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## Trafficking in Narratives: Conceptualizing and Recasting Victims, Offenders, and Rescuers in the War on Human Trafficking

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# TRAFFICKING IN NARRATIVES: CONCEPTUALIZING AND RECASTING VICTIMS, OFFENDERS, AND RESCUERS IN THE WAR ON HUMAN TRAFFICKING

SABRINA BALGAMWALLA<sup>†</sup>

## ABSTRACT

Anti-trafficking laws emerge from a complex historical context, shaped in no small part by public perception of this highly complex problem. This Article explores and questions the headlines and examples that drove anti-trafficking reforms over the past century. These “trafficking narratives” have stimulated and shaped the response to trafficking both globally and domestically and have powerful implications for the evolving framework of protection and punishment. Specifically, this Article argues that the roles of “victims,” “offenders,” and “rescuers” serve as proxies for racialized and gendered assumptions about trafficking, which in turn are reflected in anti-trafficking law and enforcement. This Article builds on legal scholarship focused on trafficking victims to consider how public understanding of offenders have unintended consequences in rendering victims—and indeed, entire communities—suspect. It argues that these stark narratives further aggressive, carceral responses to human trafficking as a way of bringing offenders to justice and rescuing victims even though the distinction between victims and offenders is not always clear. It concludes that advocates should reconsider the use of victim narratives in advancing anti-trafficking causes, particularly in association with criminal justice responses.

## TABLE OF CONTENTS

INTRODUCTION: CREATING THE CRIME OF HUMAN TRAFFICKING .....	2
I. EVOLUTION OF THE GLOBAL ANTI-TRAFFICKING FRAMEWORK .....	3
A. <i>From “White Slavery” to “Sex Trafficking”</i> .....	3
B. <i>Trafficking as Violence Against Women; Violence Against Women as a Crime</i> .....	5
C. <i>United Nations Protocols on Trafficking and Human Smuggling—Solidification of a Criminal Law Framework</i> .....	7

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<i>D. The Trafficking Victims Protection Act and Crime Control Initiatives in the United States</i> .....	9
1. Precedent: The Anti-Domestic Violence Movement .....	9
2. The Anti-Trafficking Movement .....	10
II. RECASTING TRAFFICKING NARRATIVES .....	13
<i>A. The Victim Role</i> .....	15
1. The “Innocent Victim” .....	15
2. Recasting the Victim .....	18
a. Age, Gender, Race, and Sexual Exploitation .....	18
b. Agency .....	21
c. Consent and Coercion .....	23
d. Fallibility .....	26
<i>B. The Offender Role</i> .....	28
1. The “Evil Offender” .....	28
2. Recasting the Offender .....	29
a. Troubling the Victim/Offender Dichotomy .....	29
b. State Perceptions of Traffickers .....	30
<i>C. The Rescuer Role</i> .....	33
1. The “Good Rescuer” .....	33
2. Recasting the Rescuer: Rescue as Harm .....	33
a. “Rescue” as Carceral Protectionism .....	33
b. Rescue as Community Harm .....	35
III. RECONSIDERING TRAFFICKING NARRATIVES AND THE STATE’S CARCERAL RESPONSE .....	37
<i>A. Anti-Trafficking Law as Crime Control</i> .....	37
<i>B. Anti-Trafficking Law as Immigration Control</i> .....	39
CONCLUSION .....	41

## INTRODUCTION: CREATING THE CRIME OF HUMAN TRAFFICKING

Trafficking, once considered a crime concerning sale of illicit goods, is now a broader concept that includes the unlawful movement of people and exploitation of their labor.<sup>1</sup> Human trafficking in fact encompasses a number of crimes; under U.S. law for example, “severe trafficking in persons” includes forced prostitution, involuntary servitude, and exploitation of minors, as well as harbor, transport, or procurement related to these activities.<sup>2</sup> State and local governments further expanded the

1. For an extensive exploration of definitions of “human trafficking,” see John Salt & Jennifer Hogarth, *Migrant Trafficking and Human Smuggling in Europe: A Review of the Evidence*, in *MIGRANT TRAFFICKING AND HUMAN SMUGGLING IN EUROPE* 11, 18–24 (Frank Laczko & David Thompson eds., 2000). See also Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1469 (2000) (codified as amended in scattered sections of various titles of U.S.C.); G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, annex, United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/RES/55/25, art. 3(a) (Dec. 22, 2003).

2. See 22 U.S.C. § 7102(9)(A) (2012) (defining “severe trafficking in persons”). For a critique of this expanding definition of human trafficking and its application, see Janie A. Chuang,

criminalization framework by increasing sentences for trafficking and related offenses and requiring offender registration.<sup>3</sup> This criminalization framework, however, is not unique to the United States. Around the world, anti-trafficking reforms rely heavily on prosecution and incarceration as mechanisms to punish and prevent trafficking—what scholars have described as a “carceral” response to this social phenomenon.

Even as mechanisms to prosecute and punish trafficking have evolved, a growing number of scholars have criticized the lack of quality research on the problem of trafficking. Researchers have pointed out a number of startling misconceptions as to how trafficking is understood, portrayed, and addressed. This Article compares anti-trafficking rhetoric and field research examples to examine the role narratives play in the global understanding of—and response to—the problem of human trafficking. Specifically, this Article argues that trafficking narratives employ tropes of “victims,” “offenders,” and “rescuers” in a manner that moralizes anti-trafficking discourse and reinforces a legal response largely focused on punishing offenders. Casting these roles in stark terms inhibits a nuanced understanding of a complex social problem and creates distance between the highly idealized realm of law and the lived experiences of individuals who seek its protection.<sup>4</sup> Furthermore, in overly simplifying distinctions between roles, the law may also cast an offender’s wrongdoing in severe terms, reinforcing the rationale for a harsher punishment. Where the distinction between victims and offenders is overly simplified, this increases the potential for prosecution of individuals who in fact may be in need of legal protection. This Article also connects human trafficking policy to a broader criminalization framework that serves as a proxy for immigration enforcement and crime control, rendering minority communities as suspect.

## I. EVOLUTION OF THE GLOBAL ANTI-TRAFFICKING FRAMEWORK

### A. From “White Slavery” to “Sex Trafficking”

Trafficking is frequently referred to as “modern slavery,” a moniker suggestive of backwardness and moral repugnance. While this language may resonate in the modern age, it does not represent the historical anti-trafficking movement accurately. In fact, international anti-trafficking

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*Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609 *passim* (2014).

3. See *Human Trafficking Laws in the States*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws-in-the-states-updated-nov.aspx> (last updated Feb. 14, 2012).

4. For powerful treatment of this topic in gender violence, trafficking, and immigration contexts, see, e.g., Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 79–88 (2008); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 209–12 (2012); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 205–07 (2007).

instruments borrow very little conceptually from international instruments condemning enslavement of African-Americans.<sup>5</sup> Although early anti-slavery conventions theoretically condemned the African slave trade, current international law on human trafficking is more substantially influenced by early international instruments addressing prostitution.<sup>6</sup> At the turn of the twentieth century, due in part to social anxiety about women's greater freedom to travel, a movement emerged to combat a problem known as "white slavery"—the (presumed involuntary) prostitution of white women in the United States and abroad.<sup>7</sup> Despite the dearth of evidence that American women were being forced into prostitution in great numbers, the public "moral panic" that ensued prompted federal and state legislation. The 1910 Mann Act, also known as the White Slave Traffic Act, criminalized the transport of women for the purpose of engaging in "immoral acts," and still serves as the basis for many claims involving trafficking of minors.<sup>8</sup> Enforcement became a focus of the newly formed Federal Bureau of Investigation (FBI),<sup>9</sup> meanwhile, states began to pass their own laws criminalizing prostitution.<sup>10</sup>

Contemporaneously with the passage of the Mann Act in the United States, the League of Nations developed the 1904 International Agreement for the Suppression of White Slave Traffic (1904 Agreement).<sup>11</sup> This instrument contains the first definition of "traffic"—"the procuring of women or girls for immoral purposes abroad."<sup>12</sup> The 1904 Agreement also alludes to immigration control, calling upon states to monitor railway stations, ports, and routes for trafficked women,<sup>13</sup> as well as obtain

5. See Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1489–91 (2015) (describing the historical and persistent racial distinction in human trafficking law between African-American and white victims).

6. Corin Morcom & Andreas Schloenhardt, *All About Sex?!: The Evolution of Trafficking in Persons in International Law* 11–12 (Mar. 2011) (unpublished research paper) (on file with the University of Queensland, Human Trafficking Working Group), <https://law.uq.edu.au/files/4311/Evolution-of-Int-Law-relating-to-Trafficking-in-Persons.pdf>.

7. *Id.*; see also MAGGY LEE, *TRAFFICKING AND GLOBAL CRIME CONTROL* 6, 26–27 (2010). Debt bondage was not addressed until the passage of the 1956 U.N. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. LEE, *supra* at 6. For an in-depth discussion of the comparison between the modern conception of trafficking in persons and the enslavement of African-Americans, see generally Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 212–13 (2007).

8. 18 U.S.C. §§ 2421–2425 (2012).

9. See ATHAN G. THEOHARIS, *THE FBI AND AMERICAN DEMOCRACY: A BRIEF CRITICAL HISTORY* 18–19 (2004). The Child Exploitation and Obscenity Section of the FBI's Criminal Division now investigates crimes brought under the Mann Act, White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424). See OFFICES OF THE U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL: CRIMINAL RESOURCE MANUAL § 2027, <https://www.justice.gov/usam/criminal-resource-manual-2027-mann-act> (last updated 1997).

10. See *Prohibited Consensual Sexual Activity*, 50 STATE STATUTORY SURVEYS: CRIMINAL LAWS, 0030 SURVEYS 14, tbl.13 (Thomson Reuters 2007).

11. International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

12. *Id.* art. 1.

13. *Id.* art. 2.

information about foreign women and make efforts to repatriate them.<sup>14</sup> The 1910 International Convention for the Suppression of the White Slave Traffic subsequently introduced elements of violence, threats, and compulsion in the definition of trafficking.<sup>15</sup> It also called on states to share information about perpetrators<sup>16</sup> and extradite them as necessary for prosecution.<sup>17</sup>

Both of these instruments were limited in application to white women involved in prostitution. The 1921 International Convention for the Suppression of the Traffic in Women and Children expanded to include male as well as female children,<sup>18</sup> but this did not necessarily alter the perception that adult men were not in need of protection as victims of trafficking. The 1949 United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others later consolidated the four preceding white slavery instruments, and eliminated specific references to the age and gender of victims.<sup>19</sup>

### *B. Trafficking as Violence Against Women; Violence Against Women as a Crime*

The second wave of international anti-trafficking policy developed in association with the global feminist initiative to address women's rights as human rights.<sup>20</sup> As this framework developed and engaged the problem of trafficking in persons, the law retained a focus on procurement for prostitution.<sup>21</sup> The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>22</sup> and the expanded scope of the 2000 United Nations Trafficking Protocol again discussed trafficking in gender-specific terms and with particular reference to prostitution.<sup>23</sup>

14. *Id.* art. 3.

15. International Convention for the Suppression of the White Slave Traffic, art. 2, May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20.

16. *Id.* arts. 6–7.

17. *Id.* art. 5.

18. International Convention for the Suppression of the Traffic in Women and Children art. 5, *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 415. This convention was followed by the International Convention for the Suppression of the Traffic in Women of the Full Age, Oct. 11, 1933, 150 L.N.T.S. 431 (excluding male victims).

19. International Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others pmbl., arts. 1, 5, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271 (entered into force July 25, 1951); *see also id.* art. 1 (utilizing the gender-neutral term “person”).

20. *See* Berta Esperanza Hernández-Truyol, *Women's Rights as Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 617 (1996); *see also* Hilary Charlesworth, *The Mid-Life Crisis of the Universal Declaration of Human Rights*, 55 WASH. & LEE L. REV. 781, 789–90 (1998).

21. Charlesworth, *supra* note 20, at 784.

22. G.A. Res. 34/180, annex, Convention on the Elimination of All Forms of Discrimination Against Women art. 6 (Dec. 18, 1979) (requiring states to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”).

23. *See supra* Section I.A.

The United Nations Fourth World Conference on Women, held in Beijing in 1995, followed the 1976–1985 United Nations “Decade for Women” and the development of CEDAW.<sup>24</sup> The resulting Beijing Platform for Action included “diagnosis” of twelve problems affecting women; human trafficking was included in the Platform as part of the Violence Against Women diagnosis, which called for the elimination of trafficking in women and assistance to “victims of violence due to prostitution and trafficking” as a strategic objective.<sup>25</sup> The Platform recommended that governments “[c]onsider the ratification and enforcement of international conventions on trafficking in persons and on slavery”<sup>26</sup> and “[s]tep up cooperation and concerted action by all relevant law enforcement authorities and institutions with a view to dismantling national, regional and international networks in trafficking”<sup>27</sup> as a means of addressing the problem.

It is significant that the Beijing Platform presented trafficking as part of the Violence Against Women diagnosis and a phenomenon of gender-based violence. Following the International Labor Organization’s international conventions on forced labor—the 1949 Convention Concerning Migration for Employment,<sup>28</sup> the 1957 Abolition of Forced Labor Convention,<sup>29</sup> and the Migrant Workers Supplementary Provisions Convention<sup>30</sup>—it would have been just as viable to make trafficking part of the Women and Poverty diagnosis and frame the issue as a problem of limited economic opportunities for women.<sup>31</sup> Instead, the Beijing Platform made only a cursory reference to the connection between labor and trafficking.<sup>32</sup> As one human rights activist observed, “Beijing is where

24. See JULIETTA HUA, *TRAFFICKING WOMEN’S HUMAN RIGHTS* 7–9 (2011).

25. United Nations Fourth World Conference on Women, *Beijing Declaration and Platform for Action* (Sept. 4–15, 1995) [hereinafter *Beijing Platform*], [http://www.unwomen.org/~media/headquarters/attachments/sections/csw/pfa\\_e\\_final\\_web.pdf](http://www.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf).

Janie Chuang and Elizabeth Bernstein are among the scholars who noted the role of the American neo-feminist anti-prostitution movement in the evolution of this framework. See Elizabeth Bernstein, *Carceral Politics as Gender Justice? The “Traffic in Women” and Neoliberal Circuits of Crime, Sex, and Rights*, 41 *THEORY & SOC’Y* 233, 235–36 (2012); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 *U. PA. L. REV.* 1655, 1672–77 (2010).

26. *Beijing Platform*, *supra* note 25, ¶ 130(a).

27. *Id.* ¶ 130(e).

28. Int’l Labour Org. [ILO], *Convention Concerning Migration for Employment (Revised)*, C097 (Jan. 22, 1952), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312242](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312242).

29. Int’l Labour Org. [ILO], *Convention Concerning Abolition of Forced Labour Convention*, C105 (Jan. 17, 1959), [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C105](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105).

30. Int’l Labour Org. [ILO], *Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, C143 (Dec. 9, 1978), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C143](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C143).

31. See *Beijing Platform*, *supra* note 25, ¶¶ 47–57.

32. See *id.* ¶ 130(b) (urging states to “[t]ake appropriate measures to address the root factors, including external factors” that contribute to the problem of trafficking).

trafficking as a labor issue was first transformed into a sexual violence and slavery issue.”<sup>33</sup>

*C. United Nations Protocols on Trafficking and Human Smuggling—  
Solidification of a Criminal Law Framework*

In January 1999, the United Nations Office on Drugs and Crime convened a subcommittee to develop a new protocol on organized crime, including accompanying protocols on human trafficking and human smuggling.<sup>34</sup> Both protocols take a criminalization approach to the issues of trafficking and smuggling though the protocols differ in the assignment of legal culpability for what may essentially be the same conduct.<sup>35</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)<sup>36</sup> defines trafficking with reference to the means of recruitment<sup>37</sup> and calls on member states to recognize and meet the special needs of trafficked persons.<sup>38</sup> Article 5 of the Trafficking Protocol, devoted to the subject of “criminalization,” specifically calls upon states to enact “legislative and other measures as may be necessary to establish . . . criminal offences”<sup>39</sup> for trafficking and for the related offenses of attempt<sup>40</sup> and conspiracy,<sup>41</sup> which may subject individuals to prosecution even if they have been exploited.<sup>42</sup> The United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air (UN Smuggling Protocol)<sup>43</sup> reinforces a criminal framework to address smuggling (“procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person”), illegal entry, and document fraud.<sup>44</sup> The instrument, however, fails to address the ways in which individuals who are complicit in these acts may be exploited and, hence, be considered “smuggled” as well as “trafficked.” The UN Smuggling Protocol does state that individuals who are the “objects” of criminalized activities

33. Bernstein, *supra* note 25, at 252.

34. See Melissa Ditmore & Marjan Wijers, *The Negotiations on the UN Protocol on Trafficking in Persons*, 4 NEMESIS 79, 79 (2003).

35. See *infra* notes 36–47 and accompanying text.

36. G.A. Res. 55/25, annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000) [hereinafter U.N. 2000 Trafficking Protocol].

37. *Id.* art. 3(a) (noting that trafficking recruitment takes place “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”).

38. *Id.* arts. 6–8.

39. *Id.* art. 5(1).

40. *Id.* art. 5(2)(a).

41. *Id.* art. 5(2)(b)–(c).

42. See Ditmore & Wijers, *supra* note 34, at 85 (discussing the protection and assistance provisions in the Protocols and recognizing the discretionary nature of such provisions).

43. G.A. Res. 55/25, annex III, Protocol Against the Smuggling of Migrants by Land, Sea and Air, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000) [hereinafter U.N. 2000 Smuggling Protocol].

44. *Id.* art. 3(a)–(c).



should not be held criminally liable for the conduct,<sup>45</sup> but this framing does not reinforce the agency of migrants, trafficked and otherwise.<sup>46</sup> Through these key international legal instruments, the global community manifestly embraced a border-conscious law enforcement approach to both trafficking and smuggling.<sup>47</sup>

These protocols explicitly linked anti-trafficking initiatives with the larger international legal framework on crime and, by proxy, anxiety about the possible criminogenic effects of globalization.<sup>48</sup> But while these twin Protocols resemble each other in their criminalized approach, they differ in their gendered assumptions about migration. The UN Trafficking Protocol, with its special reference to the protection of women and children, clearly reflects the perspectives on trafficking from Beijing +5 conference.<sup>49</sup> The gendered focus of the Protocol harkens not only to the Beijing Platform's gender-based violence framing but also to the international trafficking instruments that preceded it. By contrast, the UN Smuggling Protocol makes no reference to gender whatsoever.<sup>50</sup> The underlying inference is that women and children are the "objects" of criminalized migration activity in the Trafficking Protocol, while men are willing migrants or traffickers.<sup>51</sup>

Critical scholars attribute the creation of this dichotomy between trafficking (as a problem of gender-based violence) and smuggling (as a problem of border control) to a strategic move by states, as this framing rationalizes harsh immigration and border enforcement measures in the name of combatting trafficking in persons.<sup>52</sup> This linkage between immigration and trafficking control persists, although trafficking schemes regularly override or elude border control measures. Many trafficked individuals have presented valid entry documents at border inspection, and trafficking schemes regularly exploit legitimate visa programs to bring workers to host countries.<sup>53</sup> The role of the global economy and demand for labor never figures into this framework, shifting focus to protection of borders rather than protection of workers.

45. *Id.* art. 5.

46. *See infra* Section II.A.2.b.

47. Both protocols make specific reference to the need for increased border control to prevent unauthorized migration. *See* U.N. 2000 Trafficking Protocol, *supra* note 36, art. 11; U.N. 2000 Smuggling Protocol, *supra* note 43, arts. 7–8, 10–15.

48. *See* LEE, *supra* note 7, at 22; *see also* Bravo, *supra* note 7, at 224 n.90.

49. U.N. 2000 Trafficking Protocol, *supra* note 36, pmb. According to the accounts of those involved with the development of the Protocol, this inclusion of this gender-specific language was tied to the lobbying efforts of a pro-abolitionist NGO coalition; this was a second choice to using "Trafficking in Women and Children" in the title of the document, rather than the gender-neutral reference to trafficked "persons." *See* Ditmore & Wijers, *supra* note 34, at 82.

50. *See* U.N. 2000 Smuggling Protocol, *supra* note 43.

51. *See* U.N. 2000 Trafficking Protocol, *supra* note 36, pmb., arts. 2–3, 6, 9–10.

52. *See, e.g.*, Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1619 (2010).

53. *See id.* at 1637–38.

*D. The Trafficking Victims Protection Act and Crime Control Initiatives in the United States*

1. Precedent: The Anti-Domestic Violence Movement

The anti-trafficking movement that emerged in the United States in the 1990s is notable in its connection to this theme of gender-based, sexual dominance. The concept of “female sexual slavery” began gaining traction in the 1970s<sup>54</sup> as prostitution and pornography emerged as key issues in the mainstream feminist movement.<sup>55</sup> The contemporary mainstream anti-trafficking movement in the United States drew considerable support from a particular sector of dominant feminist, anti-domestic violence activism.<sup>56</sup> As advocates called for state recognition of the problem of spousal abuse, they enlisted law enforcement as an ally to intervene in these situations and to treat batterers as criminals—a phenomenon that scholar Elizabeth Bernstein refers to as “carceral feminism.”<sup>57</sup>

Courts became part of an advocacy strategy to ensure that violence against women was taken seriously.<sup>58</sup> In 1976, two domestic violence cases concerning failure of local law enforcement to respond to calls for help—*Bruno v. Codd*<sup>59</sup> and *Scott v. Hart*<sup>60</sup>—motivated arrest policies for local law enforcement offices.<sup>61</sup> Over the next two decades, law enforcement responses to domestic violence expanded to include police mandatory arrest policies<sup>62</sup> and no-drop prosecution policies in court.<sup>63</sup> These approaches, however, were not without critique within the anti-

54. See, e.g., KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 54–59 (1979); KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY 1–3 (1995).

55. See Bravo, *supra* note 7, at 223 (discussing how sex tourism also emerged as an issue in the late 1970’s and concerns about how international prostitution arose in the context of the fall of the Soviet Union). For influential works on pornography in the dominance feminist tradition, see ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 101–03 (1981); CATHARINE A. MACKINNON, WOMEN’S LIVES, MEN’S LAWS 327, 328–29 (2007). For an in-depth discussion of dominance feminism as an influencing force on the movement against domestic violence movement, see LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 9–15 (2013) (discussing dominance feminism as an influential force on the movement against domestic violence).

56. Elizabeth Bernstein, *From “Prostitution” to the “Traffic in Women”: Political Implications of (Re)emergence of a Discourse*, WILSON CTR., Summer 2010, at 12, 12–13 (Middle East Program & United States Studies Occasional Paper Series), <https://www.wilsoncenter.org/sites/default/files/Rethinking%20Human%20Trafficking.pdf>.

57. Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS 45, 52–58 (2010).

58. See GOODMARK, *supra* note 55, at 17.

59. 396 N.Y.S.2d 974, 976 (N.Y. Sup. Ct. 1977), *rev’d in part, appeal dismissed in part*, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978), *aff’d*, 47 N.Y.2d 582 (N.Y. 1979).

60. No. C-76-2395 (N.D. Cal. Oct. 28, 1976).

61. See Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 255–60 (2014). See generally Pauline W. Gee, *Ensuring Police Protection for Battered Women: The Scott v. Hart Suit*, 8 SIGNS 554, 554–67 (1983).

62. Houston, *supra* note 61, at 267.

63. *Id.* at 265.

domestic violence movement. Many advocates were concerned about this reliance on law enforcement and the minimizing of survivor agency survivors in these situations.<sup>64</sup> Even so, the Violent Crime Control and Law Enforcement Act of 1994 included a critical victory for the movement—the Violence Against Women Act, which developed key roles for law enforcement and the criminal justice system with respect to the problem of domestic violence.<sup>65</sup>

## 2. The Anti-Trafficking Movement

The Trafficking Victims Protection Act (TVPA), the first comprehensive federal anti-trafficking law in the United States, came to fruition in association with the Violence Against Women Act of 2000.<sup>66</sup> The TVPA created a new crime known as “severe trafficking in persons,”<sup>67</sup> increased the applicable sentences for trafficking-related crimes,<sup>68</sup> criminalized additional trafficking-related acts,<sup>69</sup> and established the right to mandatory restitution for these crimes.<sup>70</sup> The TVPA, like the UN Trafficking Protocol, rationalized border and immigration control as part of a law enforcement strategy to protect victims.<sup>71</sup> The TVPA also retained the highly-gendered notions of trafficking and migration set forth in the UN protocols, placing particular emphasis on the exploitation of women and girls and the problem of sex trafficking.<sup>72</sup> Senator Paul Wellstone, who introduced the bill, specifically stated that the resolution was intended to address trafficking of women and girls for sexual exploita-

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64. See, e.g., Andrea L. Dennis & Carol E. Jordan, *Encouraging Victims: Responding to a Recent Study of Battered Women Who Commit Crimes*, 15 NEV. L.J. 1, 3 (2014); Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 8 (2004).

65. Violent Crime Control and Law Enforcement Act of 1994 § 2001, Pub. L. No. 103-322, 108 Stat. 1796, 1910 (codified as amended in scattered sections of 42 U.S.C.). 42 U.S.C. § 13981, which was part of the Violence Against Women Act of 1994, was subsequently declared unconstitutional by the Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000).

66. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of various titles of U.S.C.) (organizing the Victims of Trafficking and Violence Protection Act of 2000 into divisions including the Trafficking Victims Protection Act of 2000 and the Violence Against Women Act of 2000).

67. Compare 22 U.S.C. § 7102(9) (2000) (defining “severe forms of trafficking in persons”), with U.N. 2000 Trafficking Protocol, *supra* note 36, at 43 (calling on the global community to criminalize trafficking and related activities). Many legal scholars have noted the global practice of criminalizing trafficking in persons. See, e.g., Chacón, *supra* note 52, at 1617–20; Chuang, *supra* note 25, at 1725–26; Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking*, 33 MICH. J. INT’L L. 53, 58, 61–67 (2011) (noting the prevalent practice of adopting criminal laws as a means of combatting trafficking in persons).

68. 22 U.S.C. § 7109 (2000); 18 U.S.C. § 1594 (2000).

69. 18 U.S.C. §§ 1589–1592 (2000).

70. *Id.* § 1593.

71. See Bernstein, *supra* note 25, at 251; Chuang, *supra* note 25, at 1697–1703.

72. See Trafficking Victims Protection Act of 2000 § 102(b), Pub. L. No. 106-386, 114 Stat. 1464, 1466–69 (2000) (codified at 22 U.S.C. § 7101 (2012)).

tion.<sup>73</sup> A separate proposal, which made broad reference to labor exploitation, did not pass.<sup>74</sup>

As with the Violence Against Women Act, victim advocates hailed some provisions of the TVPA as a much-needed development. The TVPA is noteworthy in that its passage and implementation galvanized a wide range of supporters beyond victim advocates, including groups across the political spectrum, from mainstream feminist organizations to religious abolitionists.<sup>75</sup> Aspects of the bill respond to critical needs of trafficking survivors. For example, the TVPA explicitly addresses the immigration status of survivors by creating a “T” visa that will allow individuals who assist law enforcement to remain in the United States.<sup>76</sup> The TVPA also includes non-physical and psychological aspects in the definition of “coercion,” which supersedes the Supreme Court’s interpretation of the term.<sup>77</sup> At the same time, this framework bears the mark of the anti-prostitution movement, which became more perceptible under the presidency of George W. Bush.<sup>78</sup> President Bush also authorized the

73. 144 CONG. REC. S1702–04 (daily ed. Mar. 10, 1998) (statement of Sen. Wellstone), <https://www.congress.gov/crec/1998/03/10/CREC-1998-03-10-pt1-PgS1702-2.pdf>; see also S. Con. Res. 82, 105th Cong. (1998) (enacted).

74. See Comprehensive Antitraficking in Persons Act of 1999, S. 1842, 106th Cong. (1999), <https://www.congress.gov/106/bills/s/1842/BILLS-106s1842is.pdf>.

75. See, e.g., Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Antitraficking in Persons Policy*, 14 TUL. J. INT’L & COMP. L. 269, 283 (2006).

76. 8 U.S.C. § 1101(a)(15)(T) (2012). Nonimmigrant visas are available to individuals who can prove: (1) they are victims of severe human trafficking; (2) present in the United States on account of trafficking; (3) either comply with requests to cooperate with law enforcement in the investigation of their trafficking case or are deemed exempted from doing so on the basis of their youth or the trauma they have suffered; and (4) would suffer “extreme hardship involving unusual and severe harm upon removal” from the United States to remain in the United States. *Id.* T visas are valid for four years and carry the benefits of work authorization, derivative status for qualifying family members, and the possibility of adjusting status if certain requirements are met. 8 C.F.R. § 214.11(l)(4), (o)–(p) (2016). Exceptions to the law enforcement requirement are available to individuals who are under fifteen years of age or who are unable to assist due to trauma. See *id.* § 214.11(a) (defining “reasonable request for assistance” with respect to eligibility criteria set forth in § 214.11(b)(3)).

77. Compare *United States v. Kozminski*, 487 U.S. 931, 952–53 (1988) (holding that for purposes of criminal prosecution under 18 U.S.C. § 1584, “the term ‘involuntary servitude’ necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process”), *superseded by statute*, Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, as recognized in *United States v. Bell*, 761 F.3d 900 (8th Cir. 2014), with Trafficking Victims Protection Act of 2000 § 103(2), 22 U.S.C. § 7102 (2000) (defining coercion to include “any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person”).

78. See, e.g., U.S. Dep’t of State, Bureau of Pub. Affairs, *The Link Between Prostitution and Sex Trafficking* (2004), <https://2001-2009.state.gov/r/pa/ei/rls/38790.htm> (stating that trafficking is both the cause and effect of prostitution). The research methods and data supporting this assertion have since been contested by scholars. See, e.g., Sealing Cheng & Eunjung Kim, *The Paradoxes of Neoliberalism: Migrant Korean Sex Workers in the United States and “Sex Trafficking,”* 21 SOC. POL. 355, 356–57 (2014); Chuang, *supra* note 25, at 1683–84 (examining the anti-prostitution legal reforms scaffolded onto anti-trafficking laws following the passage of the TVPA); Rebecca L. Wharton, Note, *A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, 16 WM. & MARY J. WOMEN & L. 753, 771 (2010) (discussing the appointment of John Miller, a prostitution abolitionist, as Chairman of the Office to

National Security Presidential Directive in February 2002, which framed trafficking as a national security issue in the wake of the 9/11 attacks.<sup>79</sup> Hence, the anti-trafficking advocacy of the past two decades crystalized century-old narratives featuring women forced into prostitution as trafficking victims, and traffickers as threats to border security and public safety.<sup>80</sup>

This framework also entrenched the criminalization approach to trafficking, advocating for law enforcement as a means to rescue of victims and identify and punish traffickers. When the TVPA was reauthorized in 2008, one of the amended provisions called for the promulgation of Model State Criminal Provisions on pimping, pandering, and prostitution.<sup>81</sup> These provisions, modeled on Chapter 27 of the Criminal Code of the District of Columbia, were intended to supplement existing state criminal frameworks with specific provisions involving commercial sex exploitation of minors and compelled or coerced commercial sex acts.<sup>82</sup> A subsequent amendment clarified (and lessened) the government's burden when proving the age of the victim in commercial sex trafficking prosecutions.<sup>83</sup> Since Congress passed the TVPA, federal and local law enforcement have also become increasingly involved in identifying undocumented individuals and placing them in removal proceedings.<sup>84</sup>

Critics of the TVPA's criminalization provisions point out that the emphasis on criminalization places trafficked individuals at the risk of arrest, prosecution, and deportation. These aspects also make migration itself more dangerous and contribute to the prevalence of trafficking. This criminal framework also brings a greater number of individuals under state scrutiny, particularly people of color.<sup>85</sup> Criminal law aspects of the TVPA have also facilitated aspects of restrictive immigration poli-

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Monitor and Combat Trafficking in Persons and his anti-prostitution campaign, which further conflated prostitution and trafficking).

79. See Press Release, Office of the Press Sec'y, White House, Trafficking in Persons National Security Presidential Directive (Feb. 25, 2003), <http://fas.org/irp/offdocs/nspd/trafpers.html>.

80. See Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 382-85 (2006); see also Chacón, *supra* note 52, at 1637-43.

81. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 225(b), Pub. L. No. 110-457, 122 Stat. 5044, 5072 (2008).

82. See U.S. Dep't of Justice, Model State Provisions on Pimping, Pandering, and Prostitution, Explanatory Notes, <http://www.justice.gov/olp/model-state-provisions-pimping-pandering-and-prostitution> (last updated June 18, 2014).

83. See 18 U.S.C. § 1591(c) (2012) (amending the law such that the prosecution need not prove that the defendant knew the victim was under the age of eighteen if the defendant had "a reasonable opportunity to observe the [victim]").

84. See, e.g., Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1290 (2010); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 88, 92 (2005); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1820-21 (2011).

85. See, e.g., Kamala Kempadoo, *Victims and Agents of Crime: The New Crusade Against Trafficking*, in GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON-INDUSTRIAL COMPLEX 35, 38-42 (Julia Sudbury ed., 2005); see also discussion *infra* Sections II.A.-B., III.B.

cy. These enforcement practices include greater involvement by federal courts<sup>86</sup> and law enforcement, including agencies concerned with immigration and border control. States' adoption of a law enforcement-centered approach is comparable to domestic violence policy in that it demonstrates a commitment to treating these violations as serious offenses. However, many advocates argue that the need to prosecute offenders must be balanced with protection for victims, just as the law has done in the domestic violence context.<sup>87</sup>

## II. RECASTING TRAFFICKING NARRATIVES

The phenomenon of human trafficking is enormous and complex, and how it is understood depends heavily on the perspective by which one views it. There is limited evidence available—some of which is based on questionable research—from which to draw conclusions.<sup>88</sup> Media has traditionally played a key role in the public's understanding of the problem.<sup>89</sup> Feature and documentary films, television shows, journalistic accounts, public awareness campaigns, and legislative statements cast the problem of human trafficking in ways that resonate with the public and capture the interest of audiences. These media portrayals, complete with their dramatic narratives and stereotypical characters, become important sources of information for the public about the realities of trafficking in persons, regardless of the accuracy of facts or authenticity of the narratives captured therein.<sup>90</sup> In particular, images of criminality and illegality inform attitudes about actual crimes and the people who commit them, even when this information comes from media other than news, such as entertainment or commercials.<sup>91</sup> These popular narratives,

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86. Chacón, *supra* note 52, at 1611.

87. *Id.* at 1626–27.

88. See, e.g., INST. OF MED. & NAT'L RESEARCH COUNCIL, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 9 (Ellen Wright Clayton et al. eds., 2013) (“The committee’s review of commercial sexual exploitation and sex trafficking in minors in the United States was constrained by the extremely limited evidence base related to these crimes, particularly in the areas of prevention and intervention strategies. In addition, the committee found considerable variability in the quality of current research in these areas.”); Jonathan Todres, *Human Trafficking and Film: How Popular Portrayals Influence Law and Public Perception*, 101 CORNELL L. REV. ONLINE 1, 19 (2015).

89. See, e.g., Annie Isabel Fukushima & Julietta Hua, *Calling the Consumer Activist, Consuming the Trafficking Subject: Call + Response and the Terms of Legibility*, in DOCUMENTING GENDERED VIOLENCE: REPRESENTATIONS, COLLABORATIONS, AND MOVEMENTS 45, 49 (Lisa M. Cuklanz & Heather McIntosh eds., 2015) (“Because trafficking can happen anywhere to anyone, and its exact form is uncertain, trafficking privileges visuality and the trope of revelation. Documentary film, even as it presents a constructed vision, has an element of witness that alongside trafficking’s presumed need to *be witnessed* in order to be stopped.”); see also Todres, *supra* note 88, at 24.

90. Edith Kinney, *Victims, Villains, and Valiant Rescuers: Unpacking Sociolegal Constructions of Human Trafficking and Crimmigration in Popular Culture*, in THE ILLEGAL BUSINESS OF HUMAN TRAFFICKING 87, 90 (Maria João Guia ed., 2015) (first citing Linda Heath & Kevin Gilbert, *Mass Media and Fear of Crime*, 39 AM. BEHAV. SCI. 379 (1996); then citing SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION (updated ed. 2010)).

91. *Id.* at 88 (“Official sources explain the paucity of data regarding victims of trafficking in the U.S. by stating: ‘we are not finding victims in the United States because we are not looking for

and the policies they inspire, carry baggage from historical debates about the rights of women, racial minorities, and noncitizens. As these tropes persist, so does the rationalization of a law-enforcement driven response.<sup>92</sup>

These forms of public understanding have not only shaped the development of the law, as alluded to previously, but also play a vital role in how the law is applied and enforced. For example, in the context of domestic violence law, clients tell their stories to judges, and elements of those stories make their way into findings of fact and conclusions of law.<sup>93</sup> In immigration courts, images of “good” and “bad” immigrants affect eligibility for immigration relief.<sup>94</sup> In criminal trafficking arrests and prosecutions, local and federal law enforcement are informed by these stories as well.

Popular trafficking narratives tend to feature three stock characters, which this Article will refer to as “the innocent victim,” “the evil offender,” and “the good rescuer.”<sup>95</sup> Congressional debates leading up to the passage of the TVPA featured repeated references to the figure of the innocent victim—individuals lured or forced into trafficking situations, particularly in the sex industry.<sup>96</sup> Offenders in these cases included underhanded recruiters, organized crime bosses, and brutal pimps.<sup>97</sup> Popular portrayals of trafficking frame these acts in association with dangerous criminal enterprise, implying that law enforcement response is the logical (and necessary) response. This prompts public pressure for the state to intervene via the criminal justice system as rescuer.<sup>98</sup>

Critical feminist scholars have noted in these “victimization accounts” the troubling racial and neocolonial themes of naïveté, backwardness, and sexual deviancy as pertaining to women from the global South, as well as the tendency of these stories to “rely on dichotomous framings of ‘good’ and ‘bad’ human rights actors.”<sup>99</sup> Scholars have also

them.’ This sets up a dynamic where awareness-raising reports by journalists and others in the ‘rescue industry’ emphasise [sic] the scope, scale, and suffering of trafficking victims to trigger and justify law enforcement efforts to tackle ‘the hidden crime’ of trafficking.”)

92. *Id.*

93. See, e.g., Goodmark, *supra* note 4, at 81.

94. See generally Keyes, *supra* note 4, 226–27.

95. Kinney, *supra* note 90, at 92.

96. 146 CONG. REC. 7293–94 (2000) (statement of Rep. Pitts); see also *Trafficking of Women and Children in the International Sex Trade: Hearing on H.R. 1356 Before the Subcomm. on Int’l Operations & Human Rights of the H. Comm. on Int’l Relations*, 106th Cong. 56 (1999) [hereinafter *Trafficking of Women and Children in the International Sex Trade*] (statement of Rep. Smith), <https://www.gpo.gov/fdsys/pkg/CHRG-106hhrg63274/pdf/CHRG-106hhrg63274.pdf>; *id.* at 41 (statement of Gary A. Haugen, President and Chief Executive Officer, International Justice Mission); *id.* at 35 (statement of Anita Sharma Bhattari, trafficking survivor).

97. *Trafficking of Women and Children in the International Sex Trade*, *supra* note 96, at 35–36.

98. Kinney, *supra* note 90, at 88.

99. *Id.* at 92 (alteration in original) (internal quotation marks omitted) (noting that anti-trafficking discourses reflect “particular conceptions of migration, female sexuality, and the sex

noted the parallels with the white slavery moral panic, in which public understanding of the dangers posed to white women fueled a campaign that ultimately restricted freedom of movement for women worldwide.<sup>100</sup> Even where individuals benefit from conforming to this idealized image of the “perfect victim,” they may do so in ways that deny the realities of their lived experiences and their dignity before the law. Reinforcing these images may also be detrimental to others who might seek relief in the future if they cannot live up to the idealized role of a worthy victim.<sup>101</sup>

These narratives are also troubling because for every victim, there must be a perpetrator, and there is a narrative tendency to make victims more pure or make perpetrators more evil to show contrast between them.<sup>102</sup> A “good victim” is likely to obtain benefits, such as social services and immigration status, and escape prosecution, whereas a “bad offender” is likely to be found guilty and sentenced under the criminal law framework. Unfortunately, when a survivor is not “good” or “pure” enough to be seen as a victim, he or she is likely to be deemed ineligible for relief. Worse yet, he or she may be subject to prosecution for a crime associated with the trafficking situation or removal from the United States for an immigration violation. In this sense, victims may be seen as perpetrators and may be portrayed in the worst possible light to justify punishment under the fullest extent of the law. Particularly in the era of immigration enforcement, these narratives carry tremendous power to shape responses to trafficking. Law enforcement officers, expected to act as rescuers, may rely on narratives in ways that render individuals suspect based on their gender, race, immigration status, or national origin.

### A. *The Victim Role*

#### 1. The “Innocent Victim”

The victim construct in the trafficking narrative emerged in the early days of the white slavery campaign. Legal reformers used images of innocent women, kidnapped and forced into prostitution, as justification for criminal penalties. This quintessential victim was entirely passive in order to show that she had no responsibility for her situation and was

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industry, reflecting deeper fears and uncertainties, concerning national identity, women’s increasing desire for autonomy, foreigners [and] immigrants”); see also Julietta Hua & Holly Nigorizawa, *US Sex Trafficking, Women’s Human Rights and the Politics of Representation*, 12 INT’L FEMINIST J. POL. 401, 409 (2010); Jo Doezema, *Loose Women or Lost Women? The Re-Emergence of the Myth of ‘White Slavery’ in Contemporary Discourses of ‘Trafficking in Women,’* 18 GENDER ISSUES 23, 34 (2000).

100. Doezema, *supra* note 99, at 41.

101. See, e.g., Rose Broad, *‘A Vile and Violent Thing’: Female Traffickers and the Criminal Justice Response*, 55 BRIT. J. CRIMINOLOGY 1058, 1068–69 (2015) (describing the harsh sentencing of female traffickers, even though their “relationships and previous victimization [were] significant in their pathways into . . . offending”).

102. See Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 938 (2015).



therefore completely deserving of public sympathy.<sup>103</sup> The victim's innocence was further reinforced by her appearance—specifically her youth, virginity, and whiteness.<sup>104</sup> This image of the victim persists even in contemporary anti-trafficking discourse. The role of the victim in trafficking narratives has not changed—she remains an icon for mobilizing reform to combat “modern-day slavery.”<sup>105</sup> She bears resemblance to the prototypical battered woman, an image that played a comparable role in the criminalization of domestic violence<sup>106</sup> and rape.<sup>107</sup>

The iconic trafficking victim of the present day bears a striking resemblance to the “white slave”—she is female, trafficked for sex, and blameless for her plight because of her youth or lack of education; she is rescued by law enforcement instead of escaping on her own, is cooperative in the investigation, and is flawlessly credible as a witness for the prosecution.<sup>108</sup> Just as in the case of the virginal white slave, the rescue of the modern-day trafficking victim “puts a ‘soft glove’ on the ‘punishing fist’ of American immigration enforcement,” rationalizing criminal enforcement as the necessary means to protect the innocent, feminine subject.<sup>109</sup> Her passivity and blamelessness conceptually separate her from the illegal immigrant or prostitute and render her worthy of legal protection.

A particularly powerful example of the power of the trafficking victim icon is “Christina,” a figure invoked in an anti-trafficking rally in the early 2000s, as documented in the field notes of scholar Elizabeth Bernstein. The keynote speaker at an event described Christina as a young woman lured by the promise of a babysitting job, who was ultimately forced to work in a brothel. According to the speaker, Christina found prostitution to be a “disgusting,” “degrading,” and “traumatic” experience, and tragically discovered that she was infertile once she managed to escape.<sup>110</sup> Bernstein notes that she heard this story retold a number of times with only minor differences, “the only significant alteration being

103. Doezeza, *supra* note 99, at 28.

104. *Id.*

105. Kinney, *supra* note 90, at 91; *see also* Bernstein, *supra* note 25, at 239 (describing the “victim subject” as the galvanizing figure of what he calls governance through crime, and arguing that “the crime victim has supplanted the rights-bearing citizen as the idealized legal subject of our time”).

106. *See, e.g.*, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 793 (2007); Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER, RACE & JUST. 531, 543 (2013).

107. *See, e.g.*, Aya Gruber, *A “Neo-Feminist” Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER, RACE & JUST. 583, 589–90, 592–94 (2012).

108. *See* Srikantiah, *supra* note 4, at 187; *see also* Jennifer Musto, *Domestic Minor Sex Trafficking and the Detention-to-Protection Pipeline*, 37 DIALECTICAL ANTHROPOLOGY 257, 266 (2013) (illustrating that age, gender, and heteronormative behavior all play a role in convincing fact-finders that victimization has actually occurred).

109. Kinney, *supra* note 90, at 94–95.

110. Bernstein, *supra* note 25, at 248.

the victim's name."<sup>111</sup> She also found that the Department of Justice had no record of any prosecuted cases with a victim matching Christina's description.<sup>112</sup> As with the iconic victims of the white slavery epidemic, the facts of Christina's story were less important than her role in a narrative to drive a particular brand of reform.<sup>113</sup>

It remains unclear whether Christina was a real person or a sympathetic composite, but the use of victims as prototypes has troubling implications. Individuals may be pressured, directly or indirectly, to conform to an idealized victim image. Jill Brennehan, a survivor of coerced prostitution who at one point was involved with a sector of the anti-trafficking movement, recalls that she was encouraged to change the narrative of her experiences to conform more closely to a political message.<sup>114</sup> Other scholars have documented the ways in which the charged language of victimhood changes the way in which exploited individuals tell their stories.<sup>115</sup>

This image also plays an influential role in identification of trafficking victims.<sup>116</sup> In discretionary matters of immigration law, for example, categories of relief serve as "proxies for" deeper "questions of worthiness,"<sup>117</sup> and nowhere is that truth more starkly illustrated than in trafficking cases. Immigrants, often times through advocacy by their attorneys, may also find themselves cast as victims to make themselves more eligible for immigration relief, such as T and U visas that are available for survivors of trafficking and labor exploitation.<sup>118</sup> These narratives, however, are fragile and may pose risks to individuals within the justice system. Although Christina has not been a subject of public interrogation, other individuals subject to trafficking or exploitation who have been placed on the "iconic victim" pedestal have later been discredited

111. *Id.*; see also Erin Denton, *International News Coverage of Human Trafficking Arrests and Prosecutions: A Content Analysis*, 20 WOMEN & CRIM. JUST. 10, 20 (2010) ("Many such articles [in the study analyzing global media accounts of human trafficking] told stories of young women forced into sexual servitude but frequently failed to mention any specific details regarding a trafficking offense and rarely used real names and locations. Although it is certainly possible that these editorial-style reports were based on actual cases of trafficking, little explanation can be provided for why some articles were specifically related to a trafficking offense and others merely adopted what could be perceived as a scare-tactic approach to addressing sex slavery.")

112. Bernstein, *supra* note 25, at 248–49.

113. See *id.* at 239; see also Kinney, *supra* note 90, at 91.

114. See Maggie McNeill, *Mind-Witness Testimony: The Unreliability of First-Person Accounts in Sex Trafficking Discourse*, 7 ALB. GOV'T L. REV. 56, 83–84 (2014) (quoting Jill Brennehan as saying that individuals encouraged her to "lie[], which they call 're-framing experiences', to make their point. As difficult and extreme as my experiences were, they wanted me to re-frame them, meaning adding things that didn't happen to make it worse.")

115. *Id.* at 70–73.

116. Musto, *supra* note 108, at 266 (quoting a vice detective as saying, "The district attorney is looking to find young trafficked victims chained to beds. It's hard to convince a jury that older women can be victims [of trafficking]. So it's the young victims the DA is after and that's who we look for. But most of our girls aren't perfect victims." (alteration in original)).

117. Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 HOW. L.J. 899, 900 (2014).

118. See Keyes, *supra* note 4, at 226–31.

for embellishing their stories.<sup>119</sup> The stakes are much higher for individuals in criminal or immigration proceedings. As narratives fall apart under scrutiny, victims may be discredited as witnesses or deemed ineligible for services, legal relief, or protection from prosecution.

## 2. Recasting the Victim

### a. Age, Gender, Race, and Sexual Exploitation

Popular narratives overwhelmingly portray human trafficking as a crime against women.<sup>120</sup> This is due, in part, to the frequent reduction of trafficking to only the crimes of forced prostitution and sexual exploitation. Many of the victims featured in the Department of Homeland Security's Blue Campaign to combat human trafficking<sup>121</sup> and other public anti-trafficking campaigns are young women, often Latina or Asian, with overt or subtle references to sex trafficking.<sup>122</sup> Scholars have criticized the construct of the "human trafficking victim" as gendered, racialized, and infantilized—imbued with stereotypes about "third world" women.<sup>123</sup> There are relatively few references to the context of labor trafficking. These portrayal of victims also fail to acknowledge the research findings that men and boys are also victims of trafficking, including sex trafficking.<sup>124</sup>

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119. One high-profile example is the story of Somaly Mam, an anti-trafficking activist in Cambodia, profiled in Nicholas Kristof's documentary *Half the Sky* and selected as one of *Time Magazine's* "100 Most Influential People" list in 2009. See Angelina Jolie, *The 2009 Time 100: Somaly Mam*, TIME MAG. (Apr. 30, 2009), [http://content.time.com/time/specials/packages/article/0,28804,1894410\\_1894289\\_1894268,00.html](http://content.time.com/time/specials/packages/article/0,28804,1894410_1894289_1894268,00.html). Mam resigned from the head of her foundation in 2014 following a *Newsweek* exposé on inconsistencies in Mam's accounts of her victimization and the experiences of trafficking survivors in Cambodia, many of which were found to have been fabricated. Simon Marks, *Somaly Mam: The Holy Saint (and Sinner) of Sex Trafficking*, NEWSWEEK (May 21, 2014, 5:49 AM), <http://www.newsweek.com/2014/05/30/somaly-mam-holy-saint-and-sinner-sex-trafficking-251642.html>; Taylor Wofford, *Somaly Mam Foundation Closes*, NEWSWEEK (Oct. 20, 2014, 6:28 PM), <http://www.newsweek.com/somaly-mam-foundation-closes-278657>.

120. See, e.g., Todres, *supra* note 88, at 11 (analyzing portrayals of trafficking in three popular films and noting, "If you watched these three films, you would think that young women and girls are the only victims of human trafficking. No man or boy is shown as a victim in any of these films.")

121. See, e.g., Annie Isabel Fukushima, Mellon Postdoctoral Assoc., Rutgers Univ., Lecture at the Transnational Feminisms Summer Institute: Caged, Bound, and Shackled: Diasporan Crossings and the Tethering of Subjects to Anti-Violence Iconographies (July 7, 2014); Kasey Carmile Ragan, Rhetoric Constructs Reality: Using Feminist Scholarship to Assess an Anti-Human Trafficking Campaign 14–15, 90–91 (Dec. 2013) (unpublished M.S. thesis, Northern Arizona University).

122. See Erin O'Brien, *Human Trafficking Heroes and Villains: Representing the Problem in Anti-Trafficking Awareness Campaigns*, 25 SOC. & LEGAL STUD. 205, 208–09 (2016).

123. See, e.g., Doezeema, *supra* note 99, at 37–38; Fukushima & Hua, *supra* note 89, at 53 (noting that the victims in the *Call + Response* campaign materials are largely identified as south or southeast Asian); see also Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 1–2 (2002); Kempadoo, *supra* note 85, at 35; Srikantiah, *supra* note 4, at 187. *But see* Butler, *supra* note 5, at 1495–1500 (arguing that iconic victims are still white women and that individuals of color are frequently overlooked as victims of trafficking).

124. See SARA ANN FRIEDMAN, ECPAT–USA, AND BOYS TOO 5–6 (2013), <http://www.ecpatusa.org/wp-content/uploads/2016/02/and-boys-to-report.pdf>.

Popular images of victims have traction with individuals directly tasked with enforcing trafficking laws and identifying victims in need of relief and assistance. There is an impression among some law enforcement officials that most victims are U.S. citizen children, though studies suggest otherwise.<sup>125</sup> Scholar Jennifer Musto observes in her interviews with law enforcement agents that

it was common for general discussions about human trafficking to veer toward conversations about forced prostitution and invariably, US-born underage girls forced into prostitution by trafficker pimps. Most law enforcement officers agreed that they have come across ever more US-born victims of domestic trafficking. Whether referenced as runaways, throwaways, domestic trafficked minors, or the victims of commercial sexual exploitation, there was a consistent emphasis on the fact that that victims are young (varying from 10 to 17 years of age) and that they keep getting younger.<sup>126</sup>

These perceptions are striking when compared with federal trafficking prosecution patterns. According to the most recent U.S. Department of Justice report, which analyzed 2,515 suspected trafficking cases opened by federally-funded task forces between January 2008 and June 2011, around 82% of trafficking cases involved sex trafficking.<sup>127</sup> The majority of the victims in these cases were women.<sup>128</sup> Most of the sex trafficking victims were U.S. citizens,<sup>129</sup> and many of them were identified as white or black/African-American.<sup>130</sup> Less than half of the cases classified as sex trafficking involved prostitution or sexual exploitation of minors,<sup>131</sup> though most cases involved victims age twenty-four or younger.<sup>132</sup> Numbers suggest, however, that there may be a growing law enforcement focus on pursuing child prostitution and sexual exploitation

125. See, e.g., Denton, *supra* note 111, at 17–18.

126. Musto, *supra* note 108, at 265.

127. DUREN BANKS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, at 3 (2011) (reporting that 82.1% of trafficking cases opened for investigation in January 2008 and June 2010 were sex trafficking cases, compared to 13.9% which were labor trafficking cases, 2.6% of which were “other suspected trafficking,” and 6.8% of which were unknown); see also Denton, *supra* note 111, at 20 (arguing, based on an analysis of global media coverage of human trafficking, that sex trafficking is over-reported).

128. BANKS & KYCKELHAHN, *supra* note 127, at 6 (reporting that 432 out of 460 matters classified as sex trafficking cases involved women, compared with 27 that involved men).

129. *Id.* (finding that 345 out of 460 victims in sex trafficking cases were U.S. citizens/nationals, compared to 6 who were legal permanent residents, 64 who were undocumented aliens, 0 who were temporary workers, and 41 whose status was unknown).

130. *Id.* (finding that 102 out of 460 victims in sex trafficking cases were identified as white and 161 were identified as Black/African-American, compared to 95 who were identified as Hispanic/Latino, 17 who were identified as Asian, 23 of which were identified as “other,” and 61 whose race was unknown).

131. *Id.* at 3 (reporting that 40% of matters classified as “sex trafficking” involved minors, compared to 48% that involved adults).

132. *Id.* at 6 (reporting that 248 out of 460 individuals identified as victims in sex trafficking cases were age 17 or younger, and 124 were ages 18–24, compared with 46 who were ages 25–34, 12 who were age 35 or older, and 12 whose ages were unknown).

cases because the TVPA does not require proof of force, fraud, or coercion when the victim is a minor.<sup>133</sup> By 2013, prosecutions with a lead charge of sex trafficking of minors had increased from 35 to 203—nearly a five-fold increase.<sup>134</sup> The number of prosecutions for the 2016 fiscal year-to-date is 273 under this lead charge,<sup>135</sup> compared to two prosecutions with a lead charge of sale into involuntary servitude,<sup>136</sup> two prosecutions with a lead charge of trafficking with respect to slavery,<sup>137</sup> and nine prosecutions with a lead charge of forced labor.<sup>138</sup>

These prosecution demographics contrast sharply with the available statistical data on labor trafficking. Internationally, labor trafficking represents a significant percentage of all trafficking cases.<sup>139</sup> The most recent U.S. statistics, however, indicate that a scarce 11% of trafficking cases in the reporting period involved labor trafficking.<sup>140</sup> Interestingly,

133. See 22 U.S.C. § 7102(9)(A) (2012) (explaining that sex trafficking occurs when the sexual conduct in question is “induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age” (emphasis added)).

134. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, FOURFOLD INCREASE IN PROSECUTIONS OF CHILD SEX TRAFFICKING CRIMES SINCE 2008: PROSECUTIONS FOR 18 USC 1591 THROUGH JUNE 2013 (2013), <http://trac.syr.edu/tracreports/crim/328/>.

135. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LEAD CHARGE: 18 USC 1591 - SEX TRAFFICKING OF CHILDREN BY FORCE, FRAUD OR COERCION (2016), [http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p\\_series=annual&p\\_stat=fil&agenrevgrp=&distcode=&progrpr=&progrcat=&trac\\_leadcharge=18+%3A00001591&varlist=&varlist\\_submit=&countlist=&monthcountlist=&stat\\_count=133041&stat\\_monthcount=10090&stat\\_cost=1&costlist=&month=sep&year=16&t=1482461899&\\_SERVICE=express9&\\_DEBUG=0&\\_PROGRAM=interp.annualreport.sas](http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p_series=annual&p_stat=fil&agenrevgrp=&distcode=&progrpr=&progrcat=&trac_leadcharge=18+%3A00001591&varlist=&varlist_submit=&countlist=&monthcountlist=&stat_count=133041&stat_monthcount=10090&stat_cost=1&costlist=&month=sep&year=16&t=1482461899&_SERVICE=express9&_DEBUG=0&_PROGRAM=interp.annualreport.sas).

136. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LEAD CHARGE: 18 USC 1584 - SALE INTO INVOLUNTARY SERVITUDE (2016), [http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p\\_series=annual&p\\_stat=fil&agenrevgrp=&distcode=&progrpr=&progrcat=&trac\\_leadcharge=18+%3A00001584&varlist=&varlist\\_submit=&countlist=&monthcountlist=&stat\\_count=133041&stat\\_monthcount=10090&stat\\_cost=1&costlist=&month=sep&year=16&t=1482462061&\\_SERVICE=express9&\\_DEBUG=0&\\_PROGRAM=interp.annualreport.sas](http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p_series=annual&p_stat=fil&agenrevgrp=&distcode=&progrpr=&progrcat=&trac_leadcharge=18+%3A00001584&varlist=&varlist_submit=&countlist=&monthcountlist=&stat_count=133041&stat_monthcount=10090&stat_cost=1&costlist=&month=sep&year=16&t=1482462061&_SERVICE=express9&_DEBUG=0&_PROGRAM=interp.annualreport.sas).

137. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LEAD CHARGE: 18 USC 1590 - TRAFFICKING WITH RESPECT TO SLAVERY (2016), [http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p\\_series=annual&p\\_stat=fil&agenrevgrp=&distcode=&progrpr=&progrcat=&trac\\_leadcharge=18+%3A00001590&varlist=&varlist\\_submit=&countlist=&monthcountlist=&stat\\_count=133041&stat\\_monthcount=10090&stat\\_cost=1&costlist=&month=sep&year=16&t=1482462315&\\_SERVICE=express9&\\_DEBUG=0&\\_PROGRAM=interp.annualreport.sas](http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p_series=annual&p_stat=fil&agenrevgrp=&distcode=&progrpr=&progrcat=&trac_leadcharge=18+%3A00001590&varlist=&varlist_submit=&countlist=&monthcountlist=&stat_count=133041&stat_monthcount=10090&stat_cost=1&costlist=&month=sep&year=16&t=1482462315&_SERVICE=express9&_DEBUG=0&_PROGRAM=interp.annualreport.sas).

138. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LEAD CHARGE: 18 USC 1589 - FORCED LABOR (2016), [http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p\\_series=annual&p\\_stat=fil&agenrevgrp=&distcode=&progrpr=&progrcat=&trac\\_leadcharge=18+%3A00001589&varlist=&varlist\\_submit=&countlist=&monthcountlist=&stat\\_count=133041&stat\\_monthcount=10090&stat\\_cost=1&costlist=&month=sep&year=16&t=1482462315&\\_SERVICE=express9&\\_DEBUG=0&\\_PROGRAM=interp.annualreport.sas](http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p_series=annual&p_stat=fil&agenrevgrp=&distcode=&progrpr=&progrcat=&trac_leadcharge=18+%3A00001589&varlist=&varlist_submit=&countlist=&monthcountlist=&stat_count=133041&stat_monthcount=10090&stat_cost=1&costlist=&month=sep&year=16&t=1482462315&_SERVICE=express9&_DEBUG=0&_PROGRAM=interp.annualreport.sas).

139. See INT’L LABOUR OFFICE, ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS & METHODOLOGY 13 (2012), [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_182004.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_182004.pdf); see also JONATHAN MARTENS & JETTE CHRISTIANSEN ET AL., INT’L WORK. FOR MIGRATION, COUNTER TRAFFICKING AND ASSISTANCE TO VULNERABLE MIGRANTS: ANNUAL REPORT OF ACTIVITIES 2011, at 18 (2012), [https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Annual\\_Report\\_2011\\_Counter\\_Trafficking.pdf](https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Annual_Report_2011_Counter_Trafficking.pdf).

140. BANKS & KYCKELHAHN, *supra* note 127, at 3 & tbl.2 (finding that 278 out of 2515 trafficking cases in the reporting period, or 11.1%, were identified as trafficking cases). It is also worth noting that, for purposes of analysis, matters involving both labor and sex trafficking were classified as sex trafficking cases. *Id.* at 3.

the majority of victims in these cases were also female,<sup>141</sup> which raises questions about the extent to which law enforcement officers identify men as trafficking victims. Individuals identified in labor trafficking cases were predominately Hispanic/ Latino,<sup>142</sup> and most victims were above the age of twenty-five.<sup>143</sup> These statistics suggest that individuals who do not fit the traditional image of victims, such men or older adults, are less likely to be identified as individuals who merit relief.<sup>144</sup>

Critiques of trafficking policy have focused heavily on the danger stereotypes pose to victims who do not fit these images.<sup>145</sup> In the example above, because labor trafficking enterprises are also associated with adult men,<sup>146</sup> gender stereotypes about victims are likely interfere with the successful identification of individuals subject to workplace exploitation. Where an individual is not identified as a victim, it is more likely that he or she will be subject to punishment, as in the case of an unauthorized worker or undocumented immigrant. To assign culpability, the individual's transgressions are more likely to be attributed to choice rather than coercion in the course of a criminal prosecution or removal proceeding.<sup>147</sup>

#### b. Agency

The innocent victim is an individual who does not wish to be in a trafficking situation, but is incapable of leaving it. This image manifests in law enforcement bias against individuals who self-report after leaving their trafficking situations of their own accord; data suggests that officials are also more likely to believe the accounts of individuals they have rescued through law enforcement operations.<sup>148</sup> This stereotype of help-

141. *Id.* at 6 & tbl.5 (finding that 43 out of 63 matters classified as "labor trafficking" involved a female victim, compared to 20 that involved a male victim).

142. *Id.* at 6 tbl.5 (finding that 34 out of 63 individuals identified as victims of labor trafficking were Hispanic/Latino, compared to one who was white, 6 who were Black/African-American, 9 who were Asian, 11 who were identified as "other," and 2 whose race were unknown).

143. *Id.* (finding that 22 out of 63 individuals identified as victims of labor trafficking were age 25–34 and 15 were age 35 or older, compared with 6 who were age 17 or younger and 17 who were age 18–24).

144. *Id.*; see also Denton, *supra* note 111, at 21 (finding that in an analysis of recent news stories on trafficking, 7% of men were identified as exploited and the remaining 93% were identified as voluntarily smuggled and suggesting that "trafficked males are rarely given the victim-status attention in the media that their female and child counterparts receive").

145. See Srikantiah, *supra* note 4, at 158, 160–61, 170; see also Dina Francesca Haynes, (*Not Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 347 (2007).

146. See Susan Carroll, *Traffickers Force More Men into Servitude*, HOUS. CHRON. (July 6, 2009, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Traffickers-force-more-men-into-servitude-1730660.php> (quoting a U.S. Department of Health and Human Services spokesperson who attributed the increase in the number of male victims to an increase in labor trafficking cases).

147. Jennifer Lynne Musto, *What's in a Name?: Conflations and Contradictions in Contemporary U.S. Discourses of Human Trafficking*, 32 WOMEN'S STUD. INT'L F. 281, 283 (2009).

148. Dina Haynes, *Conceptual, Legal and Implementation Gaps in the Protection of Trafficked Persons in the United States*, WILSON CTR., Summer 2010, at 16, 17–18 (Middle East Program & United States Studies Occasional Paper Series),

lessness inhibits effective identification of trafficked people, particularly where they are disinclined to self-identify as “trafficking victims.”<sup>149</sup> Where individuals exercise independent capacity for decision-making, their status as victims becomes legally debatable. The law attempts to parse questions of agency in decisions to migrate and undertake risky work arrangements. The Trafficking Protocol and Smuggling Protocol attempt to clearly distinguish the two phenomena, where in fact many migration cases occupy a gray area between them.<sup>150</sup>

The existing legal approach is in tension with migration theory, which posits that the migration process is best understood as a process of free will.<sup>151</sup> As Saskia Sassen observes, migration is a matter of initiative rather than passive osmosis: “only certain people leave, and they travel on highly structured routes to their destinations, rather than gravitate blindly toward any rich country they can enter.”<sup>152</sup> The agency of female migrants in particular troubles the dominant narratives about labor migration. Recent studies in migration theory, however, specifically cast the “new migrant” as a female looking to break from social roles and constraints including familial expectations, such as the expectation to care for elderly relatives, to marry, to carry out gender roles determined by society, or to turn over paychecks to male relatives.<sup>153</sup> From this perspective, migrations are matters of choice but never completely voluntary—each decision is influenced by “push” and “pull” factors.<sup>154</sup> Economic, political, and social circumstances contribute to an individual’s desire to migrate,<sup>155</sup> blurring the distinction between agency and coercion. In the words of Professor Dina Haynes, “[t]he legal fiction is that one can either be a victim or a capable person of free will, but not both.”<sup>156</sup>

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<https://www.wilsoncenter.org/sites/default/files/Rethinking%20Human%20Trafficking.pdf>; see also Srikantiah, *supra* note 4, at 183 (“[T]he regulations . . . grant preference to victims who are rescued by law enforcement over those who escape from trafficking, a preference that appears nowhere in the statute. Victims whose cases come to light because they escaped from traffickers not only must convince law enforcement to issue an LEA, but also must convince DHS that they could not have left the country after escaping their traffickers.”).

149. See, e.g., Cheng & Kim, *supra* note 78, at 363–64.

150. See *supra* Section I.C.

151. Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 7–8 (2009).

152. SASKIA SASSEN, GUESTS AND ALIENS 2 (1999).

153. See *id.* at 19–20; see also Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409, 1442 (2011) (describing the need for a more nuanced view of coercion that takes into account the marginalizing experiences of women).

154. See Carolyn Hoyle, Mary Bosworth & Michelle Dempsey, *Labelling the Victims of Sex Trafficking: Exploring the Borderland Between Rhetoric and Reality*, 20 SOC. & LEGAL STUD. 313, 322 (2011).

155. See, e.g., Nicole Constable, *Migrant Workers, Cross-Border Marriages, and Trafficking*, WILSON CTR., Summer 2010, at 26, 26 (Middle East Program & United States Studies Occasional Paper Series),

<https://www.wilsoncenter.org/sites/default/files/Rethinking%20Human%20Trafficking.pdf>.

156. Haynes, *supra* note 151, at 7.

The narrow conception of a victim permits the state to re-categorize a small number of individuals, particularly (young) women associated with sex work, as victims of abuse rather than as laborers.<sup>157</sup> When trafficking victims are migrants with agency, their lived experience blurs this convenient distinction between “trafficking” and “smuggling for purposes of economic migration,” perhaps tipping the scale in favor of designation as an offender rather than a victim.<sup>158</sup> Irregular migration often becomes the only option for people—men and women—to exercise a modicum of choice, increasing the likelihood that people will continue to take risks when accepting employment.<sup>159</sup> For this very reason, scholars argue that the existing anti-trafficking framework, with its emphasis on border control, actually makes it more likely that global migrants will become involved in trafficking.<sup>160</sup>

### c. Consent and Coercion

To be identified as a trafficking victim, an individual must be seen as someone who was forced, defrauded, or coerced into labor exploitation.<sup>161</sup> In determining whether an individual has been coerced, one must consider the role of a worker’s consent.<sup>162</sup> Those who seek protection as legally-designated trafficking victims must therefore demonstrate their lack of capacity for consent or argue that they were forced, coerced, or deceived into the work arrangement.<sup>163</sup>

Consent in the trafficking context, however, is frequently complicated by a number of factors. Immigration status,<sup>164</sup> youth,<sup>165</sup> gendered oppression,<sup>166</sup> education and experience,<sup>167</sup> and poverty may all play a role in an individual’s decision-making.<sup>168</sup> Research on global migration

157. Srikantiah, *supra* note 4, at 194, 197.

158. *See id.* at 197.

159. LEE, *supra* note 7, at 30.

160. *See id.* at 31; *see also* Constable, *supra* note 155, at 26 (“In reality, although economic factors are primary, motivations are often more complex. Women work in Hong Kong for many reasons besides economic need, including escaping marital problems or familial conflicts, or a desire for travel and adventure. Filipina DWs are well educated and do not come from the poorest sector of the Philippine population. If they were, they would not be able to afford the required fees associated with working overseas. Many were under-employed or dissatisfied with opportunities in the Philippines, and their incomes may be higher as DWs in Hong Kong. Many described their decisions as the most desirable ‘choice’ among the available options.”).

161. *See generally* Haynes, *supra* note 151, at 7.

162. *Id.*; *see also* Constable, *supra* note 155, at 26.

163. Constable, *supra* note 155, at 26; Haynes, *supra* note 151, at 7.

164. *See* Haynes, *supra* note 151, at 7.

165. *See* Cheryl Nelson Butler, *Kids for Sale: Does America Recognize Its Own Sexually Exploited Minors as Victims of Human Trafficking?*, 44 SETON HALL L. REV. 833, 835 (2014).

166. *See* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 29 (2009).

167. *See* Diana Tietjens Meyers, *Feminism and Sex Trafficking: Rethinking Some Aspects of Autonomy and Paternalism*, 17 ETHICAL THEORY & MORAL PRAC. 427, 433–34 (2014).

168. *See* Kay B. Warren, *Troubling the Victim/Trafficker Dichotomy in Efforts to Combat Human Trafficking: The Unintended Consequences of Moralizing Labor Migration*, 19 IND. J. GLOBAL LEGAL STUD. 105, 110 (2012).



shows countless exercises of consent and agency, but at the same time workers regularly assume risks in their employment arrangements.<sup>169</sup> Many workers who decide to migrate understand that work options on the whole are undesirable—whether in the home country or destination country—but work in the destination country is better compensated.<sup>170</sup> There is also a question of type and degree when it comes to the undesirability of an employment opportunity. For migrant workers in the sex industry, some may know beforehand that their job involves a sexual component, but as Laura María Agustín points out, “knowing beforehand is a poor measure of exploitation and unhappiness, since no one can know what working conditions will feel like in any future occupation.”<sup>171</sup> Critical to this discussion is the reality that sex work is like any other form of labor, particularly in the informal sector—work that one can consent to, where conditions of exploitation may independently exist, but which is not in itself inherently abusive.<sup>172</sup>

Though human trafficking includes a number of situations of abuse and exploitation, there is tension between the threat of violence within the process and conditions of migration itself and the structural inequality imposed by immigration, labor, and criminal law enforcement frameworks.<sup>173</sup> This makes for a highly individualized, nuanced, and at times ambiguous framework for consent—one that is difficult for the state to standardize and embrace. Aspects of this understanding of consent may also conflict with individual law enforcement officers’ beliefs and assumptions about coercion, exploitation, and sex work. For example, in Jennifer Musto’s field research, a vice detective interview subject expressed the opinion that

prostitution is never voluntary. Even if a person says it is, they’re not. . . . And whether it be the economics or whatever of the situation, that’s coercing them to do it. It’s not something they want to do. If they could make money doing something else they

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169. Kempadoo, *supra* note 85, at 37–38 (“[Workers] often do not know, or sometimes tacitly accept, . . . the dangers of underground routes they have to take to cross a border; the financial costs; the type of activities; the working and living conditions upon arrival; the high level of dependence on a particular set of recruiters, agents, or employers; the health risks; the duration of the job; their criminalized status once in an overseas location; the enforcement violence; and/or periods of detention or incarceration they may face.”).

170. See, e.g., Warren, *supra* note 168, at 110, 112 (“[Many migrant women] see themselves as people who made unfortunate job decisions that resulted in their having to work in exploitative and dangerous conditions with poor pay, both chronic issues in their work lives as a whole whether or not they leave their home communities.”).

171. LAURA MARÍA AGUSTÍN, *SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY* 30 (2007) (internal quotation marks omitted); see also Kempadoo, *supra* note 85, at 38 (“Most trafficked persons . . . express some personal desire to migrate, and about half of women in the global sex trade appear to be conscious of the fact that they will be involved in some form of sex work prior to migration.”).

172. See Kempadoo, *supra* note 85, at 37.

173. *Id.* at 37–38.

would. . . [I]t's very degrading and there's no way a person would do what they would do for money.<sup>174</sup>

Musto specifically notes that this vice detective was speaking in the context of young girls who lacked the age and life experience to fully consent, but in the course of the agent's narrative, these young girls "come to stand in for the entire population of adult female, male, and transgender sex workers."<sup>175</sup>

These distinctions are critical because eliminating the possibility of consent also eliminates meaningful exercise of agency and autonomy. Work, including sex work, may involve aspects of consent and choice, regardless of economic push and pull factors.<sup>176</sup> As Meyers explains, even though these workers may be subject to the constraints of jobless economies, research does not reinforce the notion of "women as passive pawns of economic pressures and criminal gangs," but rather as individuals who are known to "rebuff sex traffickers" and "manipulate the trafficking system to their own advantage."<sup>177</sup> This does not discount the fact that abuse can and does certainly occur under these circumstances, and serious harm may result.<sup>178</sup> Individual experiences of marginalization and desperation may contribute to decisions made around consent.<sup>179</sup> Kamala Kempadoo posits that individuals may use their agency in ways that generate income and permit survival, but the circumstances of travel and work, particularly in informal and underground sectors, may facilitate exploitation.<sup>180</sup> She points out that "[s]ituations in which women are abducted or kidnapped, chained to beds in brothels, and held as sex or other types of slaves are rarely documented," and that labor exploitation and migratory processes are much more common sites of trafficking and other forms of exploitation.<sup>181</sup> The question is, to what extent the state will consider any of these individual factors, including whether individuals who demonstrate agency in the form of consent are eligible for assistance.

The United Nations Office on Drugs and Crime has acknowledged the challenges inherent in assessment of consent and coercion in the law enforcement context, which can create challenges in identifying both

174. Musto, *supra* note 108, at 265.

175. *Id.*

176. Meyers, *supra* note 167, at 432.

177. *Id.*

178. Musto, *supra* note 108, at 265.

179. See Kempadoo, *supra* note 85, at 37 ("[W]omen are not simply located as victims of terrifying or paralyzing male power or as a homogeneous group. Rather, they are co-located in this perspective as agentic, self-determining, differentially positioned subjects who are capable of negotiating, complying with, as well as consciously opposing and transforming relations of power, whether these are embedded in institutions of slavery, prostitution, marriage, the household, or the labor market.").

180. *Id.*

181. *Id.*

victims and offenders.<sup>182</sup> While a prosecutorial approach under the TVPA would favor a clear case of coercion, deception, or fraud to recruit and retain trafficked workers, the issues of false promises and force are quite complicated and speak to a range of different experiences.<sup>183</sup> Experiences of force, coercion, and deception are equally subjective.<sup>184</sup> Indeed, many scholars view autonomy as episodic and as a matter of degree.<sup>185</sup> The judicial history of coercion in forced labor cases is far from clearly resolved.<sup>186</sup> The TVPA sought to broaden the definition of “psychological coercion” beyond the narrow definition in *United States v. Kozminski*.<sup>187</sup> Unfortunately, the TVPA’s non-specific language around coercion, while intended to permit inclusion of psychological and other forms of non-physical coercion, forces a clear designation.<sup>188</sup> This creates space for unfavorable discretion by law enforcement. Where trafficked individuals demonstrate agency and deviate from the image of the passive victim, they do not have defenses or mitigating factors for criminal offenses, such as prostitution, drug use or distribution, unlawful entry, or possession of fraudulent documents.<sup>189</sup>

#### d. Fallibility

The flip side of agency and consent is that victims cannot always be considered “innocent” of unlawful conduct. Certain individuals are less likely to be “rescued” by law enforcement than to be arrested for having committed another crime.<sup>190</sup> From 2000 to 2007, a total of 298 traffick-

182. See U.N. OFFICE ON DRUGS & CRIME, ISSUE PAPER: THE ROLE OF ‘CONSENT’ IN THE TRAFFICKING IN PERSONS PROTOCOL 15 (2014), [https://www.unodc.org/documents/human-trafficking/2014/UNODC\\_2014\\_Issue\\_Paper\\_Consent.pdf](https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf).

183. See, e.g., Julia O’Connell Davidson, *Gender, Migration, ‘Trafficking’ and the Troublesome Relationship Between Agency and Force*, U. OXFORD FAC. L.: BORDER CRIMINOLOGIES (June 19, 2015), <http://bordercriminologies.law.ox.ac.uk/gender-migration-trafficking/> (attributing the emphasis on voluntariness to the dominant liberal paradigm present throughout the antitrafficking legal framework); see also AGUSTÍN, *supra* note 171, at 31–32 (“Some intermediaries deceive migrants egregiously, as when the package includes signing a contract whose language and foreign currencies they cannot comprehend. Some overeager travellers [sic] do not investigate what they are promised, and some permit false documents to be prepared which render them vulnerable in ways they cannot imagine.”).

184. AGUSTÍN, *supra* note 171, at 32.

185. See Meyers, *supra* note 167, at 432.

186. See Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941, 943–44 (2007).

187. 487 U.S. 931 (1988), *superseded by statute*, Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, *as recognized in United States v. Bell*, 761 F.3d 900 (8th Cir. 2014); see also 22 U.S.C. § 7101(b)(13) (2012).

188. See Kim, *supra* note 186, at 966–68.

189. See Musto, *supra* note 147, at 283.

190. Haynes, *supra* note 148, at 17; see also Musto, *supra* note 108, at 266 (“[S]ome law enforcement conceded that it is much harder to convince people—and especially prosecutors, judges, and juries—that adults are also victimized, since many assume they are complicit in their own victimization or addicted to ‘the life’ of prostitution”).

ing cases were filed in U.S. Federal Appellate and District courts.<sup>191</sup> Most of these cases involved female victims in sex trafficking situations.<sup>192</sup> From the outset, it is clear that these numbers reflect a relatively small percentage of the individuals in trafficking situations in the United States, and that these numbers disproportionately exclude forced labor cases. Prosecutors report a number of challenges to bringing successful cases under these laws including determining who is a victim, obtaining “truthful” testimony from victims in light of fear of traffickers, and ensuring the safety of the victim’s family abroad.<sup>193</sup> Ultimately, very few victims testify in trafficking prosecutions.<sup>194</sup> In addition to the ordinary considerations of whether witnesses are willing and able to testify, prosecutors face the challenge of producing “good” victims.<sup>195</sup> As witnesses, trafficking victims may refer to choices such as travelling abroad, knowingly accepting sex work, keeping false passports, and deciding to make money, all of which might undermine their credibility in court.<sup>196</sup> Prosecutors might also anticipate that judges and juries might have stereotypes about who is a victim and may be hesitant to call witnesses who do not conform to this image.<sup>197</sup> The distinction between traffickers and victims may therefore become a matter of selectively-presented evidence where the reality is much more complex.<sup>198</sup>

Lawmakers have attempted to better protect trafficked persons from prosecution. For example, for individuals who have received T visas on account of trafficking, the TVPA makes certain exceptions to the “good moral character” requirement for legal permanent residence.<sup>199</sup> Ordinari-

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191. HEATHER J. CLAWSON ET AL., ICF INT’L, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES 12 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf>.

192. *Id.* at v (finding that out of the sample of federal cases prosecuted under the TVPA, 71% of cases involved sex trafficking and 94% involved female victims, whereas 29% involved non-sex-related labor trafficking).

193. *See id.* at vi–vii.

194. *Id.* at vi (finding that out of the sample of federal cases prosecuted under the TVPA, victims testified at the grand jury hearing in 49% of cases, 40% included victim testimony at trial, and 11% involved testimony at the disposition; 89% of cases did not involve victim testimony at the disposition); *see also* Christine Guida, Assistant Dist. Attorney, Nassau Cty. Dist. Attorney’s Office, Remarks at the Cardozo Journal of Law and Gender Symposium: Sex Work and the Law: Felony, Fetish, or Free Market? (Nov. 5, 2014), in 21 CARDOZO J.L. & GENDER 499, 513 (2015) (“Some [trafficking] cases, many cases, that I do pursue, where the victim is not cooperative with the prosecution, where we either can prove the case evidence-based, photographs, 911 calls, other evidence, eyewitnesses, or we try to go forward and we try to get them services, and we do whatever we can to assist the victim of trafficking, we get them enrolled in a program, we give them a referral, we find them shelter, they get free legal services, job services, whatever we can possibly give them, trauma-based counseling, whatever the programs can give, and we see I [sic] something changes, and it is difficult to pursue a case without a cooperative victim on these cases.”).

195. Warren, *supra* note 168, at 118 (citations omitted) (highlighting difficulties in the prosecution of human trafficking cases in the Columbian court system).

196. *Id.*

197. *Cf.* Haynes, *supra* note 151, at 44–45 (distinguishing victims of human trafficking for sex purposes and labor purposes).

198. *See* Warren, *supra* note 168, at 113.

199. 8 U.S.C. § 1255(1)(2)(B) (2012).

ly, the good moral character requirement will disqualify individuals who have committed even a single crime of moral turpitude. Without the waiver exception, individuals with convictions for prostitution, drug offenses, or immigration fraud associated with their trafficking situations would be potentially unable to obtain green cards.<sup>200</sup> Another example of shielding trafficked individuals from prosecution is the series of state “Safe Harbor” laws, which grant minors subject to sex exploitation immunity from prosecution.<sup>201</sup> But these legal exceptions are double-edged swords. While these provisions keep avenues of relief open to individuals who may have engaged in unlawful conduct, they also tend to reinforce the divide between the “guilty” and the “innocent.” A claim for an exception will likely downplay individual agency in favor of the argument that the individual was coerced or deceived into the illegal activity. As Jayashri Srikantiah explains, the stereotypical victim who enters the United States under complete control of a trafficker is an “effective prosecutorial story” in that she “allows prosecutors to describe the trafficker as maximally culpable.”<sup>202</sup> In addition, “perfect victims” make good witnesses, and individuals may need to conform to this passive stereotype in order to be eligible for relief.<sup>203</sup> “Safe Harbor” prosecutions also retain a focus on victimization of minors, whose testimony is generally not required in trafficking cases because there is no need to prove consent.<sup>204</sup>

## B. The Offender Role

### 1. The “Evil Offender”

Critical scholarship has engaged the troubling stereotypes about trafficking victims, but the other side of the narrative coin is the equally problematic concept of the evil offender.<sup>205</sup> In the cast of characters, this offender is usually the trafficker. Kay Warren notes that this trafficker/victim dichotomy is essential to the trafficking narrative “to harness the power of moralizing, that is both gendered and generational, to produce innocent victims for wider publics, human rights activism, service providers, and the state.”<sup>206</sup> As the previous discussion of victims suggests, the complex nature of trafficking and the nature of anti-trafficking laws can make it difficult to distinguish between victims and offenders. The current legal framework, with its emphasis on criminalization, is

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200. 8 U.S.C. § 1101(f)(3) (2012).

201. See UNIF. ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING § 15 (UNIF. LAW COMM’N 2013), [http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM\\_UPRHT\\_As%20approved.pdf](http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM_UPRHT_As%20approved.pdf).

202. Srikantiah, *supra* note 4, at 160–61.

203. *Id.* at 179 (describing the simultaneous evaluation of the viability of witnesses’ testimony alongside individuals’ eligibility for immigration relief); see also Kinney, *supra* note 90, at 95.

204. See BANKS & KYCKELHAHN, *supra* note 127, at 8.

205. See Doezeema, *supra* note 99, at 24, 28, 47.

206. See Warren, *supra* note 168, at 116.

also more likely to attribute wrongdoing to individuals rather than to systemic factors that motivate and facilitate trafficking.

## 2. Recasting the Offender

### a. Troubling the Victim/Offender Dichotomy

Within a narrative, clear distinction between the entirely good/passive conduct of the victim and the thoroughly bad/active conduct of the offender allows for complete assignment of blame and criminal liability. These roles exist in opposition to one another. Nils Christie describes victims and offenders as relative; whereas a victim is “weak[,] [s]ick, old or very young” and “carrying out a respectable project,” the offender is “big and bad” and has no personal relationship to the victim.<sup>207</sup>

In reality, however, the distinction between victims and offenders may not be so stark as popular images of trafficking might suggest. In the context of sex work exploitation, for example, supervisors may be hard to distinguish from workers, and individuals in management could easily be considered both complicit and victimized in a trafficking scheme. Traffickers and victims often have similar economic backgrounds, histories of family abuse and drug abuse, and experiences of physical or sexual abuse or family prostitution.<sup>208</sup> Contrast between victims and offenders can be merely a matter of framing; in some cases, individuals have even been charged as co-conspirators in their own trafficking cases.<sup>209</sup>

Personal relationships between offenders and victims are also extremely common. Victims and their traffickers are seldom strangers to each other; many have familial, pseudo-familial, or romantic connections.<sup>210</sup> These relationships that may be characterized by power dynamics, as in the case of individuals who are recruited or supervised by older family members.<sup>211</sup> In some trafficking networks, kinship models are encouraged, including domestic partnerships, mother-daughter dyads, and extended families.<sup>212</sup> Some female traffickers use their friendship and acquaintance networks for recruitment, often at the urging of male

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207. See Nils Christie, *The Ideal Victim*, in FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 17, 18–19 (Ezzat A. Fattah ed., 1986).

208. INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 88, at 108–09.

209. See, e.g., Guida, *supra* note 194, at 513, 517 (“[W]e saw one case within our city in the EHTICs, where someone’s trafficker had put them down on the lease of the place that they were using as a brother [sic] and I believe she was convicted for trafficking as well.”).

210. See, e.g., AGUSTIN, *supra* note 171, at 1.

211. See *id.*

212. Warren, *supra* note 168, at 114–15, 117–18 (recognizing that “images of trafficking networks as family businesses complicate the vision of solo traffickers and victims in favor of the family basis common to other kinds of organized crime,” and the fact that women also work as labor recruiters “contrasts with the image of the predatory male stranger common in antitrafficking media”).

counterparts with whom they are intimately involved.<sup>213</sup> Though most trafficking narratives emphasize the fear and psychological manipulation that connects victims and offenders, there is a wide range of experiences among trafficked individuals, and the reality is that some individuals may feel emotional connection, familial obligation, and other complex—and potentially competing—emotions to those implicated in their trafficking situations.

#### b. State Perceptions of Traffickers

Traffickers are almost always portrayed as male, nonwhite, and noncitizens.<sup>214</sup> These portrayals are not without historical precedent. During the moral panic of the early twentieth century, anti-trafficking reformers frequently depicted offenders as foreigners and immigrants.<sup>215</sup> Jonathan Todres observes that these representations are intentional, drawing on the theme that trafficking is a problem “rooted in other cultures” that are “exploitative by nature.”<sup>216</sup> This image of men of color as traffickers persists in current anti-trafficking law enforcement. Jennifer Chacón observes, for example, that public statements by the U.S. Department of Justice generally involve cases with noncitizen or minority defendants.<sup>217</sup>

The demographics of those apprehended and tried for trafficking offenses underscore the disproportionate effects of anti-trafficking law enforcement on communities of color. The U.S. Department of Justice estimates that, between 2008 and 2010, more than 75% of suspects identified in trafficking cases were male.<sup>218</sup> Overwhelmingly, suspects were people of color, predominantly black or African-American.<sup>219</sup> Critics argue criminal anti-trafficking laws contribute to gendered and racialized

213. See Broad, *supra* note 101, at 1061.

214. Kinney, *supra* note 90, at 91; see also Fukushima & Hua, *supra* note 89, at 53 (“[T]he criminal element is visualized as a Southeast Asian man who enables the transaction of women and children. The man is racialized as similar to the women and children he traffics over and against his presumed difference to the male voice behind the camera (a difference emphasized through the Southeast Asian man’s broken and accented English), making the crime seem like a cultural problem of immoral global ‘others.’”). *But cf.* U.N. OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 10 (2009), [http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf) (finding that in a study of trafficking in forty-six countries, women also make up a significant percentage of perpetrators).

215. See Doezema, *supra* note 99, at 30, 39–41.

216. See Todres, *supra* note 88, at 52–53.

217. Chacón, *supra* note 52, at 1628 (underscoring patterns throughout the Department’s annual reports to Congress).

218. See BANKS & KYCKELHAHN, *supra* note 127, at 1, 6 (finding that 368 of the 488 suspects in trafficking cases during the reporting period were male, compared to 88 who were female and 32 whose sex was unknown). The arrest and prosecution of male suspects, however, does not necessarily mean that most trafficking cases are in fact committed by men. See, e.g., Denton, *supra* note 111, at 21 (opposing the characterization of “sexual exploitation of trafficked individuals as a male-dominated and male perpetrator-only crime”).

219. BANKS & KYCKELHAHN, *supra* note 127, at 6 (reporting that 224 out of 488 suspects were Black/African American, 119 were Latino or Hispanic, and 28 were Asian, compared with 24 who were white, 20 whose race was identified as “other,” and 73 whose race was unknown).

perceptions of offenders, “creat[ing] a new ‘demon’ akin to the black drug dealer or Arab terrorist who not only is depicted as completely disrespectful of women but also is used to justify drastic punitive measures against populations of color.”<sup>220</sup>

These racialized images of offenders have larger community effects in the enforcement of anti-trafficking laws, particularly state and local ordinances with low thresholds for police stops. Kate Mogulescu, founder of the New York Legal Aid Society’s Trafficking Victims Advocacy Project, has pointed out this problem with respect to New York’s anti-prostitution loitering law.<sup>221</sup> Because law enforcement must only have “perceived intention” to make stops for loitering, stops tend to target particular neighborhoods and individuals (“[t]he same people who face arrest for every sort of quality of life offense in New York City”) who are then more likely to be prosecuted for trafficking offenses.<sup>222</sup> Mogulescu also cites the New York Police Department’s (NYPD) Operation Losing Proposition, a multi-year effort targeting johns, as an example of a street-based operation that results overwhelmingly in the arrest of undocumented men of color.<sup>223</sup> The public’s consumption of trafficking narratives takes on new significance in a widely-advertised tool to combat trafficking: the Department of Homeland Security’s Investigation Tip Line.<sup>224</sup> Official government statements about trafficking cases tend to be those that involve noncitizen defendants and sex trafficking. In doing so, argues Jennifer Chacón, law enforcement “primes the public to look for—and report—a certain kind of trafficker.”<sup>225</sup>

When law enforcement uses anti-trafficking policy as justification to establish a presence in select communities, it facilitates police harassment in the name of protecting victims. Law enforcement sweeps have particularly detrimental effects on individuals in the shadow economy; in the case of the sex industry, for example, suspected sex workers, clients, and pimps all face the possibility of police detainment, arrest, and prosecution.<sup>226</sup> Practices intended to identify offenders disproportionately target immigrants and communities of color by placing them “under extra scrutiny” and “expos[ing] them to the dangers of being apprehended,

220. Kempadoo, *supra* note 85, at 43.

221. See Kate Mogulescu, Pub. Def., Legal Aid Soc’y Trafficking Victim’s Advocacy Program, Remarks at the Cardozo Journal of Law and Gender Symposium: Sex Work and the Law: Felony, Fetish, or Free Market? (Nov. 5, 2014), in 21 *CARDOZO J.L. & GENDER* 499, 500–01, 510 (2015) (discussing N.Y. PENAL LAW § 240.37 (McKinney 2016)).

222. *Id.* at 510.

223. *Id.* at 524; see also *NYPD Legal Bureau: Civil Enforcement Unit*, NYC, [http://www.nyc.gov/html/nypd/html/legal\\_matters/dclm\\_civil\\_enforcement\\_unit.shtml](http://www.nyc.gov/html/nypd/html/legal_matters/dclm_civil_enforcement_unit.shtml) (last visited Nov. 5, 2016) (“‘Operation Losing Proposition,’ focuses on the seizure and forfeiture of the cars of ‘johns’, [sic] the prostitutes’ customers, thereby deterring street prostitution.”).

224. See *Investigating Illegal Movement of People and Goods*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/tipline#wcm-survey-target-id> (last visited Aug. 21, 2016).

225. Chacón, *supra* note 52, at 1629.

226. Bernstein, *supra* note 25, at 253.



harassed, detained, deported, and recycled back into underground, criminalized activities.<sup>227</sup> This phenomenon heightens the perception of immigrants as criminals and fuels immigration enforcement efforts, ironically making trafficking more clandestine and giving abusive employers more leverage in their threats to deport workers who come forward to report trafficking to law enforcement.<sup>228</sup>

The United Nations Office on Drugs and Crime acknowledges in its issue papers that the criminalization framework it endorses will subject offenders “to a different and typically harsher legal regime than would be applicable if that identification had not occurred.”<sup>229</sup> In the United States, anti-trafficking reforms contribute to the trend of incarcerating people of color, particularly men, with prescription of heavier sentences. Ironically, scholar Elizabeth Bernstein points out, “young men of color [are] being given 99-year or even life sentences as ‘domestic traffickers’—more than they would get if they had killed the woman in question, rather than simply profiting from their labor.”<sup>230</sup> Although men are prosecuted at a higher rate than women for trafficking, researcher Rose Broad finds that female offenders are also likely to suffer from gendered portrayals of trafficking. According to her research, female traffickers frequently received harsher penalties than their male counterparts and attributes this to the “doubl[y] devian[t]” nature of female offenders in that they both transgress gender norms and commit crimes “that only the most brutal of men would contemplate.”<sup>231</sup>

In the state response to human trafficking through, individual criminal liability ignores the responsibility of other social actors that create the demand for exploited labor. Media coverage and law enforcement training focus on the conduct of “bad actors” rather than culpability for the individuals who demand this labor and consume its results.<sup>232</sup> The demand for cheap labor in the agricultural, manufacturing, and domestic and commercial service industries far exceeds the demand for underground sex work, which suggests that enforcement action against actors in the formal economy might be more effective in curtailing practices of trafficking and exploitation than a street-based dragnet approach.<sup>233</sup>

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227. Kempadoo, *supra* note 85, at 47.

228. See, e.g., Chacón, *supra* note 52, at 1632–33.

229. U.N. OFFICE ON DRUGS & CRIME, *supra* note 182, at 15.

230. Bernstein, *supra* note 56, at 13.

231. Broad, *supra* note 101, at 11–12.

232. *Id.*

233. See Kempadoo, *supra* note 85, at 43.

### C. The Rescuer Role

#### 1. The “Good Rescuer”

As the trafficking narrative goes, the plight of the innocent victim at the hands of the evil offender must be resolved by a third party—the good rescuer.<sup>234</sup> The rescuer in popular trafficking narratives is frequently American, in contrast to the traffickers who are foreign nationals.<sup>235</sup> The state and its laws occupy the rescuer role, with law enforcement officers as proxy.

The youth, naiveté, weakness, and limited capacity of victims, as well as the danger posed by offenders, apparently justifies rescue by the state. The rationale for intervention, as summarized by Jennifer Chacón, is “that trafficking is perpetrated by foreign criminal organizations and is best solved through aggressive policing at the border.”<sup>236</sup> The legal anti-trafficking framework, at both a national and international level, reflects and reinforces this need for intervention by law enforcement. But this approach does not always benefit victims. Nor does it always result in the successful identification, arrest, and prosecution of offenders. In Melissa Ditmore’s research for the Sex Worker Project, she interviewed a law enforcement agent who at one point thought “victims would be grateful for the rescue,” but then realized “that this is not true. It is more complicated.”<sup>237</sup>

#### 2. Recasting the Rescuer: Rescue as Harm

##### a. “Rescue” as Carceral Protectionism

Anti-trafficking reformers frequently point to law enforcement intervention as a means to keep victims safe. As an example of the paternalism of the state’s role as rescuer, Jennifer Musto quotes an NGO advocate as saying that the arrest of a 16-year-old sex worker is justifiable because “it’s the only way we can help her.”<sup>238</sup> In her research, law enforcement officials repeatedly stated that they felt arresting young people in the sex industry is critical to victims’ safety.<sup>239</sup> Musto compares these

234. Todres, *supra* note 88, at 15.

235. *Id.*

236. Chacón, *supra* note 52, at 1630–31.

237. MELISSA DITMORE, SEX WORKERS PROJECT, THE USE OF RAIDS TO FIGHT TRAFFICKING IN PERSONS 38 (2009), <http://sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf>; AMY FARRELL ET AL., NE. U. INST. ON RACE & JUST., UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING: FINAL REPORT 38 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/222752.pdf>.

238. Musto, *supra* note 108, at 257.

239. *Id.* at 267 (quoting a law enforcement interviewee who stated, “We have to focus on arresting victims as an option because right now we don’t have other options. I don’t necessarily like putting victims in jail. I recognize that’s what we’re doing. I’m incarcerating a victim. But I’m doing it for their best interest. . . . Law enforcement as a whole—we don’t necessarily want to incarcerate the victim, but we have to work with the tools we have.”); *see also id.* at 268 (noting where a law enforcement officer referred to the criminal justice and juvenile justice system as “safety net[s]”).

arrests to the history of institutionalizing young women for their protection; in both cases, she argues, these young women were likely to be victimized while in custody.<sup>240</sup> She concludes that the law enforcement approach, particularly in the context of both voluntary and involuntary sex work, embodies a combination of incarceration and paternalism—a “largely uninterrogated combination of law enforcement punishment combined with psychosocial efforts to rehabilitate them”—which she calls “carceral protectionism.”<sup>241</sup>

It is not coincidental that raids typically focus on prostitution operations and the practice of arrest as a form of protection for women in particular. The invocation of women’s bodies as sites of violence rationalizes state intervention “for their protection” and presumes the state knows what is best for these individuals, even if it means arresting and detaining them. For individuals who consider themselves “workers” as opposed to “victims of trafficking,” “rescue” is tantamount to “capture,” and the state can appear “not as a savior, but oppressor.”<sup>242</sup> Rather than expanding rights for women, migrants, and workers—categories which overlap in meaningful ways—the rescuer may actually constrain their movement and endanger their lives and livelihoods.<sup>243</sup> This phenomenon, ironically, replicates the dynamics of control and coercion within a trafficking situation.

Many law enforcement officials and anti-trafficking advocates believe that rescue is necessary, even when it is unwelcome, because it allows the state to connect vulnerable individuals with important services and benefits. Anti-trafficking reforms have included a number of critical victim services, which are certainly available via law enforcement referrals and certifications. However, state interventions are not always effective in connecting individuals identified as trafficked with the assistance they might need. It is not a regular priority for law enforcement to connect trafficked individuals with benefits and services. There are no overarching due process guidelines to guarantee prompt access to legal assistance or supportive services in association with law enforcement arrests.<sup>244</sup> Service providers have recalled cases where trafficking survivors were denied access to immigration counsel and were deported or interrogated before obtaining access to counsel.<sup>245</sup> This may not happen in eve-

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240. *Id.* (citations omitted).

241. *See id.* at 263. In their article about human trafficking intervention courts, Aya Gruber, Amy Cohen, and Kate Mogulescu introduce the similar concept of “penal welfare,” which they define as “states’ growing practice of provisioning social benefits through criminal court.” *See* Aya Gruber, Amy J. Cohen & Kate Mogulescu, *An Experiment in Penal Welfare: The New Human Trafficking Intervention Courts*, 68 FLA. L. REV. (forthcoming 2016).

242. Kempadoo, *supra* note 85, at 41.

243. *See* Kapur, *supra* note 123, at 6.

244. *See* DITMORE, *supra* note 237, at 40–41.

245. Melissa Ditmore & Juhu Thukral, *Accountability and the Use of Raids to Fight Trafficking*, 1 ANTI-TRAFFICKING REV. 134, 144–45 (2012).

ry case; service providers acknowledge positive experiences of collaborating with agents, but also indicated that experiences with law enforcement are “hit or miss,” and that well-meaning agents at times found their hands tied by systemic constraints.<sup>246</sup> The policy of arresting individuals in the interest of their own welfare also suggests that benefits cannot be given outside the criminal justice system, although there are a number of programs that seek to deliver their services independently of criminal justice proceedings.<sup>247</sup>

#### b. Rescue as Community Harm

There is widespread concern about the collateral damage from law enforcement intervention, particularly rescue of victims through law enforcement raids. Although raids and rescues differ in terms of their purposes and targets, the terms are frequently used interchangeably in the law enforcement context, and individuals who are rescued often receive similar treatment to those arrested in raids.<sup>248</sup> In a Sex Worker Project study on law enforcement raids, nine of the fifteen sex workers interviewed were previously arrested by local police at least once (often on multiple occasions), and were never identified as trafficking victims while in law enforcement custody.<sup>249</sup> This does not appear to be an isolated phenomenon. A prominent public example of this phenomenon was the extensive Operation Gilded Cage, a raid of eleven massage parlors owned and staffed by Koreans in the San Francisco Bay area.<sup>250</sup> Law enforcement arrested forty-five people and brought 150 workers into police custody as witnesses.<sup>251</sup> Federal officials did not call in trained service providers for twenty-four hours, during which time the women were interrogated.<sup>252</sup> The operation was heralded as the largest trafficking bust since the passage of the TVPA, and yet none of witnesses were deemed eligible for immigration relief as trafficking victims.<sup>253</sup> “By the time advocates arrived, federal officials had already decided that the majority of women were not legal victims of trafficking, and placed them in immigration detention.”<sup>254</sup>

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246. DITMORE, *supra* note 237, at 40.

247. *See id.* at 40–41.

248. *Id.* at 20.

249. *Id.* at 8.

250. *See* David Rosenzweig & K. Connie Kang, *Raids on Brothel Rings Net 45 Arrests*, L.A. TIMES (July 2, 2005), <http://articles.latimes.com/2005/jul/02/local/me-smuggling2>.

251. *Id.* The FBI’s website notes that the operation “has resulted in the arrest/detention of approximately 100 illegal/legal aliens, [and] 26 federal convictions,” suggesting that some of the individuals detained as witnesses were later classified as immigration enforcement targets. *See Today’s FBI: Investigative Programs*, FBI.GOV, [https://www2.fbi.gov/facts\\_and\\_figures/investigative\\_programs.htm](https://www2.fbi.gov/facts_and_figures/investigative_programs.htm) (last visited Aug. 29, 2016).

252. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 333 (2007).

253. *See id.*

254. *Id.*

While rescues are intended to reach victims, there is an additional danger that individuals will be identified as offenders who have run afoul of anti-prostitution, labor, or immigration law. In Operation Gilded Cage, for example, more than half of the workers were ultimately deported after law enforcement officials concluded they had not been coerced and, therefore, had not been subject to trafficking.<sup>255</sup> Another example is Operation Bad Neighbor, another brothel sting in the Bay Area, in which “104 women were arrested [but] only twelve were certified as victims.”<sup>256</sup> Sienna Baskin, an attorney for the Sex Workers Project at the Urban Justice Center in New York, recently observed that an attempt to “crack down” on trafficking during the 2014 Super Bowl resulted in arrests of numerous sex workers.<sup>257</sup>

In addition to harming workers in marginalized labor sectors, including underground sex work, law enforcement rescue tactics may disproportionately target marginalized communities. In October 2014, the Red Umbrella Project released its Human Trafficking Intervention Court report—an eight-month study of human trafficking intervention courts in eleven jurisdictions within New York City.<sup>258</sup> Ariel Wolf, a Red Umbrella member and court observer for the project, described “racially motivated tactics by the NYPD, especially in charges like loitering for the purpose of prostitution.”<sup>259</sup> She observes, for example, that 94% of the arrested individuals in Brooklyn were black, and that there was a high rate of arrest of trans women in Jackson Heights.<sup>260</sup> In addition, there were “frequent re-arrests also happening in places where it was a known area for prostitution charges,” resulting in repeat victimization by law enforcement.<sup>261</sup>

Not only are anti-trafficking raids harmful to victims and non-trafficked persons working in certain marginalized industries, but the beneficial effects of these raids are often overstated. Arrests often do not result in successful identification of trafficked individuals or help with referring them to victim services.<sup>262</sup> Law enforcement officials and advocates also agree that individuals arrested in raids often do not make good witnesses in trafficking prosecution. Although state officials maintain the

255. *Id.* at 333–34.

256. Bernstein, *supra* note 56, at 14.

257. Sienna Baskin, Co-Dir., Sex Workers Project, Urban Justice Ctr., Remarks at the University of Miami Race and Social Justice Law Review Symposium: Converge! Reimagining the Movement to End Gender Violence: Panel on Sex Trafficking (2014), in 5 U. MIAMI RACE & SOC. JUST. L. REV. 445, 451 (2015).

258. See generally AUDACIA RAY & EMMA CATERINE, RED UMBRELLA PROJECT, CRIMINAL, VICTIM, OR WORKER? (2014), <http://www.redumbrellaproject.org/wp-content/uploads/2014/09/RedUP-NYHTIC-FINALweb.pdf>.

259. Ariel Wolf, Artist, Sex Worker & Organizer, Red Umbrella Project, Remarks at the Cardozo Journal of Law and Gender Symposium: Sex Work and the Law: Felony, Fetish, or Free Market? (Nov. 5, 2014), in 21 CARDOZO J.L. & GENDER 499, 500, 503 (2015).

260. *Id.* at 503.

261. *Id.* at 504.

262. DITMORE, *supra* note 237, at 9.

belief that trafficking is a problem, there are relatively few prosecutions.<sup>263</sup> Most prosecutions are in sex trafficking cases, typically cases involving minors, where proving consent is not an issue.<sup>264</sup> Sienna Baskin observes that these raids can in fact be more traumatizing than the trafficking or exploitation experiences themselves.<sup>265</sup> For these reasons, the federal government has also expressed concerns about raids practices,<sup>266</sup> but the continued pursuit of law enforcement objectives continues to place trafficked people at risk.<sup>267</sup>

### III. RECONSIDERING TRAFFICKING NARRATIVES AND THE STATE'S CARCERAL RESPONSE

#### *A. Anti-Trafficking Law as Crime Control*

In 2010 Luis CdeBaca, Ambassador-at-Large for the Office to Monitor Combat in Trafficking in Persons at the U.S. Department of State, made the following remarks at a WWICS conference on human trafficking:

[H]uman trafficking around the world is not something we can address only by ridding the world of sexism and racism, of poverty, conflict, corruption or human rights abuses. Nor is it a cultural phenomenon that can only be tackled with education and awareness building. To put it bluntly, trafficking in persons is a crime. It is a crime akin to murder and rape and kidnapping. We have to confront it not just by addressing root causes that are so far away from the realities of the trafficker and those they enslave, but by using all of our tools. And so the UN Protocol mandates criminalization of trafficking in persons, and the U.S. laws are very focused on law enforcement, because a policy solution to a heinous crime problem must involve freeing the victims and punishing their tormentors.<sup>268</sup>

For individuals who entered the United States unlawfully, interaction with the judicial system also means potentially facing criminal charges, including misdemeanors for entry without inspection or felony charges for illegal reentry or document fraud.<sup>269</sup> The Global Alliance Against the Trafficking of Women (GAATW) has indicated that, despite extensive financial investment in addressing trafficking in persons (the

263. Chacón, *supra* note 52, at 1630.

264. *See id.*

265. Baskin, *supra* note 257, at 451.

266. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 31 (10th ed. 2010), <http://www.state.gov/documents/organization/142979.pdf> (explaining that wholesale raids are one of ten troubling governmental practices).

267. *Id.* at 40.

268. Luis CdeBaca, Ambassador-at-Large, Office to Monitor & Combat Trafficking in Persons, Remarks at the John F. Kennedy, Jr. Forum, Harvard University's Institute of Politics: From Bondage to Freedom: The Fight to Abolish Modern Slavery (Feb. 18, 2010), <http://www.state.gov/j/tip/rls/rm/2010/136918.htm>.

269. *See* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 142, 144 (2009).

United States being the largest investor), there is “substantial evidence to suggest that anti-trafficking measures have had unacceptably negative consequences for marginalized categories of people, such as migrants and refugees and that these measures have been counter-productive for some of the very people they are supposed to benefit most directly.”<sup>270</sup> As previously discussed, law enforcement regularly arrest marginalized individuals, such as African-American men and transgendered sex workers that are routinely targeted and as part of local anti-trafficking initiatives. Even where community members are not arrested, neighborhoods may be subject to greater police presence and scrutiny.<sup>271</sup>

Anti-trafficking activism should therefore consider an approach that resists the trend towards criminalization. Dr. Annalee Lepp argues for what she calls a “do no harm” framework as an approach to trafficking.<sup>272</sup> This framework would require the government and all parties involved in anti-trafficking initiatives to consider the possible harmful effects of these strategies, including consequences for the rights and safety of victims.<sup>273</sup> The associated “do no harm” principles includes judicial limitations on rescue and post-rescue activities; protections for a rescued person’s human rights and prevention of further violations; adequate care to the person during and after the rescue; and application of “the best interest of the victim/rescued person” principle to guide all actions and decisions in the case.<sup>274</sup>

The role of law enforcement may be reconsidered as part of this “do no harm” framework. Under current anti-trafficking policy, law enforcement intervention is intended to direct trafficked and exploited individuals towards the criminal justice system, but it is worth considering the effectiveness of minimal contact with police.<sup>275</sup> Eisha Jain has suggested that because arrests carry consequences, the law should create mechanisms to expunge arrests from individual records in a similar manner to convictions.<sup>276</sup> Where individuals are arrested in association with trafficking situations and do not wish to be involved in a prosecution, an expungement would help these individuals avoid the law enforcement

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270. ANNALEE LEPP, LEARNING NETWORK, CTR. FOR RESEARCH & EDUC. ON VIOLENCE AGAINST WOMEN & CHILDREN, *DO NOT HARM: A HUMAN RIGHTS APPROACH TO ANTI-TRAFFICKING POLICIES AND INTERVENTIONS IN CANADA* (2013) (internal quotation marks omitted), [http://www.learningtoendabuse.ca/sites/default/files/AnnaLee\\_Lepp\\_Human\\_Trafficking.pdf](http://www.learningtoendabuse.ca/sites/default/files/AnnaLee_Lepp_Human_Trafficking.pdf); see also Bernstein, *supra* note 57, at 57.

271. See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820 (2015).

272. LEPP, *supra* note 270, at 4.

273. *Id.* at 4–5.

274. U.N. OFFICE ON DRUGS & CRIME & GOV'T OF INDIA, *PROTOCOL ON INTER STATE RESCUE AND POST RESCUE ACTIVITIES: RELATING TO PERSONS TRAFFICKED FOR COMMERCIAL SEXUAL EXPLOITATION* 7 (2007), [https://www.unodc.org/documents/human-trafficking/India\\_Training\\_material/Protocol\\_on\\_Inter\\_State\\_Rescue\\_and\\_Post\\_Rescue\\_Activities.pdf](https://www.unodc.org/documents/human-trafficking/India_Training_material/Protocol_on_Inter_State_Rescue_and_Post_Rescue_Activities.pdf).

275. See *infra* Section III.B.

276. Jain, *supra* note 271, at 862–63.

scrutiny that may jeopardize their safety and subsistence and help facilitate voluntary interactions with law enforcement in the future.

### *B. Anti-Trafficking Law as Immigration Control*

National and international debates over human trafficking reflect anxieties about the mobility of populations and the phenomenon of migration. The international community took great pains to distinguish trafficking from human smuggling, but remains concerned with the irregular migration aspects of trafficking.<sup>277</sup> In the United States, debates over the TVPA took great pains to distinguish trafficking from smuggling and economic migration.<sup>278</sup> Trafficking is still associated with border security and immigration control.<sup>279</sup> Criminal penalties associated with unlawful migration and presence in the United States have expanded since the 1980s, including federal charges related to unauthorized reentry to the United States and document fraud to facilitate unauthorized work.<sup>280</sup> States and localities have also passed laws and ordinances targeting individuals who may be in the country unlawfully.<sup>281</sup> These laws increase the likelihood that individuals profiled as undocumented immigrants will come into contact with law enforcement.

Many advocates for immigrant women's rights have supported the involvement of law enforcement in trafficking cases as a way of connecting exploited workers to much needed services, including certification for T or U visas.<sup>282</sup> However, there are other angles of this problem that also have implications for immigrant rights. As Michael Kagan recently pointed out in his analysis of the U visa program, it is "the knife's edge that separates good/deserving immigrants from bad/undeserving ones. By distinguishing between deserving and undeserving immigrants, different visa programs often perpetuate preconceived images or narratives of the ideal beneficiary."<sup>283</sup> Employing these narratives on behalf of some clients seeking trafficking relief may ultimately undermine opportunities for others to seek relief.

Jennifer Chacón has also pointed out that parsing the distinction between trafficking victims and abused immigrant workers is part of a larger strategy of immigration control.<sup>284</sup> She pointedly observes that "[t]he invocation of trafficking . . . puts a human rights gloss on a border-

277. See Galma Jahic & James O. Finckenauer, *Representations and Misrepresentations of Human Trafficking*, TRENDS ORGANIZED CRIME, Mar. 2005, at 24, 28–30.

278. See Srikantiah, *supra* note 4, at 191–92.

279. See Chacón, *supra* note 52, at 1637.

280. See 8 U.S.C. § 1324(a)(1)(A)–(B) (2012); 18 U.S.C. § 1028(a)(1)–(8) (2012).

281. See Chacón, *supra* note 52, at 1643–45; Eagly, *supra* note 84, at 1346.

282. See, e.g., Salima Khakoo, Karl Krooth, & Gail Pendleton, *Advanced Issues in T and U Visas* 2 (unpublished manuscript), [https://cliniclegal.org/sites/default/files/1\\_advanced\\_issues\\_for\\_ts\\_and\\_us.pendleton\\_1.pdf](https://cliniclegal.org/sites/default/files/1_advanced_issues_for_ts_and_us.pendleton_1.pdf) (last visited Sept. 17, 2016).

283. Kagan, *supra* note 102, at 930.

284. See Chacón, *supra* note 52, at 1649.



enforcement model that, in fact, raises a number of serious human rights concerns.”<sup>285</sup> Local anti-trafficking laws, adopted in the name of victim protection, have in fact given law enforcement enhanced abilities to identify and arrest undocumented immigrants or immigrants with criminal records.<sup>286</sup>

Advocates should also consider the effects of these narratives on other movements for workers’ rights. Advocates on behalf of sex workers and other marginalized laborers are concerned that immigration control enforcement may serve as auspices to crack down on marginalized labor operations.<sup>287</sup> According to one law enforcement agent interviewed for the Sex Worker Project study, “[the U.S. Department of Justice and other law enforcement agencies] have to have probable cause for a criminal case, but ICE [Immigration and Customs Enforcement] can raid whatever they want, if they think there are illegal immigrants.”<sup>288</sup> The preamble to the TVPA presents labor trafficking related primarily as an economic threat rather than a practice that is damaging to exploited workers.<sup>289</sup> This suggests that individuals subjected to labor trafficking are “second class victims”<sup>290</sup> less worthy of relief and legal protection. This framing also eclipses the larger realities of abuse of workers in both formal and informal sectors of the economy.

Victim-centered approaches, like those highlighted in both the 2015 Trafficking in Persons Report<sup>291</sup> and the current strategic plan for the Office of Victim Services,<sup>292</sup> are fundamentally incompatible with current immigration law enforcement practices. So long as individuals are recognized as immigration law offenders rather than as victims of exploited labor, the prevention of trafficking and protection of victims will remain subordinate to border control objectives. Conversely, comprehensive immigration reform that offers more individuals the opportunity to migrate would decrease the reliance of low-income migrants on exploitative employers to obtain passage to the United States.<sup>293</sup>

285. *Id.* at 1642.

286. See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1594–95 (2008) (describing the efforts of state governments and municipalities to localize immigration control through the use of criminal law, particularly since September 11, 2001); see also Jennifer M. Chacón, *Human Trafficking, Immigration Regulation and Sub-Federal Criminalization*, NEW CRIM. L. REV. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2791792](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2791792).

287. See, e.g., DITMORE, *supra* note 237.

288. *Id.* at 37.

289. See 22 U.S.C. § 7101(b)(12) (2012) (referring to the “impact [trafficking has] on the nationwide employment network and labor market”).

290. LEPP, *supra* note 270, at 7.

291. See U.S. DEP’T OF STATE, *supra* note 266, at 26.

292. U.S. DEP’T OF JUSTICE ET AL., COORDINATION, COLLABORATION, CAPACITY: FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 2013–2017, at 10 (2014), <https://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>.

293. See Meyers, *supra* note 167, at 438.

## CONCLUSION

Dominant anti-trafficking discourse, from its historic roots in the United States to its present-day globalized incarnation, relies on images of trafficking victims, offenders, and rescuers to promote and reinforce the need for state intervention through law enforcement. These trafficking narratives and the characters within them are imbued with racialized and gendered assumptions, presenting barriers to effective assistance to exploited workers and evolution of policy to prevent trafficking and enhance community safety. Misguided law enforcement policy intended to rescue victims may replicate the dynamics of coercive control within a trafficking situation, expose real and perceived victims to danger, and justify arrests and higher sentences for populations already disproportionately targeted by the justice system. Moving forward, the anti-trafficking movement—especially advocates who are concerned with larger questions of rights for undocumented and exploited workers—should reconsider the value of the carceral approach to human trafficking based on concern for victims, but also based on the concern for overarching issues of solidarity with other marginalized communities, particularly communities of color.

