. President's Interagency Task Force to Monitor and Combat Trafficking in Persons, <https://www.state.gov/j/tip/response/usg/>.

¹⁴⁷ Authorized by § 105(a) of the TVPA and established by Executive Order 13257, sec. 1(a) (Feb. 13, 2002).

international trafficking-related programming. Because of this authority, the narratives, definitions, and images produced by this task force hold significant sway. The official numbers issued in its annual report are also widely circulated and used by other agencies and scholars.

However, it is clear from the outset that paradigmatic tropes play a role in the Task Force's operation, despite its representation as a neutral source of information. The 2017 Report's opening paragraph sets the tone:

Trafficking in persons, also known as modern slavery or human trafficking, ... all too often is a hidden crime. ... Human trafficking respects no boundaries. ..., threatens public safety and national security, distorts economic markets, undermines rule of law, and spurs transnational criminal activity. Human traffickers will continue to expand and diversify their recruitment tactics and methods of exploitation if left unchecked.¹⁴⁸

The "enforcement" of criminal laws is listed first as the primary purpose for bringing together all agencies across the federal spectrum, and of its 10 strategic objectives for 2017, criminal sanction or identification occupies the first, second, and third spots. Unsurprisingly, prosecutions and investigations within the criminal justice framework are reported first, with the authors extolling the virtues of the "high impact human trafficking investigations and prosecutions".¹⁴⁹ These "high impact" investigations produced convictions against 499 defendants during the reporting period, and during that same time the Department of Homeland Security (DHS) reports that it "initiated 833 human trafficking cases, resulting in 1,602 arrests and 578 convictions".¹⁵⁰ The FBI during this period initiated 316 human trafficking investigations resulting in arrests of 553 suspects, and through its Violent Crimes Against Children Program opened 486 more cases related to child sex trafficking, resulting in the arrest of 2,135 suspects.¹⁵¹

These statistics, ranging into the thousands, give the impression that the work being conducted on trafficking is fruitful. However, in 2017 Federal courts only *had* 1,474 active defendants charged with trafficking on all of their dockets, and they resolved only 361 of those cases.¹⁵² The PITF appears to be suggesting that triple the number of convictions were secured than what was reported by federal courts themselves. This discrepancy raises key questions about the terminology used and data portrayed. Department of Homeland Security's involvement alone in "convictions" is cause for further inquiry, as the agency has no official role in criminal trials.¹⁵³

¹⁴⁸ See President's Interagency Task Force, U.S. Dep't of State, *Report on U.S. Government Efforts to Combat Trafficking in Persons* (2017), <https://www.state.gov/j/tip/rls/other/2017/283825.htm> (last visited Feb 22, 2019) [hereinafter PITF 2017]

¹⁴⁹ *Id.* at 10.

¹⁵⁰ *Id.* at 11.

¹⁵¹ *Id.*

¹⁵² Human Trafficking Institute, *2017 Federal Human Trafficking Report*, https://www.traffickingmatters.com/wp-content/uploads/2018/05/2017-Federal-Human-Trafficking-Report-Executive-Summary_web.pdf. The Human Trafficking Institute (HTI) reviews all criminal and civil human trafficking cases in the federal court system in their annual reports each year. Taking into account that this report assessed the 2017 calendar year and the PITF report focused on the fiscal year, 344 of the 361 defendants in the resolved cases would have had to have been convicted for the PITF to be correctly reporting the federal caseload, approaching a 95% conviction rate. This suggests that even if one accounts for discrepancy in the months counted (HTI assessed calendar months, PITF assessed fiscal year) a rise in conviction rate during the first 4 months of 2018 could not possibly explain the generous gap.

¹⁵³ DHS investigates immigration-related offenses on the territory of the United States and this raises the question whether immigration-related offenses resulting in removal are being classified as "trafficking," or whether DHS-initiated charges stemming from immigration investigations are being counted in these statistics, given that DOJ is

What constitutes a trafficking-related conviction “as a result” of anti-trafficking investigations is a key issue, as it conveys standards for measuring success. It is not clear from these apparently inflated numbers what that causal link is, or how these numbers are to be read. Yet reports such as these function as the very justification for continuing current approaches to anti-trafficking work.

The report does detail one specific collaboration with Mexican law enforcement that resulted in trafficking-related arrests, providing insight into the consequences of the carceral feminist approach. The convictions of eight members of a “transnational organized criminal sex trafficking enterprise”, prompted the U.S. Attorney’s Office press release: *Prosecution Dismantles Transnational Sex Trafficking Organization that Compelled Women and Girls into Prostitution for Over a Decade*. The release described the “organization” as a:

family-based enterprise that profited by prostituting young women and girls. ... [T]he defendants and their associates recruited young women and girls from Mexico on false promises, smuggled them into the United States, prostituted them in New York, Georgia, and other locations, and retained the prostitution proceeds for members of the family-based criminal organization... [They] admitted to participating in the sex trafficking of nine women and two minor girls, as well as the prostitution of a twelfth woman.¹⁵⁴

The U.S. Attorney notes that the defendants would be ordered to pay restitution to the victims in an amount to be determined at the time of sentencing; however, the ultimate fate of the victims is not mentioned anywhere in the over 1,500-word article. We are not told whether they were granted legal status in the United States, nor whether the “not-trafficked” woman was criminalized or deported as a result of this operation. The prosecution of the perpetrators is the key story. Only one victim appears to have made public statements about her personal experience, and it is unclear if the victims or the “non-victim” suffered any collateral damage as a result of taking down this “family-based enterprise”. The government frames the story as a success yet omits the very victims the operation was allegedly intended to protect.

These kinds of investigations flourished in the wake of the TVPA since significant amounts of funding were provided for law-enforcement initiatives. Operations such as *Gilded Cage* and *Operation Cross Country* have grabbed both dollars and media headlines in the name of trafficking each year.¹⁵⁵ The name “Operation Gilded Cage” immediately evokes paradigmatic trafficking tropes, presenting the investigation and raids as necessary for saving trapped innocents. However, when law enforcement “rescued” over 100 South Korean women from performing sex work in the San Francisco area, it was ultimately determined that there was no “firm evidence” they had been coerced into prostitution, and as such they were instead placed into immigration detention.¹⁵⁶ The

required to prosecute the charge and would undoubtedly have accounted for the prosecution in their own statistics. It is not made clear in what way they “result” from DHS intervention or whether searches initiated on the basis of “human trafficking” investigations produce other unrelated immigration offenses.

¹⁵⁴ Press Release, U.S. Attorney’s Office, Eastern District of N.Y., *Eight Members of Mexican Sex Trafficking Enterprise Plead Guilty To Racketeering, Sex Trafficking, And Related Crimes*, <https://www.justice.gov/usao-edny/pr/eight-members-mexican-sex-trafficking-enterprise-plead-guilty-racketeering-sex>.

¹⁵⁵ Kimberly Mehlman-Orozco, *Why we should question the FBI's recent human trafficking sting*, Thomson Reuters, <https://news.trust.org/item/20171024161910-x96o5>.

¹⁵⁶ Kathleen Kim and Grace Chang, *Reconceptualizing Approaches to Human Trafficking: New Directions and*

myth of trafficking operated to criminalize and deport over 100 people, but this operation is still touted as protecting victims. *Operation Cross Country*, functioning for over a decade, “rescues” hundreds of girls from the streets, many after having escaped from institutions and group homes. Girls are returned to these institutions, and their “rescue” (initially garnered through an arrest) accompanied by the arrest of hundreds of adult consensual sex workers. It also captures individuals in domestic and economic relationships with those adults and their clients.¹⁵⁷

In her 2016 study of sub-federal regulation of trafficking, Jennifer Chacon highlights the racialized aspects of such enforcement methods, noting the disproportionate enforcement of state criminal trafficking provisions against black males and other men of color. She suggests “that the enforcement of prohibitions on ‘trafficking,’ like that of other vague criminal law provisions, has been shaped by pervasive racialized understandings of criminality generally, and of perpetrators of specific kinds of sex crimes more specifically.”¹⁵⁸ With the backing of neo-abolitionist feminist advocates, authorities have been able to raise the spectre of transnational organized crime as support for all anti-trafficking measures, local and international, despite the majority of trafficking charges being laid against U.S. citizens for acts taking place entirely within the country:

[S]tates .. are increasingly deploying the very same narrative that resulted in the Trafficking Protocol’s status as supplemental to the Crime Convention. Specifically, state officials have begun to explain state trafficking crimes as a product of transnational gang activity, even as they prosecute crimes related to commercialized sex that appear largely domestic in nature. In this way, efforts to maximize trafficking prosecutions have become increasingly intertwined with anti-gang policing that is fueled by, and feeds, narratives of urban Black and Latino criminality, as well as immigrant criminality.¹⁵⁹

Anti-trafficking enforcement has disproportionately affected populations already subject to high levels of police oversight. This has resulted in an amplification of the highly racialized levels of targeting already problematic in some local policing efforts.

“Victims” identified through operations in many cases stand trial themselves, either in criminal or immigration proceedings, having to prove their innocence to obtain any relief. In these cases “the promises that ‘you have nothing to fear from the authorities’ are simply not true.”¹⁶⁰ In 2017, U.S. Immigration and Customs Enforcement (ICE) and Homeland Security Investigations (HIS) launched a “dedicated hotline for Immigration court personnel to relay time-sensitive information on potential human trafficking cases.”¹⁶¹ The expenditure came from its “Victim

Perspectives from the Field(s), 3(2) Stanford Journal of Civil Rights and Civil Liberties 47 (2007); Dana Bruxvoort, *The Untold Side of Raids and Rescues: Rethinking Anti-Trafficking Efforts*, HTC Blog, <http://humantraffickingcenter.org/posts-by-htc-associates/the-untold-side-of-raids-and-rescues-re-thinking-anti-trafficking-efforts/>; David Rosenzweig and K Connie Kang, *Raids on Brothel Rings Net 45 Arrests*, LA Times, July 2, 2005, <http://articles.latimes.com/2005/jul/02/local/me-smuggling2>.

¹⁵⁷ SWOP USA, *24 Things to Know About Operation Cross Country*, <http://www.swopusa.org/things-to-know-about-operation-cross-country-and-raids-to-rescue-child-sex-trafficking-victims/>.

¹⁵⁸ Chacon 2017, *supra* note 1 at 25.

¹⁵⁹ *Id.*

¹⁶⁰ Rutvica Andrijasevic and Bridget Anderson, *Anti-trafficking campaigns: Decent? honest? truthful?*, 92 Feminist Review 151, 154 (2009).

¹⁶¹ PITF 2017, *supra* note 148.

Assistance Program”, though it is unclear what assistance was to be specifically provided. What is clear is that any non-citizen could be detained by DHS if reported, as they would be designated a potential felon. Combined with recent spates of ICE arrests at courthouses and other administrative venues, noncitizens are discouraged from interacting with authorities, even as their own tragic stories have been used to justify these interventions.¹⁶²

The goal of rescue and the spectre of the child prostitute ultimately provide cover for what are largely criminal and immigration enforcement efforts against adults. They have provided little to no tangible benefit for the vast majority of youth encountered, and few international victims are granted the immigration benefits associated with identification. Yet those identified become counted in statistics for enforcement operations and the numbers generated are used to represent the number of trafficking incidents. Trafficking is created in this way in official records and in public discourse and forms the basis for future operations. The rhetoric employed in these campaigns allows for massively disproportionate criminal consequences in the name of saving innocents, with little evidence of either need or success. These consequences though are deemed necessary in the interests of justice, and to uphold the values now written into law.

This framework also plays out directly in the legal system through court processes framed around addressing this version of trafficking. Special trafficking courts have further contributed to the creation of trafficking, generating victims and the numbers that will be counted as part of the anti-trafficking effort. They have been lauded as a progressive tactic aimed at “rehabilitating” rather than punishing women, yet they still involve initial arrests, bringing about a significant amount of hardship to many involved. These courts, now established in several counties in New York and California, are tasked with vacating prostitution-related charges where a defendant is deemed to have been involved with a trafficker.¹⁶³ Women (or men in rare cases) are to be provided with services rather than jail-time because of their victimization in the coercive relationship. However, in practice the way in which these courts are structured still engage victims in criminal justice systems, and problems inherent to those systems spill over onto individuals before that court. For example, a backlog in the services required to vacate a defendant’s conviction leaves non-citizens vulnerable to deportation during this period, since they are technically charged with the offense in the initial stages. They are ineligible for other services and have reported trouble gaining employment and keeping custody of children.¹⁶⁴ In some cases, these are the very consequences that acted as threats (explicit or implicit) preventing them from leaving the circumstances now considered exploitative. Reports also indicate that women shuffled into this system often have their cases heard in just minutes. Due process considerations would normally afford them the opportunity to be heard on their participation in the transactional sex-act itself – the allegedly criminal act. However, this process is largely absent in trafficking court where the assumption is any criminal liability will be eventually vacated. Where there are delays in processing their vacatur, or they are unable to meet the requirements, the conviction is formally

¹⁶² Chacon 2017, *supra* note 1 at 125.

¹⁶³ *Id.* at 121.

¹⁶⁴ *Id.* at 124-125.

entered onto their criminal record. Yet the initial criminal safeguards were not in place to have afforded them due process.¹⁶⁵ And given that women of color and noncitizens make up a disproportionately large sector of the victims identified, they ultimately face the brunt of the consequences for this new criminal-justice regime of “rehabilitation”.

Potential victims are pressured to collaborate with prosecutions in exchange for this classification, and in many cases are not asked their story in detail but shuffled in to these courts whenever arrested. A manager, a boyfriend or roommate is suddenly transformed into a trafficker and individuals are faced with the choice to “either declare themselves to be a ‘victim’ and betray their colleagues, partners ... as ‘traffickers’, or refuse to do so and themselves be prosecuted and imprisoned.”¹⁶⁶ In this moment they must choose under pressure how to relate the complex experiences of their relationships through a pre-ordained narrative – trafficked or not-trafficked. For some, this framework would not have been the natural choice and does not reflect the complexity of their experiences. Interviews with migrants in the sex industry have shown that some sold sex prior to relocating, some aware that they would be working selling sexual services of some kind, in some cases facilitators are relatives or friends who assist with migrating, some of whom do hide the extent of the indebtedness or terms in the migrant’s contracts, and some of whom do not. Some understand the working conditions in selling sex in the destination country while others may not fully appreciate them. Ultimately what these studies show are that people identified as traffickers “do not necessarily fit the ‘folk devil’ stereotype popularized by the anti-trafficking movement” and that “there are multiple migration trajectories and worker experiences, ranging from highly coercive and exploitative to informed consent and intentionality on the part of the migrant. Yet, the crusade presents only the worst cases and universalizes them.”¹⁶⁷ They all required to tell stories in similar ways to avoid the potentially dire consequences of imprisonment or deportation and all become part of the same “trafficked” statistics. Here trafficking is once again generated where it might not otherwise have been. While some individuals before the court have indicated gratitude for the process and the introduction it provided them to services, other victims interviewed have indicated that they consider the system to be more victimizing than the situation they had previously been in.¹⁶⁸ People are also often faced with choices in the U.S. immigration system that result in the creation of trafficking as a charge or arrest on the books and counted towards statistical understanding. Given the dearth of immigration options available for low-skilled and low-earning foreigners, those suffering immense deprivation and fear are often excluded from finding a path to permanent residency.

¹⁶⁵ Melissa Gira Grant, *Flawed justice for sex workers*, NY Daily News, Sept. 30, 2014, <https://www.nydailynews.com/opinion/gira-grant-flawed-justice-sex-workers-article-1.1958688>: “Nearly 70% of defendants facing prostitution charges in the Brooklyn trafficking courts are black. For loitering charges, 94% appear to be black. (The group sent monitors and used open records to track 364 cases in Brooklyn and Queens, where 58% of defendants are Asian, over nine months.)”

¹⁶⁶Marjan Wijers, Purity, *Victimhood and Agency: Fifteen years of the UN Trafficking Protocol*, 4 Anti-Trafficking Review 56 at 74 (2015).

¹⁶⁷ Weitzer, *supra* note 28 at 454.

¹⁶⁸ Grant, Daily News, *supra* note 165.

Immigration avenues are closing rather than expanding as rhetoric on “border security” increases. Individuals must seek out new and obscure ways to come to or remain in the U.S. without being detected or put on a priority list for deportation by DHS. Without an immediate relative to petition for them, most low-skilled Mexican and Central American people are not provided with any way to apply for legal status in the U.S. Though desperate to leave dire poverty and violence in some regions of Mexico and the Northern Triangle, there is no means for gaining legal status in the U.S., where ads and stories have relayed to them that they have at least a chance at creating a stable and prosperous life for themselves and for family. For those who are the victims of crime, the “U-Visa” has provided some relief, but currently there is a backlog of applications since only 10,000 are available in any year, for all types of crime. Victims of domestic violence are provided some relief but only if their abusers happen to be permanent residents or U.S. citizens.

One of the very few windows that has opened rather than closed is the “T-Visa”, available to victims of trafficking who show willingness to cooperate with prosecutions. Victims deemed by authorities to have been “trafficked” may obtain legal residency if they agree to help in prosecuting their traffickers and if they would face extreme hardship should they be forced to return to their home states.¹⁶⁹ Asylum law requires that individuals suffer (or potentially suffer) persecution based on specific, narrow grounds, personal to the applicant. And the rates of acceptance for claims are notoriously low in some areas of the U.S.¹⁷⁰ Only a small number of seasonal work permits are available for those in agriculture, and those jobs still require skills and physical abilities many do not possess. Limited options and barriers to those avenues leave many people without real forms of redress.

The T-Visa has been made available in this context where so few options exist. Unsurprisingly, a spate of advocacy and advice has popped up on how to tell client stories in ways that frame their experiences as having been trafficked.¹⁷¹ Individuals without legal status in the US who are facing prosecution for prostitution in criminal courts can potentially legalize status if their situation fits within the technical requirements for a T-Visa. However, their experiences with migration and their relationship with the employer who “trafficked” them are often much more complicated than what is expected from the ideal victim, and they do not frame their experiences in terms of trafficking without assistance. Given the normalcy of exploiting foreign low-skilled labor in terms of pay, housing, and job-security, T-visa specialists are trained to reframe circumstances, denaturalizing the exploitation and denaturalizing client expectations around that exploitation. This process results in clients reenvisioning their own circumstances in light of the legally predetermined notions of trafficking that would allow them to achieve legal status. The story is told to fit within that narrative rather than in ways that relay the more comprehensive and

¹⁶⁹ T-visas allow the recipients to stay in the United States, but only if they cooperate in the prosecution of the individuals responsible for their trafficking, and can demonstrate that they will be subject to "extreme hardship involving unusual and severe harm" if they are returned to their countries of origin. INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T).

¹⁷⁰ Mica Rosenberg, *They fled danger at home to make a high-stakes bet on U.S. immigration courts*, Reuters Investigates, Oct 17, 2017, <https://www.reuters.com/investigates/special-report/usa-immigration-asylum/>.

¹⁷¹ See e.g. <http://www.amigalawyers.com/services/tvisa>.

complex features of a migrant's journey, and hence they become "trafficked." Given the very real fears and dangers people face, the absence of other avenues for legalization pushes advocates towards this solution. And while the narratives told are true, these frameworks are not necessarily natural or recognizable for the client until they are counseled on this option, and they tell only a decontextualized part of a client's life. Trafficking is created through these stories simply because no other options exist in law. It acts as a lifeline in an era of heavy enforcement against undocumented persons.¹⁷²

Clients relay their stories in paradigmatic ways because courts and other adjudicative bodies have been shown to reflect paradigmatic assumptions in the language they use around trafficking. The characteristics and criteria courts have used to identify situations of trafficking officially becomes part of legal discourse and the legal landscape for future cases. This is particularly visible when determining who does and does not qualify as a victim of trafficking. For example, 300 Filipino teachers who sought legal status on the basis of having been trafficked were denied visas by a court in Baton Rouge, Louisiana. Although they had arrived on validly-held H1-B work visas, they had since been defrauded, not paid, and threatened with deportation. Notwithstanding clear evidence of the various legal elements of trafficking, defense counsel described images of cotton fields and other hallmarks of chattel slavery which these teachers did not reflect. As such, the victims were determined not to be "trafficked", but instead received compensation through other labor statutes.¹⁷³ In another example, the presiding judge in a Maryland asylum case took notice of expert testimony on the *typical characteristics* of trafficking, placing into asylum law the expected scenario against which future victims may be legally judged. The court accepted the trafficking expert's belief that the employers in that case had used measures that were "typical" of traffickers, and that this was relevant to "how the allegations ... fit within similar profiles of worker exploitation and human trafficking cases."¹⁷⁴ The Court found relevant "the patterns of coercion and threats that are typically present in situations involving the exploitation of foreign workers ... [and] how it is common for traffickers to exert control and foster

¹⁷² I do not suggest that women are somehow falsifying information in order to receive undue immigration benefits or to avoid criminal consequences. Trafficking has eclipsed other forms of relief and has reconceptualized work, migration, domestic, sexual and security relationships in ways that are unfamiliar to those who are not well versed in the paradigm. They are being asked to frame their stories in particular ways in court such that advocates are now required to help them understand how to manage that framing process. See Corey S. Shdaimah, *Prostitution/human Trafficking Courts: Policy Frontline as Fault Line*, 96 Tex. L. Rev. Online 14, 18 (2017):

[C]riminal justice personnel draw on a number of factors in order to "make sense of" women who are involved in sexual crimes and place them on trajectories that will ultimately support or refute their legal claims. Trajectories that are shaped through ongoing interactions between claimants and criminal justice personnel take place within what we call an "arena of intelligibility," ... One of the crucial factors that make women and their claims intelligible is whether their narratives fit within normative rationales of why women act the way they do. Indeed, most problem-solving justice initiatives have a performative aspect in which defendants are called upon to acknowledge and act upon what criminal justice personnel have come to see as hallmarks of acceptance and responsibility. In contemporary prostitution programs, defendants are asked to disclose their suffering and trauma, and make commitments to address these through therapy.

¹⁷³ Chuang 2014, *supra* note 12 at 625.

¹⁷⁴ *Elat v. Ngoubene*, 993 F. Supp. 2d 497, 509 (D. Md. 2014)

dependency in a variety of ways that are both subtle and overt."¹⁷⁵ Thus a profile or “typical” scenario was created in the public record, not based on data but on the particular experiences of an expert deemed to authoritatively speak to “trafficking”. These expectations set the standard for identifying future acts of trafficking and its victims. In turn, it is those characteristics that are relied upon to identify future victims.

Farrell et al’s 2013 study of trafficking-related charges in the U.S. highlights the impacts of this legalization of the paradigmatic victim. The authors note the reluctance of state prosecutors to use state human trafficking laws because, often judges don’t understand the laws, making their use difficult. As one prosecutor in Texas noted: “stories of trafficking victims are complex, and they seldom fit neatly into the categories of forced labor that the statute provides, so we generally charge offenses with less complex language, such as compelling prostitution or aggravated promotion of prostitution”.¹⁷⁶ Interviewees in the study also indicated that public perceptions further complicate the issue when faced with jury trials: “You have to get over the perception from jurors that human trafficking is slavery with an iron ball attached to their leg, and they’re wearing rags and sleeping in a shipping container. ... It’s hard. And the facts that fit that circumstance don’t come along all the time.”¹⁷⁷ And this paradigm has been created primarily through media, according to some prosecutors: “I think it’s really hard for people to understand victims being forced into servitude when they can come and go to some extent.... I think people watch TV and it’s a truckload of girls trapped in the back and they’re being hauled back and forth and that’s what people imagine.”¹⁷⁸ Those are the expectations placed upon victims and the narratives they are expected to tell.

It is also the very act of criminalizing trafficking itself that requires many women to tell this story and to create the trafficking narrative. By all accounts most “human trafficking” investigations do not result in human trafficking charges. At the federal level, Farrell’s study indicated human trafficking charges were only brought against 25% of suspects arrested, half of which were based purely on the age of the victim and not limited to forcible encounters or transnational movement. In only 6% of cases were suspects charged with sex trafficking where adult victims were involved.¹⁷⁹ At the state level, only 17% of suspects charged in the cases reviewed were actually charged with a trafficking offense. However, anti-trafficking raids do result in other very serious consequences for those who are swept up by their operation. Prostitution charges are laid against women engaging in consensual sex work, procuring charges

¹⁷⁵ *Id.*

¹⁷⁶ Farrell 2013, *supra* note 13 at 152.

¹⁷⁷ *Id.* at 153.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 149. Jennifer Chacon did an extensive review of state-level charges but she focused specifically on cases identified and charged as “trafficking”. Chacon 2017, *supra* note 1. She did note at footnote 123 though that it was not always clear from sources what charges resulted from anti-trafficking operations:

Scattered news accounts in the period from 2011 through 2014 describe twenty different defendants in cases involving crimes identified as trafficking although it is not clear that all were actually charged with trafficking. Indeed, in some cases described in media accounts (but not included in this total) individuals apprehended during anti-trafficking raids were charged with lesser offenses, including at least four women charged with misdemeanor prostitution.

are laid against those assisting them with security or transportation, and those without status suffer immigration consequences as a result of simply having been identified through these sweeps.¹⁸⁰ Farrell's study reported 26% of federally-arrested suspects were charged with harboring an alien, and 28% were charged with "transport for purposes of prostitution", an offense that applies to individuals involved in adult consensual sex work as well as those exploiting youth. Of the 140 state-level cases studied, 41% of suspects were charged with "compelling prostitution," an offense that is frequently charged against anyone arrested during human trafficking investigations, whether force was used against an adult sex worker or not.¹⁸¹ In the end, all of the arrests, regardless of charge, are still counted as the "result" of the operation, and the inflated statistics provide justification for even more raids to continue.¹⁸²

Through these raid-and-rescue operations, individuals who would not otherwise have come into contact with law enforcement are faced with criminal charges or removal from the country. It is *because of* the anti-trafficking project that this contact occurs. The arrest or potential deportation that arises out of that contact requires them to become the victim and form the trafficking narrative. The law creates a sphere of individuals who are cast as normally subject to criminal or immigration penalty but who are exempted in this case based on their exceptional circumstances. However, as a trade-off, increased restrictions and additional punishment are deemed necessary and warranted against those who are not in those exceptional spheres. Widespread arrests are made in the name of rescuing victims, and they are collected and counted and reported back out into the media. In this way anti-trafficking laws keep *creating* trafficking, both conceptually through legal texts and definitions, and in reality, as a quantifiable phenomenon in the world.

III - EXPORTING TRAFFICKING

The global consequences of anti-trafficking initiatives have been documented in numerous studies, critiques and commentaries that have drawn attention to the detrimental impacts they have had on migrants and people involved in transactional sex. Natalya Timoshinka describes the increasingly "restrictive and punitive" immigration policies that countries have imposed in the name of anti-trafficking activism.¹⁸³ In Nepal restrictions were placed on women's movement across the Nepalese border for a decade in the name of preventing trafficking and protecting

¹⁸⁰ FBI, *Operation Cross Country: Recovering Underage Victims of Sex Trafficking and Prostitution*, <https://www.fbi.gov/news/stories/operation-cross-country-xi>; *Feds 'Rescue' Women from Freedom and Money in 11th 'Operation Cross Country'*, Reason.com, <https://reason.com/blog/2017/10/18/fbi-operation-cross-country-xi>.

¹⁸¹ Farrell 2013, *supra* note 13 at 149. See also e.g. Saputo Law Firm, *Compelling Prostitution*, <https://saputo.law/criminal-law/texas/sex-crimes/compelling-prostitution/>.

¹⁸² See list of "Johns", "Pimps" and "Prostitutes" arrested: *Operation Cross Country Shuts Down Human Trafficking in Montgomery County*, Nov 5, 2018, Montgomery County Police Reporter, <http://montgomerycountypolicereporter.com/operation-cross-country-shuts-down-human-trafficking-in-montgomery-county/>.

¹⁸³ Natalya Timoshinka, *Human Trafficking: Assumptions, Evidence, Responses*, 7(4) International Journal of Arts and Sciences 209, 214 (2014).

women.¹⁸⁴ The UK also reported a policy of border control, identifying certain migrant women as “possible prostitutes” and a deportation policy targeting sex workers in the name of preventing trafficking.¹⁸⁵ Canada similarly imposed entry restrictions on “entertainer visas” but only for particular women from particular countries.¹⁸⁶ GAATW has noted that:

When announcing that ‘victims of trafficking have been rescued’, governments have taken advantage of the term trafficking to imply that the individuals concerned have been brought to the country concerned against their wishes and consequently have no wish and no right to remain there. By using the word trafficking, government officials claim they are ‘rescuing’ and helping trafficked persons, while in fact they take no notice of their wishes and forcibly repatriate them.¹⁸⁷

The United States has taken a pivotal role in the maintenance of this anti-trafficking paradigm not only within its own territorial boundaries but globally through its political and economic influence. Mechanisms like the *Trafficking in Persons Report* (TiP Report), U.S. Rule of Law foreign programming, and decisions around foreign aid have played significant roles in determining how trafficking is constructed abroad.¹⁸⁸ And these mechanisms have strongly reflected U.S. understandings of what trafficking is and the appropriate remedies for addressing it. The United States has contributed to the creation of trafficking in the ways described above not only within its own territorial boundaries, but throughout its many spheres of influence. Through the elasticity of the term and its usefulness in promoting US interests, aid packages and political favor are made dependent on conformity to US-specific models of anti-trafficking work, and as such the U.S. paradigm is recreated globally, further entrenching it in worldwide public imagination. Given this significant influence and given the wide-reaching consequences anti-trafficking rhetoric has in law, any increase in the use or visibility of the term by the US is worthy of scrutiny. As such, the current U.S. Administration’s targeted focus on the issue gives rise to an urgency for scholars and practitioners to assess the history and consequences of this discourse and the ways in which it is currently being employed.

The TVPA not only mandated legislation and programming to be created and monitored in-country; it linked US foreign policy to compliance with standards it set out. It mandates the U.S. President to carry out international initiatives to enhance economic opportunities for potential victims, increase public awareness of trafficking and consult with nongovernmental organizations

¹⁸⁴ Global Alliance Against Trafficking in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around The World*, 2007,

http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf, at 14.

¹⁸⁵ Doezeema, *supra* note 5 at 122.

¹⁸⁶ MP Harris, *Safe Streets and Communities Act*, 41st Parliament 1st Session, Sept 27, 2011,

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=21&Parl=41&Ses=1&Language=E&Mode=1>.

¹⁸⁷ GAATW, *supra* note 184 at 16.

¹⁸⁸ Ashley Feasley, *Time for A Tune-Up: Retooling the 2012 Tip Report in Order to Better Meet International Legal Research Standards*, 25 Fla. J. Int’l L. 5, 6 (2013).

with respect to implementation of those initiatives.¹⁸⁹ Through these provisions, the U.S. Department of State (DoS) conducts its annual TiP Report which provides for monitoring the self-proclaimed “minimum standards” that countries are to take to eliminate trafficking.¹⁹⁰ Accolades and aid are provided where compliance is determined, and should these minimums not be adhered to, the U.S. government threatens to deny foreign assistance and aid.¹⁹¹ It also opposes aid packages proposed by international organizations such as the World Bank where countries fail to meet U.S. measures.¹⁹² The PITF Annual Report from 2017 listed as one of its 10 objectives to “Encourage foreign governments to combat trafficking through international diplomacy and engagement.” The first item identified as contributing to this objective was the release of the 2017 TiP Report: “The theme of the 2017 Report focused on effective strategies to enhance criminal accountability of traffickers and address global challenges in prosecution efforts.”¹⁹³ “Diplomacy and engagement” is achieved in this case through monitoring and assessment of countries’ compliance with criminalizing their own citizens and those who cross their borders.

This regime was one of the primary means by which neoabolitionists’ anti-prostitution agenda became enmeshed with anti-trafficking compliance and U.S. foreign policy. It has been pivotal in the creation of laws, services and programs focused on trafficking, and yet the reporting system employed is unlike any other regime carried out to monitor international compliance with treaty or law. It is a unilateral mechanism emanating entirely from the U.S., not negotiated through international legal channels.¹⁹⁴ It lacks transparency, accountability or methodological rigor required to evaluate its results, and the report allows no mechanism for shadow reporting, counter-report from national bodies, or open hearing. Limited funding and time allocated for DoS officials to gather data also significantly restricts the types of informants they are able to access.¹⁹⁵ The numbers reported worldwide vary wildly from year to year and yet it is the most widely-known monitoring mechanism for this issue. This faith “underscores the magic of numbers: their ability to create certainty in spaces of great ambiguity. These numbers are frequently cited, often with minimal attention to their original source or data collection methods. Numbers gain credibility through frequent repetition.”¹⁹⁶

Given this ambiguity, the TiP Report provides space in which the U.S. can prioritize areas of concern without making those choices explicit. Those areas of concern then become naturalized

¹⁸⁹ 22 U.S.C. § 7104(a) (2000) (directing the President to establish and carry out international activities to enhance economic opportunities for potential victims).

¹⁹⁰ TVPA § 108.

¹⁹¹ TVPA § 110.

¹⁹² Daphna Hacker, *Strategic Compliance in the Shadow of Transnational Anti-Trafficking Law*, 28 Harv. Hum. Rts. J. 11, 16 (2015).

¹⁹³ PITF 2017, *supra* note 148.

¹⁹⁴ See Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (University of Chicago Press, 2016) 114.

¹⁹⁵ See David Guinn, *Defining the Problem of Trafficking: The Interplay of US Law, Donor, and NGO Engagement and the Local Context in Latin America*, 30(1) Hum. Rts. Q. 119, 139 (2008) and Anne Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Report*, 12 Hum. Rts. Rev. 381 (2010). Authors own field notes on file, meeting with U.S. Embassy Political Officer as contribution to Canada’s assessment for 2010 TiP Report, Ottawa, Canada, September 2009.

¹⁹⁶ Merry, *supra* note 194 at 127.

as the *real* trafficking cases. It measures victim protection through counting those helped through law enforcement cooperation, rather than through economic programming.¹⁹⁷ Without explicitly stating so, counting this form of protection while simultaneously *not counting* others exports particular norms into the assessment. By prioritizing criminal justice reform measures rather than inheritance law or economic redistribution, tacit messages are sent about the very nature of what trafficking is and what is necessary to stop it: “[B]oth defining and counting victims of trafficking are deeply political acts. ... [Institutions are] invested in defining the problem in such a way as to perpetuate their own role in eradicating it.”¹⁹⁸ The U.S. associates prosecution with protection through “the soft enforcement of the reporting system”¹⁹⁹, encouraging compliance measures most conducive to its interests. These choices are the very ones that determine what phenomena are counted as trafficking, and they contribute to the ways in which countries adjust laws and policies to ensure they continue to meet those standards. The U.S. may withhold non-humanitarian and non-trade related aid to countries not in compliance with the standards they set, providing significant incentive for creating incidents of trafficking to count so they may institute the remedies used to counteract them.

Research indicates that states have enacted anti-trafficking laws simply to satisfy TVPA requirements, often without attending to local circumstances. Governments force attention onto particular facets of human trafficking particularly after receiving a low ranking under the TVPA, and criminal figures are disclosed or withheld in relation to TVPA standards.²⁰⁰ And they have also emphasized easily quantifiable activities such as specialized “trafficking training” to law enforcement and judicial officials, regardless of whether those officials will be involved in anti-trafficking work.²⁰¹ The TiP report also has significant impact on the distribution of government resources within the states based on these compliance decisions. Those agencies and actors within the country who can help governments meet those measures receive resources to do so, while others who may be focusing on broader issues of economic empowerment or employment may not.²⁰² Law enforcement operations that involve high-visibility “raids” attract attention and generate usable numbers for reporting purposes, regardless of their impact on those unrelated persons swept up and criminalized or the ultimate charges laid against any of the persons apprehended. The apprehensions are counted, and incentives are created for individuals to tell their stories within the context of anti-trafficking frameworks to avoid criminalization and receive much-needed benefit. This in turn generates numbers and continues to perpetuate the anti-trafficking paradigm drawn up in the TVPA.

In 2001 South Korea was placed in the lowest level of the TiP Report rankings, and as a consequence the government passed anti-prostitution legislation that criminalized both the buying

¹⁹⁷ Halley, *supra* note 108 at 228.

¹⁹⁸ Prabha Kotiswaran, *From Sex Panic to Extreme Exploitation: Revisiting the Law and Governance of Human Trafficking*, in *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery*, 1, 4 (Prabha Kotiswaran ed., 2017).

¹⁹⁹ Halley, *supra* note 108 at 228

²⁰⁰ Hacker, *supra* note 192 at 31.

²⁰¹ Guinn, *supra* note 195 at 140.

²⁰² Halley, *supra* note 108 at 227.

and selling of sexual services. This allowed for the frequent arrest and detention of South Korean women for over a decade, resulting in hunger strikes and protests that were not documented in subsequent TiP Reports.²⁰³ In the mid-2000s the U.S. also unilaterally determined that Filipino women working as entertainers in Japan were potential victims of human trafficking, and as such called on the Japanese government to place stricter visa requirements on women entering to pursue that profession.²⁰⁴ Seeking to engage in hostess work in Japan allegedly made women vulnerable to being trafficked, although the women interviewed in the industry vigorously contested this basis of identification. At the time the U.S. undertook this admonishment of Japan it was also funding the Polaris project to “rescue” these poor trafficked hostesses. Polaris offered temporary shelter and repatriation to the Philippines, accompanied by counseling by a social worker, but no alternative means of income. Many women interviewed indicated that they did not see their inability to work in Japan as protection, but as denial of their primary--if not only--source of earnings.²⁰⁵

On the heels of falling from the highest “Tier 1” to a “Tier 2” ranking in 2005, Canadian police promptly engaged in raids of 16 massage parlors conducted under the guise of enforcing anti-trafficking laws. They detained 78 women, none of whom were in breach of immigration laws, and none whom were ultimately identified as trafficked.²⁰⁶ This very public raid garnered significant media attention, supporting the narrative that rooting out trafficking is the difficult task of law enforcement. The fact of their legal immigration status and the failure to locate victims from the raids received significantly less fanfare. Without evidence of any success, police forces across Canada continued to conduct these raids throughout the 2000s, and in 2014 police forces across Canada raided the workplaces and homes of sex workers to “find victims of human trafficking”. Instead, 330 women’s lives were disrupted and publicized, their due process rights in several cases ignored. From this extensive national operation law enforcement reported that they identified one underage girl as a potential victim of trafficking in Burlington, ON.²⁰⁷ A subsequent raid of a massage parlor in 2015 resulted in the deportation of 12 migrant women who had been consensually working for the owner.²⁰⁸ In Israel activists critiqued the U.S. for specifically pressuring the Israeli government to focus on cross-border sex work by giving Israel a low ranking on the TiP report. They have accused the US of emphasizing the most extreme cases in the report

²⁰³ Carole Peterson, *Sex Work, Migration, and the United States Trafficking in Persons Report: Promoting Rights or Missing Opportunities for Advocacy?*, 25(1) *Ind. Int’l & Comp. L. Rev* 115, 129 (2015)

²⁰⁴ Rhacel Salazar Parreñas, *Trafficked? Filipino Hostesses in Tokyo’s Nightlife Industry*, 18 *Yale J.L. & Feminism* 145, 148 (2006).

²⁰⁵ *Id.*

²⁰⁶ Alison Clancey, Noushin Khushrushahi, Julie Ham, *Do Evidence-Based Approaches Alienate Canadian Anti-Trafficking Funders?*, 3 *Anti-Trafficking Review* 87, 91 (2014).

²⁰⁷ Muna Mire, *Canadian Cops Launched a Sting Against Sex Workers Last Month*, *Vice*, Feb 4, 2014,

http://www.vice.com/en_ca/read/canadian-cops-launched-a-sting-operation-against-sex-workers-last-month.

²⁰⁸ Catherine McIntyre, *Migrant sex workers caught up in Ottawa sting facing deportation, further exploitation: activists*, *National Post*, May 13, 2015,

<http://news.nationalpost.com/news/canada/migrant-sex-workers-caught-up-in-ottawa-sting-facing-deportation-further-exploitation-activists>.

to cause panic, ultimately providing justification for the deportation of masses of people in a variety of migration and sex work situations.²⁰⁹

In the UAE increased surveillance in the name of anti-trafficking has clearly harmed, rather than helped migrant women, and has worked to criminalize migration in the process. The UAE has had a history of women from around the Middle East and Africa coming to work temporarily, with some committing minor immigration infractions in the process. While labor violations have been reported as a significant problem in the country, since the TVPA an additional layer of criminality has been imposed on migrant women that have exacerbated their vulnerabilities in a myriad of ways. In her research on the impacts of anti-trafficking and anti-terror campaigns, Pardis Mahdavi's describes the frustrations of an NGO serving migrant women from Ethiopia working in the UAE. She recounted how the American construction of trafficking as a criminal matter had made locals and law enforcement in the UAE now assume that all women from certain nationalities were guilty of some form of criminality:

Her voice once again became soft as she explained that things weren't always this way; that people didn't used to be this harsh toward migrant women... She emphasized that it was only when the issue became political, when the UAE was put on the TIP watch list, that female migrant workers became synonymous with sex workers and, as sex workers, became labeled as trafficking victims—seen as a dangerous, politically damaging population that demanded what some would call protection in the form of observation and surveillance.²¹⁰

In addition to generating pressure through the monitoring mechanism of the TiP report itself, a significant amount of trafficking-specific funding is available through U.S. grantmaking sources dedicated to upholding the victim/perpetrator dichotomy. In 2017 \$25 million was dedicated to the Global Fund to End Modern Slavery, a public-private partnership explicitly premised on ending modern “slavery”, with the assumption that there is “demonstrable, long term economic value to be unlocked by eliminating forced labor from supply chains”.²¹¹ It is also premised on the assumption that it is in business’ long-term interest to do so. This presumes that current transnational capital investment structures are not in fact based on what might be considered exploitative labor conditions. \$13 million USD was awarded to assist foreign national “victims”, \$18 million USD was awarded to law enforcement and victim services to identify and combat trafficking, and between 2016 and 2017 over \$46 million was awarded to “identify and assist” victims of human trafficking.²¹² One thing remained consistent through all these awards – they focused on individual instances of trafficking, conforming to the trafficker/trafficked dichotomy, assuming that whatever was to be considered trafficking was something exceptional and outside the normal course of labor functions. Whether the funds were aimed at providing

²⁰⁹ *Ibid* at 33.

²¹⁰ Mahdavi, *supra* note 8, at 64.

²¹¹ Global Fund to End Modern Slavery, *Theory of Change*, <https://static1.squarespace.com/static/5a60c34a0abd04e55389efa6/t/5a95b4c7e2c4838425aa489b/1519760584412/GFEMS+ToC.pdf>.

²¹² PITF 2017, *supra* note 148 at 19.

assistance or prosecuting offenders, the vast majority of funding the U.S. allocates works to reinforce trafficking as a special evil, outside expected labor, sexual or domestic exploitation.

This grantmaking objective is reinforced even further by training opportunities offered by the US Department of Justice, the FBI and USAID, as well as “awareness-raising” activities undertaken by various US-representing agencies. The US Department of Justice trains foreign judges, prosecutors and law enforcement officials on investigation and prosecution activities and its Office on Overseas Prosecutorial Development Assistance and Training helps develop curricula for foreign stakeholders to train others within their home states.²¹³ The FBI has also been tasked with providing training on responses to child sex trafficking to officials from several countries across the globe.²¹⁴ And in 2017 USAID trained “government and civil society stakeholders to combat human trafficking in Africa and Asia” with a highlighted focus on “how to institutionalize antitrafficking content into police training curriculum.” USAID also worked with Nepal’s Ministry of Education “to host 90 career fairs for 12,790 students in government schools” in 2017, which appears to address larger issues of economics and employment. However, the program also touted its collaboration “on curriculum development to mainstream safe migration and human trafficking messages” to these same schoolchildren.²¹⁵ This messaging links migration and trafficking in the USAID funded program, reinforcing the notion that *migration itself* is the problem. USAID is commended in the 2017 PITF Annual Report for reaching “more than 1.76 million individuals *at risk* for human trafficking through targeted outreach and awareness raising campaigns, including in Bangladesh, Tajikistan, and Afghanistan,”²¹⁶ (emphasis mine) without specifying what exactly puts them at risk or what risks they face. And it supported the “first-ever national awareness campaign to educate young Egyptians on trafficking vulnerabilities related to migration.” The report indicates that AID also “brought significant attention to Egypt’s National Coordinating Committee for the Prevention of Irregular Migration and Trafficking in Persons’ Facebook page.” However, the only remedy these “awareness campaigns” provided for youth who seek (or are forced) to leave untenable situations is to discourage their departure.²¹⁷

The monitoring, funding, and training provided by US sources not only describe anti-trafficking regimes useful to US interests but they actually require that states create them. States are provided with incentives not only to prosecute but to *identify* trafficking to be prosecuted. Simply, if there are no incidents of trafficking to identify, a state cannot report any prosecutions. In this way the measurement itself incentivizes particular formulations of stories and criminal justice responses to situations that might otherwise be characterized and addressed in different and more complex ways. Individuals don’t necessarily identify with the labels and experiences being created for them by this demand, but face choices upon “rescue” from raids conducted in the name of anti-trafficking that leave them little option. Once “rescued”, deprived of their livelihood, past

²¹³ *Id.* at 11, 17.

²¹⁴ *Id.* at 21.

²¹⁵ *Id.* at 15, 21.

²¹⁶ *Id.* at 22.

²¹⁷ *Id.*

earnings and future income, in order to receive any assistance they must identify as a victim in the precise way they are asked to. If they do not, they are criminalized without compensation. “The term ‘trafficked victim’ does not always generate recognition or self-identification, and may be counterproductive in everyday human rights and social justice work.”²¹⁸ Instead, people tend to define *themselves* as “migrant workers who have had some bad luck as a result of a bad decision.”²¹⁹ However, they must recast their life in terms of this constructed narrative in order to now survive the rescue and removal from what they may have viewed as only slightly exploitative labor conditions. They become counted as trafficked, and the everyday exploitative conditions continue to exist unhindered. Mary Crawford details such incidents in Nepal where both “victims” and NGOs have to work to recreate individuals’ experiences to fit the language within donor expectations. She highlights the fluidity of the relationship between the legal status of “trafficking victim” and the lived experience of those being categorized.²²⁰

In her study on “rescued” workers Sine Plambech also identifies this pattern and the destructive potential it has on the purported beneficiaries of anti-trafficking work. She describes anti-trafficking interviews from the perspective of women undergoing the “identification” process:

The women’s responses to these identification interviews were typically silence, crying, outspoken frustration, or rephrasing of the questions in an attempt to understand the process. When the women asked “Why do you ask me this question?” Or “What does that question have to do with me?” they were trying to figure out what kind of answers the social workers and the police were searching for. As one woman explained; “I did not know the consequences of telling the truth. Nor did I know the consequence of not telling the truth.” The atmosphere during these interview sessions was often intensely claustrophobic, spurred by the urgency of the moment and the complexity of the agendas at play. The police were searching for a potential crime, social workers were trying to identify a potential victim, and the women feared the consequences of their responses, and ultimately, deportation.

... [H]umanitarian assistance comes with a condition, poignantly played out in the interrogation room in the formulation of the police woman; “We can only protect you—if you tell us the truth.” Through the identification process, undocumented migrants can become legal subjects of humanitarian care, yet always at a cost.²²¹

Those who do not comport do bear this cost. Through her research Pardis Mahdavi related the story of Layla, a woman from Iran who had been working as a sex worker in the gulf to support her family after her husband left and her parents fell ill. There was no means for her to support them in Iran and engaging in sex work outside the country was safer for her, she had decided. Under the auspices of an anti-trafficking operation, law enforcement raided her place of work in Abu Dhabi, though it was the cleanest and safest work she believed she would find. For four weeks law enforcement demanded the name of her pimp, beating her and insisting that she testify

²¹⁸ Kempadoo, *Introduction*, *supra* note 28 at xxiv.

²¹⁹ *Id.* at xxiv.

²²⁰ Mary Crawford, *Sex Trafficking in South Asia: Telling Maya’s Story* (London and New York: Routledge, 2010).

²²¹ Sine Plambech, *Between “Victims” and “Criminals”: Rescue, deportation, and everyday violence among Nigerian migrants*, 21(3) *Social Politics* 382, 388 (2014).

against her trafficker in order to stay in the UAE. She didn't have one to provide for them as she had rented this space herself, having been told by another sex worker that it was a safe, clean environment where the clients were kind. Because of this inability to provide a "trafficker" she was told she was not eligible for residence in the local women's shelter and she would receive no protection. "This lady kept saying she was there to help, that she was going to help us all go home," Layla told Mahdavi. "But we didn't want to go home." The authorities determined on this basis that she could not be categorized as trafficked, and thus not eligible for legal protection or the ability to work in UAE. She was deported to Iran where her family found out that she had engaged in sex work abroad. Her father beat her until he eventually broke her leg and kicked her out of the house, forbidding her from ever seeing her daughter again. Disabled, she was left unable to engage in any kind of work available to someone with her skills, including sex work, and Mahdavi came upon her living on the streets begging for food to survive.²²²

Ultimately, "it is not the humans, but *the state* that emerges as the main victim of human trafficking, since the state's sovereign borders are being violated by the 'human contraband'."²²³ Through rebranding the various complexities of irregular migration into the simple "trafficked" vs "not-trafficked" binary, the victim's plight becomes merged with state security concerns and criminalizing traffickers is cast as a means to ensuring *her* well-being, regardless of her relationship with that person. The lifting of one's status *as* criminal (alien, prostitute, or worker) becomes, in fact, *dependent* upon the criminalization of another as "trafficker". In its position as donor, as *assessor*, the US facilitates the transplanting of those particular trafficking narratives – those which are politically useful to the U.S. - and the phenomenon of "trafficking" came rapidly into being. It is clear to agencies working with migrants that the U.S. in particular has had this effect. Participants in Mahdavi's research specifically pointed to the Bush era and the politicization of sex trafficking as the turning point in their struggle against some of the more odious labor violations in the UAE:

[S]he explained that things weren't always this way; that people didn't used to be this harsh toward migrant women, ... [I]n the late 1990s, migrant advocacy groups were beginning to make progress vis-à-vis the state; progress that was stunted, in her opinion, with the politicization of the trafficking issue. She emphasized that it was only when the issue became political, when the UAE was put on the TIP watch list, that female migrant workers became synonymous with sex workers and, as sex workers, became labeled as trafficking victims—seen as a dangerous, politically damaging population that demanded what some would call protection in the form of observation and surveillance.²²⁴

Though there has been pushback in some countries from sex worker collectives and migrant rights organizations, the anti-trafficking narrative promoted by the U.S. is supported by such overwhelming financial and political power it continues to dominate.

²²² Mahdavi, *supra* note 8, at 60.

²²³ Timoshinka, *supra* note 183 at 214.

²²⁴ Mahdavi, *supra* note 8, at P.64.

CONCLUSION – CRISES AND REBIRTH

The importance of scrutinizing the U.S.’ production of rhetoric has only increased in recent years as migration has once again become a source of global tension. Perceived “migrant crises” in Europe and at the U.S.-Mexico border have been shaped into loci of criminality in the public imagination. The current U.S. threat is constructed as brown-skinned, Latino, and male. However, the language used to describe him has all the hallmarks of panics seen decades and centuries before. In his 2019 State of the Union address, President Trump stated:

Smugglers use migrant children as human pawns to exploit our laws and gain access to our country. Human traffickers and sex traffickers take advantage of the wide open areas between our ports of entry to smuggle thousands of young girls and women into the United States and to sell them into prostitution and modern-day slavery. ... The savage gang, MS-13, now operates in 20 different American States, and they almost all come through our southern border. Just yesterday, an MS-13 gang member was taken into custody for a fatal shooting on a subway platform in New York City. We are removing these gang members by the thousands, but until we secure our border they're going to keep streaming back in. Year after year, countless Americans are murdered by criminal illegal aliens.²²⁵

Though no data has been provided to link gangs with irregular migration and trafficking, the repetition of their names, with the border, and with slavery and with innocence ultimately produces the chain of equivalence linking them all in imagination. Central American gang violence, the U.S.-Mexico border, undocumented migration and trafficking become naturally linked, much as they were formed between foreigners from other places and transnational crime in decades and centuries before. Unsecured borders are posed as the threat and trafficking lends urgency to the crisis:

Our progress will be limited if we do not secure our porous border and put an end to the human trafficking and humanitarian crisis that is taking place at the southern border. It is indeed a crisis. And, you know, we have right now an invasion. If you look at what’s going on with the caravans, it’s an invasion. ...

Even one woman or one child trafficked is too many. But there are thousands and thousands and thousands, and it’s billions of dollars of money flowing into the pockets of some very bad criminals. There are potential victims, including young children, that we can still protect if we act now to secure our border and build a wall.²²⁶

As in the Progressive Era and in the early 2000s, the spectre of the trafficked victim continues to be used to support wide-reaching policies such as a wall extending the length of the US-Mexico border. This policy is aimed at deterring all undocumented migration through spotlighting vulnerable victims, obscuring the parts of the victims’ stories that suggest it was their inability to

²²⁵ Donald J. Trump, Address Before a Joint Session of the Congress on the State of the Union, 2019 DAILY COMP. PRES. DOC. 63 (Feb 5, 2019).

²²⁶ Donald J. Trump, Remarks in a Meeting on Human Trafficking at the Mexico-United States Border and an Exchange with Reporters, 2019 DAILY COMP. PRES. DOC. 60 (Feb 1, 2019).

gain legal entry through valid ports of entry that pushed them to use smugglers/traffickers as a vehicle. The controversial policy known as “family separation” was even buttressed through use of human trafficking rhetoric. Secretary of Homeland Security Kirstjen M. Nielsen explained in a press conference that:

We also separate a parent and child if the adult is suspected of human trafficking. There have been cases where minors have been used and trafficked by unrelated adults in an effort to avoid detention. I’ll stop here to say that in the last five months, we’ve had a 314 percent increase in adults and children arriving at the border fraudulently claiming to be a family unit. This is, obviously, of concern.²²⁷

The Administration’s own Department of State warned in its 2018 TiP Report that separating children from parents might in fact make them more vulnerable to exploitation and have lasting traumatic effects.²²⁸ It was also unclear whether there was actually any evidence that exploitation was a factor in the fraudulent claims referred to in support of the legal policy.

However, as in past incarnations of the trafficking tale, the fear of the child trafficker is raised as a terrible possibility – as bogeyman. The exact nature of what happened with the specific family units is less important than the potential for what *could* have happened. The figure of the trafficker acts as myth, not in that he does not exist, but in that his existence is irrelevant. *Even one woman or one child trafficked is too many* and as such, any policy or law is warranted on the basis of their protection, void of scrutiny. And, as with other eras, the most egregious and salacious stories of sexual abuse and violence are brought forward as the prototype on which to build that policy:

They brought this little girl through a part of the southern border where there was no wall, easily got her to New York City. And this is hard to hear but this is the truth, and everyone needs to hear this. This little girl — and this is very typical — raped for money every day, 30 to 40 times a day. If that’s not a crisis, if that’s not an emergency, I don’t know what is.²²⁹

The elasticity of the term “trafficking” has allowed for such rhetoric to provide support for a wide array of legal action. U.S. political speech continues to impact both domestic and international legal landscapes as the US continues to monitor domestic and foreign legal systems through mechanisms such as the TVPA. Given the expansiveness of US influence, and given the breadth of ends to which this rhetoric can be put, it is of continuing interest to interrogate it and the political agendas it feeds into. The focus on trafficking as a singular, discrete, criminal act diverts attention from the structural factors that cause people to move and the state-imposed

²²⁷ This policy required the prosecution of all individuals who entered the U.S. without inspection, and since children could not be detained for lengthy periods it resulted in several thousand being removed from their parents’ custody and being placed instead with the Office of Refugee Resettlement. *DHS Secretary Nielsen’s Remarks on the Illegal Immigration Crisis*, June 18, 2018, United States Department of Homeland Security, <https://www.dhs.gov/news/2018/06/18/dhs-secretary-nielsens-remarks-illegal-immigration-crisis>.

²²⁸ *Trafficking in Persons Report* (2018), United States Department of State, <https://www.state.gov/documents/organization/282798.pdf>, at 13.

²²⁹ *Supra* note 226.

barriers that contribute to their vulnerability. An exceptional place of concern is carved out for only the most egregious exploitation while enacting harsh criminal and immigration restrictions on potential migrants in the name of preventing that exploitation. These restrictions in turn more often harm the groups who were the stated subject of concern. “The results are more laws and the criminalization of greater areas of human life and an intensification of policing and surveillance, including more prosecutions, detentions and incarcerations. Yet this leaves intact the greater system that lies at the bottom of things.”²³⁰

The appearance of the categories “trafficked” and “not-trafficked” in U.S. foreign policy has impacted not only states’ legal landscapes, but the ways in which groups of people are perceived and behave. It provides cover for increased surveillance of groups that governments periodically choose to villainize, as long as that surveillance is couched in the language of anti-trafficking operation. With each incarnation the specter of trafficking draws upon slightly new characteristics and the identified group of traffickers takes on new forms that accord with current geopolitical fears. However, the language of trafficking remains startlingly similar. It consistently structures innocence in opposition to criminality, citizenship in opposition to deviance, and it calls to protect a mythical “us” in the face of some emerging new peril. The current U.S.-crafted threat falls squarely within this paradigm and as such it remains of ongoing value to monitor the stories being told and the ways in which they inform U.S. political and legal decision-making processes.

²³⁰ Kempadoo 2016, *supra* note 72 at 11.