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ARTICLE

WHAT IS CHOICE? EXAMINING SEX TRAFFICKING LEGISLATION THROUGH THE LENSES OF RAPE LAW AND PROSTITUTION

MARISA SILENZI CIANCIARULO*

I. INTRODUCTION

Sex trafficking has proven particularly immune to attempts to eradicate it. One reason may be that some types of demand will always be illegal and thus always vulnerable to trafficking, such as violent sex or sex with minors. Another reason, however, and the one that is the subject of this article, is the lack of cohesive policy on one of the main issues surrounding trafficking: consent. As discussed below, conflicting perspectives on the nature of consent have impeded the development of effective anti-trafficking efforts.

One of the main debates plaguing efforts to eliminate sex trafficking involves the definition of the very issue: what is trafficking?¹ This debate

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1. See INTERNATIONAL ORGANIZATION FOR MIGRATION, *BASILINE RESEARCH ON SMUGGLING OF MIGRANTS IN, FROM AND THROUGH CENTRAL ASIA 11–12* (2006), available at http://tcc.iom.int/iom/images/uploads/Baseline%20Research%20on%20smuggling%20of%20Migrants%20in%20Central%20Asia1_1161347902.pdf:

Establishing a clear-cut distinction between trafficking and smuggling is challenging. It often happens that a person leaves a country as a smuggled migrant, and in transit becomes a victim of an exploitative or abusive situation. . . . The person smuggled pays the smuggler a fixed amount of money and the smuggler then facilitates the cross-border movement. The smuggled person is in general neither surprised by the facilitated illegal entry nor tricked about it. . . . Trafficking victims either did not consent or their consent was nullified by the coercive, deceptive or abusive actions of the traffickers.

See also, BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, *IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY 7* (2003) (noting that the “highly polarized and hugely emotive” debate about “the rights and wrongs of prostitution” as well as “fuzzy and unworkable distinctions between trafficking, smuggling and migration” complicate efforts to de-

has raged between anti-trafficking activists who believe that all prostitution is a form of trafficking² and anti-trafficking activists who believe that the term “trafficking” should only apply in cases where individuals are forced, defrauded or coerced into the sex trade.³

Current legislation requires that force, fraud or coercion be present in order for an offense to be considered a severe form of trafficking.⁴ This requirement applies to trafficking for all forms of labor, including the sex trade. Proponents of expanding the definition of severe forms of trafficking wish to eliminate the force, fraud or coercion requirement with regard to sex trafficking in order to make anti-trafficking legislation more effective.⁵ They do not differentiate between victims who were forced to engage in the sex trade and those who consent to being trafficked for sex work. Opponents of the expansion argue that extending the definition in this way will

fine who is a trafficked individual); Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 438 (noting that the drafting of the Palermo Protocol was plagued by debates “over global anti-trafficking policy, including whether the international legal definition of trafficking should encompass ‘voluntary’ prostitution . . .”).

2. See, e.g., Survivors of Prostitution and Trafficking Manifesto, *Who Represents Women in Prostitution?* (Oct. 17, 2005), available at <http://action.web.ca/home/catw/readingroom.shtml?x=82636> (last visited Nov. 2, 2008) (stating that “[p]rostitution is sexual exploitation, one of the worst forms of women’s inequality, and a violation of any person’s human rights.”); see also, Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 194–95 (the abolitionist perspective is that no one can consent to sex work, and “prostitution is ‘necessarily degrading’ to women”); Chuang, *supra* note 1, at 475 (stating that the Trafficking in Persons (TIP) report office has “aligned itself with the abolitionist side of the prostitution debates,” and “its perceived or actual bias against non-abolitionist organizations has caused a number of NGOs to distrust and disengage from the TIP reporting mechanism”).

3. See, e.g., U.S. Department of Justice, *DOJ Position on H.R. 3887* at 1, available at <http://www.usdoj.gov/olp/pdf/doj-position-on-hr3887.pdf> (last visited Oct. 25, 2008) (objecting to equating pimping, pandering and “every instance of adult prostitution with the worst forms of labor and sexual exploitation”); Letter from the Nat’l Dist. Att’ys Assoc. to Sen. Patrick J. Leahy and Sen. Arlen Specter (Jan. 22, 2008), available at <http://www.usdoj.gov/olp/pdf/nda.pdf> [hereinafter District Attorneys Letter] (objecting to the inclusion of prostitution offenses in federal anti-trafficking legislation on the grounds that states and local law enforcement agencies are better suited to prosecute such crimes); Letter from 51 individuals, human rights advocacy groups, anti-trafficking groups, domestic violence prevention groups and immigrant rights groups to Sen. Patrick J. Leahy, Sen. Joseph Biden, Sen. Arlen Specter, Sen. Richard Lugar and Sen. Sam Brownback (Jan. 23, 2008), available at <http://www.bayswan.org/traffick/HR3887.html> (last visited Jan. 22, 2008) [hereinafter Human Rights Groups Letter] (objecting to the equating of prostitution with trafficking crimes involving force, fraud or coercion); Letter from the Nat’l Assoc. of Att’ys Gen. to Sen. Patrick J. Leahy and Sen. Arlen Specter (Mar. 7, 2008), available at <http://www.usdoj.gov/olp/pdf/naag.pdf> [hereinafter National Attorneys General Letter] (objecting to the inclusion of “ordinary prostitution crimes” in federal anti-trafficking legislation). See also, Dina Francesca Haynes, *Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221, 259 (stating that “[p]rostitution should not be tied to anti-trafficking measures”).

4. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 103(8), 114 Stat. 1464, 1470 (2000), 22 U.S.C. §§ 7101–7112 (2006).

5. See *infra* notes 72–74 and accompanying text (discussing the movement to expand the definition of “trafficking”).

actually make efforts to eradicate trafficking less effective.⁶ This article examines parallels between this debate and the debates surrounding two related issues: rape and prostitution.

Rape law has been plagued by the inability of many victims to prove that they did not consent to sexual intercourse. A victim's acquiescence to sexual intercourse, even if brought about by threats to her life or well-being, has often been the basis for dismissing the rape charge or convicting the perpetrator of a lesser offense.⁷ Generally speaking, the "ideal" rape victim is a woman (preferably a virgin) who was attacked by a stranger, attempted to fight off her assailant during the entire rape, and immediately reported the rape to police. Proponents of expanding rape law beyond this idealized but atypical situation define rape broadly as a lack of consent. Opponents of expanding rape law tend to differentiate between "real rape" and other forms of sexual misconduct. The question, like that surrounding the definition of trafficking, is choice: does a woman really choose to engage in sexual conduct when she consumes alcohol, or goes on a date, or fears what will happen if she attempts to fight rather than submit?

The issue of legalizing prostitution is also the subject of a great deal of debate. Some proponents of legalizing prostitution believe that doing so will legitimize women's choices regarding sex work and provide legal protections for those who choose to engage in sex work. Opponents of legalizing prostitution believe that doing so legitimizes the exploitation of women and the violation of women's human rights; they assert that no one ever chooses to be prostituted. The debate, once again, centers around choice. Is a choice truly a choice when made under conditions of severe economic and social disadvantages, or as a result of childhood sexual abuse?

Part II of the article describes the modern form of slavery known as "human trafficking." Part III explores individual and legal connotations of choice and consent, and asks the reader to engage in an exercise designed to highlight how personal experience and bias tends to influence one's perception of consent. Part III goes on to explore how such personal biases manifest themselves in rape law and the debate over the legalization of prostitution. This article concludes that the debate over expanding the defi-

6. See *infra* notes 75–76 and accompanying text (discussing the opposition to expanding the definition of "trafficking").

7. See, e.g., *People v. Warren*, 446 N.E.2d 591 (Ill. App. Ct. 1983) (dismissing a conviction for deviate sexual assault on the basis that psychological coercion does not constitute force). The complaining witness, a 32-year-old woman, had been riding her bike alone near a reservoir when the defendant, a man not acquainted with her, engaged her in general conversation. When the complaining witness returned to her bike, the defendant followed her and put a hand on her shoulder. When the complaining witness said that she had to leave, the defendant said, "This will only take a minute. My girlfriend doesn't meet my needs," and also said, "I don't want to hurt you." The defendant then picked her up, carried her into the woods, and had her perform oral sex on him. These events occurred in a secluded wooded area, and the defendant outweighed the complaining witness by eighty pounds and was over a foot taller than she. *Id.* at 592–93.

inition of sex trafficking is unlikely to be resolved while rape law is evolving and the prostitution debate continues. An understanding of the nature of consent, free will and choice with regard to sex and sex work is in a critical stage of development and is unlikely to culminate in a broad consensus anytime soon. Without a consensus in those two areas, the questions of what is trafficking and what are the most effective means of combating it will remain unresolved.

II. SEX TRAFFICKING IN THE UNITED STATES

This section will briefly describe some of the characteristics of sex trafficking into the United States and U.S. efforts to combat trafficking. In many cases, the described conditions also pertain to the trafficking of U.S. citizens within the United States, to sex trafficking as it occurs within other countries, and to trafficking for other types of labor. In addition, the descriptions of trafficking conditions and law enforcement efforts are not meant to apply to all trafficking cases. Although sex trafficking cases have many commonalities, each case is unique.

A. *Life in the United States as a Victim of Sex Trafficking*

1. *Victims and Perpetrators*

The U.S. State Department estimates that approximately 800,000 people are trafficked internationally every year; of those 800,000, fifty percent are minors, and eighty percent are women and girls.⁸ The U.S. Department of Justice estimates that 14,500 to 17,500 individuals are trafficked into the United States every year.⁹ Trafficked individuals tend to originate from poor or developing nations; the highest concentrations of those trafficked into the United States come from East Asia and the Pacific, followed by Latin America, Europe and Eurasia.¹⁰

Traffickers who bring the victims into the United States fall into several categories. Some are members of powerful organized crime syndicates,

8. U.S. STATE DEP'T, *TRAFFICKING IN PERSONS REPORT 8* (2007), available at <http://www.state.gov/documents/organization/82902.pdf>.

9. U.S. DEP'T OF JUSTICE, *REPORT TO CONGRESS FROM ATTORNEY GENERAL JOHN ASHCROFT ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2003*, at 3 (2004), available at <http://www.usdoj.gov/ag/050104agreporttocongresstprav10.pdf>.

10. See U.S. DEP'TS OF JUSTICE, HEALTH & HUMAN SERVICES, STATE, LABOR, HOMELAND SECURITY, AGRICULTURE, AND THE U.S. AGENCY FOR INT'L DEV., *ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 8* (2004) [hereinafter *USDOJ ASSESSMENT*]; see also UNITED NATIONS OFFICE ON DRUGS AND CRIME, *TRAFFICKING IN PERSONS: GLOBAL PATTERNS 18* (2006), available at http://www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf [hereinafter *UNODC, GLOBAL PATTERNS*] (listing Albania, Belarus, Bulgaria, China, Lithuania, Nigeria, Moldova, Romania, Russian Federation, Thailand and Ukraine as nations with the highest incidence of trafficking origination).

such as Russian and Asian mafias.¹¹ Others are members of smaller crime organizations that tend to specialize in the sex trade.¹² Still others are individuals and families who operate on a small scale, such as men seeking subservient wives through online “matchmaking” agencies.¹³

Traffickers tend to exploit the economic, educational and social challenges of the women and children they target.¹⁴ Seventy percent of trafficked women and children are being trafficked into the sex trade.¹⁵ Although traffickers forcibly kidnap some victims, they lure others into captivity with promises of a better life and greater earning capacity in a foreign country.¹⁶ They lure some of them with promises of a lucrative career in the sex trade, while duping others with offers of modeling jobs, nanny positions, educational opportunities or other lawful careers.¹⁷ Some are recruited and trafficked through dating services promising happy marriages with American men.¹⁸

11. See Louise Shelley, *Trafficking in Women: The Business Model Approach*, 10 BROWN J. WORLD AFF. 119, 123–27 (2003–2004) (describing various models of trafficking businesses employed by post-Soviet, Chinese, Balkan and African organized crime groups). See also Sarah Shannon, *Prostitution and the Mafia: The Involvement of Organized Crime in the Global Sex Trade*, in ILLEGAL IMMIGRATION AND COMMERCIAL SEX: THE NEW SLAVE TRADE 119, 140 (Phil Williams ed., 1999) (explaining that criminal organizations find trafficking lucrative, show no signs of abandoning the business, operate increasingly transnationally and in cooperation with each other, and exhibit “callous and brutal attitudes” towards their victims).

12. See Shelley, *supra* note 11, at 123–27.

13. See *Human Trafficking: Mail Order Bride Abuses: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 2 (2004), available at <http://foreign.senate.gov/testimony/2004/JacksonTestimony040713.pdf> (testimony of Suzanne H. Jackson before the Senate Committee on Foreign Relations, July 13, 2004, reporting on the abuses present in the mail-order bride industry and the industry’s links to international human trafficking).

14. See Srikantiah, *supra* note 2, at 210 (noting that “exploitation takes many forms and that victims’ experiences vary widely even under similar conditions,” and thus arguing for a totality of circumstances approach to victim determination).

15. USDOJ ASSESSMENT, *supra* note 10, at 10.

16. Regan E. Ralph, Exec. Dir., Women’s Rights Division, Human Rights Watch, *International Trafficking of Women and Children*, Testimony before the Senate Committee on Foreign Relations Subcommittee on Near Eastern and South Asian Affairs, (Feb. 22, 2000), available at <http://www.hrw.org/background/wrd/trafficking.htm> (last visited Oct. 26, 2008).

17. See U.S. STATE DEP’T, *TRAFFICKING IN PERSONS REPORT 7–8* (2008) (stating that “[v]ery often [traffickers’] ruses involve promises of a better life through employment, educational opportunities, or marriage” and that women in particular are “susceptible to promises of jobs abroad as babysitters, housekeepers, waitresses, or models—jobs that traffickers turn into the nightmare of forced prostitution without exit”).

18. Univ. of Iowa Ctr. for Human Rights, *Human Rights Index: Human Trafficking*, 36 IOWA REV. (2006), available at http://www.uiowa.edu/%7Euichr/conferences/HR_index_spring06.html (last visited Oct. 26, 2008):

[There are] approximately 500 [mail-order bride agencies] in the United States, with American mail-order customers being generally white, older, and prone to patriarchal values that cause their usually foreign, non-white, younger brides to be made economically dependent and put at risk of physical abuse—a condition that is facilitated by U.S. immigration policy, which gives to the husbands virtual total control over their foreign wives’ immigration status, including their eligibility for “conditional resident status.”

2. Conditions

Once trafficking victims are brought to the United States to be prostituted, the conditions under which they are forced to work vary but tend to be harsh. Many sex-trafficking victims are found in brothels, strip clubs, and outwardly legitimate businesses such as massage parlors and escort services.¹⁹ They are forced to service large numbers of customers per day without access to medical care or protection against sexually transmitted diseases and pregnancy.²⁰ They suffer physical and sexual abuse at the hands of traffickers and men who pay for sex acts.²¹ Even those who are aware that they will be prostituted in the United States are often unaware of the conditions to which they will be subjected.²²

In order to maintain trafficking victims under their control, traffickers employ a variety of physical, psychological and financial methods designed to terrorize and manipulate their victims. They force many victims into debt

19. SHARED HOPE INTERNATIONAL, REPORT FROM THE U.S. MID-TERM REVIEW ON THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN AMERICA 11 (2006), available at http://www.sharedhope.org/images/US_MTR_of_CSEC.PDF (stating that trafficking victims “are found in street prostitution, massage parlors, brothels, strip clubs, and escort services”) (citing remarks by Wendy Waldron at the MTR-CSECA Conference, Apr. 3, 2006).

20. Holly Burkhalter, *Sex Trafficking and the HIV/AIDS Pandemic*, PHYSICIANS FOR HUM. RTS., available at <http://physiciansforhumanrights.org/library/2003-06-25.html> (testimony before the House International Relations Committee stating that “[f]irst, because they are virtually or literally enslaved, trafficking victims have no ability to insist upon condom use and are vulnerable to dangerous sexual practices most associated with transmission. Second, trafficking victims are forced to endure intercourse with multiple partners.”).

21. See U.S. STATE DEP’T, TRAFFICKING IN PERSONS REPORT 29 (2008):

Field research published in 2003 of women in prostitution in nine countries concluded that 63 percent were raped, 71 percent were physically assaulted, and 68 percent met the criteria for post-traumatic stress disorder in the same range as treatment-seeking combat veterans, battered women seeking shelter, and rape survivors and refugees from state-organized torture. The myriad public health implications of prostitution also include HIV/AIDS and other serious diseases.

22. See Ralph, *supra* note 16:

Many women learn they have been deceived about the nature of the work they will do, most have been lied to about the financial arrangements and conditions of their employment, and all find themselves in coercive and abusive situations from which escape is both difficult and dangerous.

...
In Thailand, Lee [not her real name] had an alcoholic and abusive husband and three young children she was struggling to feed. When a recruiter offered to find her a job as a sex worker in Japan, she agreed. She told us, “I knew there would be some debt for the airplane ticket and all, but I was never told how much.” She found out after she arrived in Japan and was taken to a room by a broker to be sold. In her words, “There were lots of women and people came to choose women and buy them. I was bought on the third day, and told that my price” – and therefore her debt – “was 380 bai [approximately US\$30,000]. After three or four days of working at the bar, I realized how much 380 bai was. The other girls said to me, ‘That’s a lot of debt and you’re old. You’ll never pay it off.’ Then I prayed that it would only take six or seven months to pay it off, and I went with all of the clients I could.”

See also Haynes, *supra* note 3, at 231 (stating that “[w]hile some trafficked persons may be willing to work in the sex industry, they do not anticipate being forced to pay off large forcibly imposed debts, being kept against their will, having their travel documents taken from them, or being raped, beaten and sold like chattel”).

bondage, a form of indentured servitude in which they tell the victims that they owe large amounts of money, often in the tens of thousands of dollars, for their purchase price, transportation to the United States, immigration documents, and living expenses.²³ The debts continue to add up even as they force the victims to work off their debt, leading to conditions of perpetual servitude.²⁴ Traffickers confiscate passports and identity documents and subject their victims to strict surveillance.²⁵ Traffickers also threaten to punish disobedience or failure to repay the debt by harming family members in the home country.²⁶

Traffickers employ even more brutal physical and psychological methods to prevent escape and disobedience.²⁷ They often beat, rape and torture trafficking victims into submission, leaving victims with severe psychological trauma in addition to sexually transmitted diseases and other injuries.²⁸ Kevin Bales, the president of the anti-trafficking organization Free the Slaves, described the situation as follows:

The physical path of a person being trafficked includes stages of degradation of a person's mental state. A victim gets deprived of food, gets hungry, a little dizzy and sleep-deprived. She begins to break down; she can't think for herself. Then take away her travel documents, and you've made her stateless. Then layer on physical violence, and she begins to follow orders. Then add a foreign culture and language, and she's trapped.²⁹

23. Ralph, *supra* note 16.

24. See *The Realities of Human Trafficking*, THE EARLY SHOW (CBS), aired Sept. 12, 2007, available at <http://www.cbsnews.com/stories/2007/09/11/earlyshow/main3250963.shtml> (last visited Oct. 25, 2008) [hereinafter *The Realities of Human Trafficking*]:

[Trafficking victims] will work in hotels and construction sites for no pay; or they are prostituted, which is far more lucrative. Their only compensation is staying alive. Others are told that they must pay a debt to the ones that brought them here, but the debt only grows and is rarely ever paid off.

25. Ralph, *supra* note 16.

26. Fed. Bureau of Investigation, *Human Trafficking: An Intelligence Report* (2006), available at http://www.fbi.gov/page2/june06/human_trafficking061206.htm (last visited Oct. 25, 2008) [hereinafter *FBI Intelligence Report*]; See also HUMAN RIGHTS CENTER, UNIV. OF CALIFORNIA, BERKLEY, FREEDOM DENIED: FORCED LABOR IN CALIFORNIA 4 (2005) [hereinafter *FREEDOM DENIED*] (reporting that trafficking victims "are often told that they will be arrested or deported, or their family members harmed or even murdered, if they contact the authorities or anyone outside the trafficking circle").

27. *FBI Intelligence Report*, *supra* note 26; see also UNODC, GLOBAL PATTERNS, *supra* note 10, at 35 (describing trafficking organizations as "extremely violent"). One trafficking group in particular was described as "exceedingly violent and inhumane towards its trafficking victims." UNODC, GLOBAL PATTERNS, *supra* note 10, at 70.

28. See *FBI Intelligence Report*, *supra* note 26 (listing "beatings, burnings, rapes, and starvation" as ways of exerting control over trafficking victims).

29. Peter Landesman, *The Girls Next Door*, N.Y. TIMES MAG., Jan. 25, 2004, available at <http://www.nytimes.com/2004/01/25/magazine/25SEXTRAFFIC.html?ei=5007en=43dbe6ef76e45af8ex=1390366800>. See also Ralph, *supra* note 16:

To prevent escape, employers take full advantage of the women's vulnerable position as migrants: they do not speak the local language, are unfamiliar with their surroundings, and fear of arrest and mistreatment by local law enforcement authorities. These factors

The conditions under which traffickers hold their victims and force them to work not only inflict lasting harm on the victims, but contribute to the difficulty in identifying and helping victims. Victims of trafficking are psychologically conditioned to live in fear of the very authorities who can help them.³⁰ Traffickers train their victims to fear law enforcement raids and subsequent deportation and continuously remind their victims that they are in double violation of the law: they are present in the United States illegally and they are engaging in illegal sex work.³¹ When people to whom victims might turn for help are also customers, the chances of coming forward diminish even further. One trafficking victim who was born in the United States and spoke English explained why she never considered escaping:

[B]ecause what's out there? What's out there was scarier. We had customers who were police, so you were not going to go talk to a cop. We had this customer from Nevada who was a child psychologist, so you're not going to go talk to a social worker. So who are you going to talk to?³²

Domestic legislation to combat human trafficking has attempted to address the brutal nature of trafficking. The following section provides a brief overview of the federal laws available to prosecute traffickers.

B. *Combating Human Trafficking in the United States*

In the 1990s, the phenomenon of human trafficking exploded upon U.S. society with media reports of “modern-day slavery” at home and abroad.³³ Stories of Chinese laborers being enslaved by their smugglers,³⁴

are compounded by a range of coercive tactics, including constant surveillance, isolation, threats of retaliation against the woman and/or her family members at home, and confiscation of passports and other documentation.

30. See *The Realities of Human Trafficking*, *supra* note 24 (reporting that trafficking victims “are afraid of authorities. Often they are told lies about what American authorities will do. They fear ICE more than their captors.”).

31. See Srikantiah, *supra* note 2, at 200 (describing the type of psychological control that many traffickers exert over their victims, even after the victim has been “rescued”).

32. Landesman, *supra* note 29; see also Harry Harris, *Sergeant Charged in Sex with Underage Prostitute*, OAKLAND TRIB., June 19, 2007, available at http://findarticles.com/p/articles/mi_qn4176/is_jai_n19306075 (reporting that a 58-year-old police sergeant, a 37-year veteran of the San Francisco Police Department, was charged with a felony count of lewd act on a child fourteen or fifteen by someone at least ten years older); Christine Vendel and Glenn E. Rice, *Prostitution Sting Labeled a Success*, KANSAS CITY STAR, June 19, 2003, at B1 (reporting that the Kansas City Police arrested a priest, a sheriff's deputy, a high-school track coach, and a Baptist college executive for purchasing prostitutes).

33. See, e.g., Donatella Lorch, *Immigrants from China Pay Dearly to be Slaves*, N.Y. TIMES, Jan. 3, 1991, at B1 (reporting that hundreds of Chinese had been trafficked into the United States to “become modern-day indentured servants”); Grant Peck, *Corruption Runs Deep Among Thai Police*, L.A. TIMES, Jan. 29, 1995, at 4 (reporting Thai police involvement in the “modern-day slave trade” of procuring and trafficking women and girls for prostitution); Jodi Enda, *Looking East as Marshall Plan Marked as Westerners Paid Tribute, Clinton Said the Spirit Should be*

disabled Mexicans being forced to work on the streets,³⁵ and young children and teenagers being raped and exploited in brothels³⁶ brought home to the U.S. public the shocking realization that slavery remains alive and well in the world. As facts began to emerge about the increasing use and brutal nature of trafficking—for sex as well as for other types of labor—the U.S. government began to take an interest. In the early 1990s, President Clinton and Attorney General Janet Reno emphasized using immigration policy to combat human trafficking.³⁷ By 1998, Congress and the State Department had made human trafficking a top priority.³⁸

Prosecutors rely principally on two laws: the Mann Act,³⁹ which dates back to the early twentieth century, and the Trafficking Victims Protection Act, passed in 2000.⁴⁰ There is no consensus as to the effectiveness of these laws. Prosecutors have hailed anti-trafficking legislation as an unprecedented and invaluable tool for dealing with human trafficking.⁴¹ Others, however, characterize the current laws as underutilized, cripplingly narrow and dependent on stereotypes of the ideal victim.⁴² The William Wilber-

Extended, PHILADELPHIA INQUIRER, May 29, 1997, at A3 (quoting President Clinton's characterization of the trafficking of women as "modern-day slavery").

34. Janet Snyder, *Chinese Seek Prosperity Abroad at Any Price*, MIAMI HERALD, June 25, 1990, at 2A; see also Gene Kramer, *Slavery, Sex Trafficking Boom, Congress is Told*, NEW ORLEANS TIMES-PICAYUNE, July 16, 1993, at A2 (quoting the remarks of Representative Joseph Kennedy II at a Congressional Human Rights Caucus forum that "in 1993, we are faced with a worldwide problem of slave-trade trafficking . . . from Brazil to Bangladesh, in China, Pakistan, Thailand and Western Europe . . . in San Francisco, San Diego, Chicago, New York and Boston").

35. Deborah Sontag, *Dozens of Deaf Immigrants Discovered in Forced Labor*, N.Y. TIMES, July 20, 1997, at 11.

36. Piero Valsecchi, *Pedophilia Ring Discovered in Italy: Parents Sell Youths to Asian Gangs, Which Send Child Prostitutes to U.S. Through Way Stations in Europe*, AKRON BEACON J., Nov. 8, 1997, at A13; *Prostitution Ring Lured Mexican Teenagers with Promises of Jobs*, ORLANDO SENTINEL, Feb. 25, 1998, at C3.

37. *Jordan Will Lead Study of Immigration*, HOUSTON CHRON., Dec. 15, 1993, at A13.

38. See Enda, *supra* note 33 (quoting President Clinton's pledge "to intensify our cooperation against a new problem that we face, the increasing practice of trafficking in women, which re-creates in an entirely different context almost a new kind of modern-day slavery").

39. 18 U.S.C. §§ 2421–2424 (2006).

40. Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–7112 (2006).

41. See, e.g., District Attorneys Letter, *supra* note 3 (stating that "[t]he measures necessary to prevent this deplorable offense, assist victims, and thoroughly investigate and prosecute using coordinated responses of and resources from State, local and Federal authorities, were provided as a result of the passage of the Trafficking Victims Protection Act of 2000 . . .").

42. See, e.g., Dorchen A. Leidholdt, *Successfully Prosecuting Sex Traffickers: Testimony before the Committee on the Judiciary, House of Representatives, United States*, COALITION AGAINST TRAFFICKING IN WOMEN, Nov. 1, 2007, available at http://action.web.ca/home/catw/readingroom.shtml?x=113289&AA_EX_Session=d36e1d977f7a1679491a12ae67fed2a0 (arguing that the "force, fraud or coercion" requirements of current anti-trafficking legislation "create insurmountable obstacles to the successful prosecution of sex traffickers. In some cases, brutal and exploitive sex traffickers need not resort to force, fraud, or coercion because their victims are so vulnerable, terrified, or traumatized that such conduct isn't necessary to obtain their victims' submission.").

force Trafficking Victims Protection Reauthorization Act,⁴³ which expands the definition of trafficking in order to facilitate trafficking prosecutions and enhance sentences, has encountered significant resistance.

1. Mann Act

The White Slave Traffic Act of 1910, known in its modern form as the Mann Act, was aimed at preventing and punishing the abduction of women for sex or forced prostitution in the United States and abroad.⁴⁴ The Mann Act was inspired by growing concerns of “white slavery,” a term employed “to promote the vision of women held in bondage against their will, of mysterious druggings and abductions of helpless young girls, and of unexplained disappearances of innocent and naïve immigrants forced into lives of prostitutions and vice.”⁴⁵ These victims were purportedly being sent abroad “to service lowly natives and ‘eastern rich potentates,’”⁴⁶ a prospect that fueled hysteria in a country becoming increasingly concerned with women’s sexuality as society became more urbanized.⁴⁷ In addition to targeting victims of “white slavery” transported abroad, the Mann Act also addressed the interstate transportation of children for prostitution,⁴⁸ and the “coercion and enticement” of individuals to engage in prostitution or other criminal sexual activity.⁴⁹ Often, however, the Mann Act was used to prosecute prostitutes, sexually promiscuous women, and unfaithful wives.⁵⁰

In modern times, the Mann Act has been available to prosecutors seeking to punish traffickers.⁵¹ It is particularly useful in cases where force,

43. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (2007).

44. Mann Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2000)).

45. Marlene D. Beckman, Note, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L.J. 1111 (1984).

46. Karen Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT’L L.J. 207, 216 (2007) (citing Eileen Scully, *Pre-Cold War Traffic in Sexual Labor and Its Foes: Some Contemporary Lessons*, in GLOBAL HUMAN SMUGGLING 74, 86 (David Kyle & Rey Koslowski eds. 2001)).

47. Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 CATH. U. L. REV. 471, 477–80 (2008).

48. 18 U.S.C. § 2423 (2006).

49. 18 U.S.C. § 2422(a) (2006).

50. Brown, *supra* note 477, at 480. For a discussion of the Mann Act’s long association with racism and government attempts to legislate morality, see Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3016 (discussing the “distinctly racial nature” of the Mann Act, particularly the term “white slavery”); Eric Weiner, *The Long, Colorful History of the Mann Act*, ALL THINGS CONSIDERED, NAT’L PUB. RADIO, Mar. 11, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=88104308> (last visited Oct. 25, 2008) (describing the political and racist intentions behind earlier Mann Act prosecutions).

51. *But see* U.S. Attorneys’ Manual § 9-79.100, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/79mcrim.htm#9-79.100 (last visited Oct. 26, 2008) (limiting some prosecutions under the Mann Act to cases involving minor victims):

fraud or coercion is not present or cannot be proven.⁵² The Department of Justice reports that prosecutors have used the Mann Act to prosecute the offenses of “knowingly transporting a person with the intent such individual will engage in illegal sexual activity,”⁵³ “coercion and enticement,”⁵⁴ and “transportation of minors.”⁵⁵

2. *Trafficking Victims Protection Act*

The first U.S. statute to address modern international human trafficking was the Trafficking Victims Protection Act of 2000 (“TVPA”).⁵⁶ The TVPA recognizes two forms of trafficking: sex trafficking and other “severe forms of trafficking.”⁵⁷ The term “sex trafficking” refers to “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act,”⁵⁸ a definition which encompasses voluntary as well as involuntary migration. The term “severe forms of trafficking” applies to two different sets of circumstances, both of which are forms of involuntary migration: (1) “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age,”⁵⁹ or (2) “the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁶⁰

The TVPA, in addition to initiating efforts aimed at combating trafficking in other countries, also contains several provisions aimed at reducing trafficking within the United States and protecting individuals trafficked into the United States. These provisions include increasing the criminal penalties for traffickers,⁶¹ making victims of international human traffick-

Unless minors are victims, prosecutions under 18 U.S.C. §§ 2421 and 2422 should generally be limited to persons engaged in commercial prostitution activities, even though commerciality is not an element of the offense Prosecution of persons other than those engaged in commercial prostitution enterprises such as panderers, operators of houses of prostitution, or call-girl operations, and those acting for or in association with such persons, should not be instituted without consultation with the Child Exploitation and Obscenity Section of the Criminal Division unless the victims are minors.

(internal citations omitted).

52. See *infra* notes 57–60 and accompanying text (discussing the definition of “severe forms of trafficking” as one that involves force, fraud, or coercion).

53. USDOJ ASSESSMENT, *supra* note 10, at 15 (citing 18 U.S.C. § 2421 (1998)).

54. *Id.* (citing 18 U.S.C. § 2422 (2006)).

55. *Id.* (citing 18 U.S.C. § 2423 (2006)).

56. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 107(b)(1), 114 Stat. 1464, 1470 (2000), 22 U.S.C. §§ 7101–7112 (2006).

57. *Id.* § 103(8)–(9), 22 U.S.C. § 7102(8)–(9).

58. *Id.* § 103(9), 22 U.S.C. § 7102(9).

59. *Id.* § 103(8)(A), 22 U.S.C. § 7102(8)(A).

60. *Id.* § 103(8)(B), 22 U.S.C. § 7102(8)(B).

61. See *id.* § 112(a) (amending several sections of 18 U.S.C. ch. 77 by creating new trafficking-related felonies; increasing the length of incarceration for trafficking in humans from ten years to twenty years; and authorizing increased penalties up to life imprisonment for aggravated forms of trafficking that include “kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill”).

ing eligible for some federal “benefits and services,”⁶² and creating a non-immigrant visa,⁶³ called a “T visa,” for victims of trafficking.⁶⁴ An applicant for a T visa must demonstrate that she or he is physically present in the United States on account of trafficking, is or has been a victim of a severe form of trafficking,⁶⁵ has assisted with the investigation or prosecution of the trafficker,⁶⁶ and would suffer unusual and severe harm upon removal from the United States.⁶⁷

The TVPA has received mixed reviews. On the one hand, prosecutors applaud the TVPA for enabling them to prosecute traffickers and impose severe penalties on them.⁶⁸ Critics, however, point out that compared to the number of trafficking victims estimated to be in the United States, the number of prosecutions has been minimal.⁶⁹ The most recent controversy surrounding the TVPA, however, involves its reauthorization: The William Wilberforce Trafficking Victims Reauthorization Act.

C. *William Wilberforce Trafficking Victims Reauthorization Act*

The William Wilberforce Trafficking Victims Reauthorization Act, named after the renowned eighteenth century British parliamentarian who led the movement to abolish slavery in the United Kingdom, proposed a number of significant changes to U.S. anti-trafficking law. One change in particular became the subject of a great deal of debate among anti-trafficking advocates and law enforcement agencies. The House version of the Wilberforce Reauthorization would penalize as a trafficker “[w]hoever knowingly . . . persuades, induces, or entices any individual to engage in prostitution for which any person can be charged with an offense.”⁷⁰ This is a significant expansion of the current definition of trafficking, which re-

62. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 107(b)(1), 114 Stat. 1464, 1470 (2000), 22 U.S.C. §§ 7101–7112 (2006).

63. A “nonimmigrant visa” refers to a visa temporary in nature, as distinguished from an “immigrant visa,” more commonly known as permanent residency or a “green card.”

64. Trafficking Victims Protection Act of 2000 § 107(e).

65. *See id.* § 103(8), 22 U.S.C. § 7102(8) (defining “severe forms of trafficking” as:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.)

66. This requirement does not apply to victims under the age of 18. *See* 8 U.S.C. § 1101(a)(15)(T)(i)(III) (2008), Immigration and Nationality Act § 101(a)(15)(T)(i)(III) (1952) [hereinafter “INA”]; 8 C.F.R. § 214.11(b)(3) (2007).

67. 8 U.S.C. § 1101(a)(15)(T), INA § 101(a)(15)(T).

68. Statement of Mark Kappelhoff, Keynote Address, St. Thomas Law Journal Symposium, Sept. 25, 2008.

69. Statement of Dr. Donna Hughes, St. Thomas Law Journal Symposium, Sept. 25, 2008; statement of Norma Ramos, Co-Executive Director of the Coalition Against Trafficking of Women, Keynote Address, St. Thomas Law Journal Symposium, Sept. 25, 2008.

70. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (2007), § 221.

quires that a trafficking defendant have employed force, fraud or coercion in order to effectuate trafficking.⁷¹ In effect, the Wilberforce Reauthorization amends the Mann Act, an anti-prostitution law, by incorporating it into federal anti-trafficking legislation.

Reactions to the House Version of the Wilberforce Reauthorization have been sharply divided. Some anti-trafficking advocates applaud the expansion of the federal definition of trafficking to include prostitution.⁷² They base their support on the assertion that all prostitution violates the human rights of women and that no woman freely chooses to engage in prostitution.⁷³

Women in prostitution do not wake up one day and “choose” to be prostitutes. It is chosen for us by poverty, past sexual abuse, the pimps who take advantage of our vulnerabilities, and the men who buy us for the sex of prostitution. Prostitution is sexual exploitation, one of the worst forms of women’s inequality, and a violation of any person’s human rights.⁷⁴

Other anti-trafficking advocates, as well as the Department of Justice, object to equating prostitution with trafficking.⁷⁵ They assert that not only is such an equation erroneous, but that including prostitution in the definition of trafficking will divert scarce resources from trafficking cases involving force, fraud or coercion.⁷⁶

One possible reason for this extreme dichotomy among advocates with a common goal—eradicating trafficking—is differing perceptions of victimhood and the nature of choice and consent, a topic discussed below in Parts III and IV.

71. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 103(8)(B), 114 Stat. 1464, 1470 (2000), 22 U.S.C. § 7102(8)(B) (2006).

72. See Letter from Coalition Against Trafficking in Women, Equality Now, Feminist Majority, and National Organization for Women to Sen. Joseph R. Biden (Jan. 22, 2008) (urging the Senate to pass the House version of the Wilberforce Act), available at <http://www.equalitynow.org/english/campaigns/sextourism-trafficking/tyva/biden.pdf>.

73. Survivors of Prostitution and Trafficking Manifesto, *supra* note 2.

74. *Id.*

75. See, e.g., U.S. Department of Justice, *DOJ Position on H.R. 3887*, *supra* note 3 at 1 (objecting to equating pimping, pandering and “every instance of adult prostitution with the worst forms of labor and sexual exploitation”); Letter from the National District Attorneys Association to Sen. Leahy and Sen. Specter, *supra* note 3 (objecting to the inclusion of prostitution offenses in federal anti-trafficking legislation on the grounds that states and local law enforcement agencies are better suited to prosecute such crimes); Human Rights Groups Letter, *supra* note 3 (objecting to the equating of prostitution with trafficking crimes involving force, fraud or coercion); National Attorneys General Letter, *supra* note 3 (objecting to the inclusion of “ordinary prostitution crimes” in federal anti-trafficking legislation).

76. U.S. Department of Justice, *DOJ Position on H.R. 3887*, *supra* note 3 at 1; District Attorneys Letter, *supra* note 3; Human Rights Groups Letter, *supra* note 3; National Attorneys General Letter, *supra* note 3.

III. CHOICE, CONSENT AND PERSONAL RESPONSIBILITY

Choice is at the center of the current debate over the definition of trafficking because choice determines whether a person is a victim or a voluntary actor in a situation involving sex and sexuality. Is the person subject to someone else's will, or is she using her own judgment, her own will, to make decisions? It is a question of autonomy, dignity, pride and self-identity. This section explores how notions of choice, consent and personal responsibility influence individual and legal connotations of victimhood.

A. *An Exercise in Consent*

I ask the reader to engage in a small exercise designed to highlight how personal experience, personal philosophy and personal values influence perceptions of choice and individual responsibility. This exercise calls for the reader to write down her or his reactions to two possible replies to statements made in three distinct situations.

First, consider two different replies to the statement, "Obviously he made you do it," said to a woman convicted of selling drugs for her boyfriend, a drug distributor. As you consider each response, note the reactions evoked in you.

1. Reply #1: "No, I made the decision to sell the drugs myself. It wasn't anyone else's fault. I could have said no."
2. Reply #2: "Yes, it's true. If he hadn't threatened me, I never would have sold those drugs. I had to do what he said if I didn't want to end up in the hospital again."

Now consider the statements made in response to the following situation, in which a woman on a date consumed alcohol to the point of intoxication but her male companion remained sober. The woman was too inebriated to resist the man's attempts to engage in unprotected sexual intercourse. The next day, she told her friend about the incident. Her friend responded by characterizing the incident as rape.

1. Reply #1: "No, what he did was wrong, but it wasn't rape. I could have stopped drinking. It was my responsibility to watch out for myself and I wasn't careful."
2. Reply #2: "Yes, you're right. Just because I was drinking does not mean this guy is entitled to do what he wants with me. It is still my body, and I never wanted or consented to unprotected sexual intercourse."

Finally, consider two possible responses from a woman who is asked why she is a prostitute.

1. Reply #1: "I am a prostitute because I would rather do this work than be on welfare or sell drugs or make minimum wage at a burger joint. I make good money, I take care of my child, and I don't contribute to the drug problem in my neighborhood."
2. Reply #2: "I am a prostitute because I have no other choice. I had a child after my foster father raped me, I never had an opportunity for a good education, and besides my pimp would come after me if I took off. I can't leave, even though I might want to. Where would I go?"

Review the reactions that you wrote down. Did one response resonate with you more than the other? Did you feel empowered by either response? Did you feel contempt for either? Did you have mixed or competing reactions to the same response? Regardless of how you reacted to each reply, you may rest assured that other readers had completely different reactions.

The reason for examining visceral reactions to hypothetical situations is to provide a sense of the deeply divisive attitudes behind trafficking legislation. Sex trafficking involves elements of both rape and prostitution. Effectively dealing with sex trafficking means dealing with both of these related issues, and with the principles of choice, consent and individual autonomy present in both issues.

B. The "Ideal" Victim and Issues of Consent

The conflicting perceptions of what constitutes trafficking are indicative of a wider debate about the proper scope of laws that protect women. On the one hand is the perception that the more protective the legislation, the more women are seen as weak and in need of that protection. On the other hand is the assertion that protective legislation serves as an equalizer, leveling the playing field. These debates carry over neatly into rape law and prostitution.

1. A Brief Overview of Consent and Rape Law in the United States

Rape turns almost exclusively on notions of consent and force. A survey of state rape statutes throughout the United States shows that many states require some form of forcible compulsion involving actual or threatened physical harm.⁷⁷ Other states broadly define force and include

77. See, e.g., ALA. CODE § 13A-6-61 (1975) (requiring "forcible compulsion" for first degree rape); ALASKA STAT. (2000) § 11.41.470(3) (defining "without consent" as "coerc[ion] by the use of force against a person or property, or by the express or implied threat of imminent death, imminent physical injury, or imminent kidnapping to be inflicted on anyone"); ARIZ. REV. STAT. ANN. § 13-1423 (West 2009), ARIZ. REV. STAT. ANN. § 13-1401(5)(a) (West 2009) (requiring that "the victim [be] coerced by the immediate use or threatened use of force against a person or property" for sexual assault); ARK. CODE ANN. § 5-14-103, 5-14-125 (West 2006) (requiring "forcible compulsion" for rape and second degree sexual assault); CONN. GEN. STAT. ANN. § 53a-70

lack of consent and consent under various forms of duress as elements sufficient to establish rape.⁷⁸

Regardless of the statutory language, however, rape is often difficult to prove, particularly when the victim knows her attacker. Rape law scholars have written extensively on the gender bias that is often present in rape statutes and in the public's (i.e., juries') perceptions of rape.⁷⁹ According to Katharine T. Bartlett and Deborah L. Rhode:

Perspectives [about the meaning of consent] range from Justice Souter's assumption that consent can be determined by "evidence of public displays of general interest in sexual activity" to Catharine MacKinnon's claim that consent is merely a label that the

(West 2002) (requiring "use of force . . . or . . . threat of use of force . . . which reasonably causes [the victim] to fear physical injury to [the victim] or a third person"); GA. CODE ANN. § 16-6-1 (West 2006) (defining rape as "carnal knowledge of a female forcibly and against her will"); 720 ILL. COMP. STAT. ANN. 5/12-13 (West 2008) (requiring "use of force or threat of force" for criminal sexual assault); IOWA CODE ANN. § 709.3 (West 1978) (requiring use or threat of force "creating a substantial risk of death or serious injury to any person" for sexual abuse in the second degree); KY. REV. STAT. ANN. § 510.040 (West 1974) (defining first degree rape as "engag[ing] in sexual intercourse with another person by forcible compulsion"); MD. CODE ANN., CRIM. LAW § 3-303 (West 2008) (requiring "force, or the threat of force, without the consent of the other" for first degree rape); MASS. GEN. LAWS ANN. ch. 265, § 22 (West 1998) (defining rape as "[having] sexual intercourse . . . and compel[ling] [the victim] to submit by force and against his will, or . . . by threat of bodily injury").

78. *See, e.g.*, CAL. PENAL CODE § 261 (West 2003) (including "duress" as a means of rape, and defining duress as "a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce to an act to which one otherwise would not have submitted"); COLO. REV. STAT. ANN. § 18-3-402 (West 2004) (requiring "submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will"); DEL. CODE ANN. tit. 11, § 773 (2003) (specifying that "the victim need resist only to the extent that it is reasonably necessary to make the victim's refusal to consent known to the defendant"); FLA. STAT. ANN. § 794.011 (West 2002) (specifying that "'consent' shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender"); HAW. REV. STAT. ANN. § 707-730 (2006) (defining sexual assault in the first degree as "knowingly subject[ing] another person to an act of sexual penetration by strong compulsion"); IDAHO CODE ANN. § 18-6101 (2003) (including in its rape definition sexual penetration where the victim "submits under the belief, instilled by the actor, that if she does not submit, the actor will . . . expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule"); KAN. STAT. ANN. § 21-3502 (2006) (defining rape as sexual intercourse that takes place when "the victim is overcome by force or fear"); LA. REV. STAT. ANN. § 14:14 (2001) (defining rape as "intercourse with a . . . person committed without the person's lawful consent"); ME. REV. STAT. ANN. tit. 17-A § 253 (2007) (defining "gross sexual assault" as "engage[ing] in a sexual act with another person and . . . [t]he actor compels or induces the other person to engage in the sexual act by any threat").

79. *See generally* JENNIFER TEMKIN AND BARBARA KRAHÉ, *SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE* (2008) (exploring attitudes of gender bias regarding victims and perpetrators in rape cases); DEBORAH L. RHODE, *JUSTICE AND GENDER* 244-53 (1991) (describing a history of Anglo-American rape law based on gender bias and racial bias); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 172-78 (1989) (describing the sexism-based social paradigms that affect perceptions of consent in rape law).

law places on the kind of sex acceptable under conditions of gender inequality.⁸⁰

The reference to Justice Souter derives from a 1988 New Hampshire Supreme Court case, *State v. Colbath*,⁸¹ in which the court reversed a rape conviction because the defendant had not been permitted to present “probably crucial evidence of the complainant’s behavior closely preceding the alleged rape.”⁸² Evidence of the complainant’s behavior included the defendant’s testimony that “he had engaged in ‘feeling [the complainant’s] breasts [and] bottom [and that she had been] rubbing his crotch’ before the two of them eventually left the tavern and went to the defendant’s trailer.”⁸³ The court characterized the complainant’s behavior as “openly sexually provocative.”⁸⁴ Another example of this perception of consent in the justice system is Federal Rule of Evidence 412, which allows the accused to provide “evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct . . . to prove consent. . . ,”⁸⁵ implying that because a woman consented to some incident or form of sexual conduct, she impliedly consented to subsequent or further conduct.

Catharine MacKinnon rejects the assumptions present in *State v. Colbath* and Federal Rule of Evidence 412. Professor MacKinnon asserts that meaningful consent is virtually impossible in a society dominated by men.⁸⁶ She notes that “[t]he level of acceptable force is adjudicated starting just above the level set by what is seen as normal male sexual behavior, including the normal level of force, rather than at the victim’s, or women’s, point of violation.”⁸⁷ Thus, according to Professor MacKinnon, there is little possibility for a woman to provide meaningful consent under any circumstances, and most sex is therefore rape.

This wide gulf between notions of how to define consent appears in the debate over how to reform rape law. On one end of the spectrum is the proposal to criminalize any sex that takes place without a clear declaration of consent by the woman.⁸⁸ Similarly, Michelle Anderson would criminal-

80. KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND THE LAW: THEORY, DOCTRINE AND COMMENTARY* 791 (4th ed. 2006).

81. *State v. Colbath*, 540 A.2d 1212 (N.H. 1988).

82. *Id.* at 1217.

83. *Id.* at 1212.

84. *Id.* at 1217.

85. FED. R. EVID. 412.

86. See MACKINNON, *supra* note 79, at 174 (“Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance.”); See also *id.* at 178 (stating that “[i]f sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept”).

87. *Id.* at 173.

88. Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously*, 11 *LAW & PHIL.* 35, 77 (1992).

ize sexual penetration that occurs without “an open discussion in which partners come to a free and autonomous agreement about the act of penetration.”⁸⁹ According to Dean Anderson’s “Negotiation Model,” rape would be defined as “engaging in an act of sexual penetration with another person when the actor fails to negotiate the penetration with the partner before it occurs. . . . Force, coercion, or misrepresentation by the actor would be evidence of a failure to negotiate.”⁹⁰

On the other end of the spectrum is the assertion that “[a]llowing verbal coercion to constitute rape is a sign of tolerance toward the ultra feminine stance of passivity.”⁹¹

By protecting women against verbal coercion, [rape-crisis] feminists are promoting the view of women as weak-willed, alabaster bodies, whose virtue must be protected from the cunning encroachments of the outside world. The idea that women can’t withstand verbal or emotional pressure infantilizes them. The suggestion lurking behind this definition of rape is that men are not just physically but intellectually and emotionally more powerful than women.⁹²

As Linda G. Mills commented, “acting out this passive role may reinforce the victim’s diminished status and prevent the victim from regaining the confidence, security, and strength lost in his or her experience of crime.”⁹³

Since rape shield laws and other evidentiary rules, for example, assume that a victim is always a pure, blameless “victim-type,” in no way a *participant* in the circumstances leading up to the crime, victims accordingly perform passive roles, with little or no opportunity for critical reflection or active participation in understanding the circumstances that gave rise to the crime in the first place.⁹⁴

The significant distance between each end of the spectrum in feminist approaches to rape law evidences the intractability of issues surrounding autonomy and consent. Compelling arguments exist that emphasizing victimhood is a disservice to rape victims and that women are not at the mercy of men, but rather are free to make their own choices. At least equally compelling is the argument that real empowerment occurs when women acknowledge the male dominance that has pervaded society and structured

89. Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1407 (2005).

90. *Id.*

91. KATHERINE ROIPHE, *THE MORNING AFTER: FEAR, SEX AND FEMINISM ON COLLEGE CAMPUSES* 68 (1993).

92. *Id.* at 67–68.

93. Linda G. Mills, *Justice and Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 483–84 (2005–2006).

94. *Id.* at 484.

rape law. The competition between these two approaches to empowerment is paralleled in the prostitution debate.

2. *A Brief Overview of the Prostitution Debate in the United States*

The debate over the legalization of prostitution is multifaceted. In 1994, Holly Fechner identified three distinct positions regarding the legalization of prostitution: the “liberal feminist” stance, the “socialist feminist” stance, and the “radical feminist” stance.⁹⁵ Each position promotes distinct approaches for defining and analyzing consent, autonomy and the empowerment of women.

The “liberal feminist” stance advocates for the legalization of prostitution on the basis that women have the right to make a choice to engage in sex work.⁹⁶ Advocates of this stance reject the victimization approach and instead view de-stigmatized prostitution as empowering for women.⁹⁷

It is the continued threat of arrest, extortion and forced sex with the police that is more emotionally damaging—and violative of human rights and dignity—than the exchange of money for otherwise lawful activity. Therein lies the true source of degradation and absence of choice. For mutually agreed upon financial transactions it should not matter to anyone outside the relationship how many times sexual activity occurs, or with how many sexual partners. If mutual agreement is not present in a relationship, there already exists an abundance of applicable laws specifically relating to coercion. Laws against prostitution are extraneous and do nothing to protect women. If we want to protect women, we should concentrate on enforcing laws designed to punish offenders [who] truly infringe on a woman’s right to choose—such as laws against spousal abuse and rape.⁹⁸

“Socialist feminist” theory advocates for the legalization of prostitution on the basis that prostitution is a necessary avenue for women who are marginalized and impoverished because of their sex, race and/or class.⁹⁹ Proponents of this theory offer a feminist critique of capitalism, specifically capitalist governments whose laissez-faire attitude is in part responsible for women being forced, by necessity, into prostitution. As Holly Fechner explains:

[T]he government is implicated in the oppression of women by failing to provide adequate social services and failing to value women’s contributions to society. The government . . . is the big-

95. Holly B. Fechner, *Three Stories of Prostitution in the West: Prostitutes’ Groups, Law and Feminist “Truth”*, 4 COLUM. J. GENDER & L. 26 (1994).

96. *Id.* at 38–42.

97. *Id.*

98. Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 HASTINGS WOMEN’S L.J. 119, 123 (1999).

99. Fechner, *supra* note 95, at 42–47.

gest pimp of all by taking advantage of women's labor (in the form of emotional and sexual services to men and physical and emotional care of families) and failing to compensate them for it as other services are compensated within a social welfare state. Thus, instead of providing solutions, the government remains part of the problem.¹⁰⁰

"Radical feminist" theory supports shifting the criminalization of prostitution away from the prostitutes and onto the men who benefit from it—the pimps and johns.¹⁰¹ Unlike liberal feminists, radical feminists do not see prostitution as an empowering choice for women, but rather an extension of men's oppression of women.¹⁰²

Prostitution is not about individuals. It is an institution of male dominance, and it is also a global industry in which the prostituting of women is constantly being packaged in new ways, using new forms of technology, tapping new markets: sex-tourism, mail-order bride selling, sex entertainment, sex immigration, dial-a-porn, computer pornography.

Just as prostitution isn't about individuals, it isn't about choice. Instead, prostitution is about the absence of meaningful choices; about having alternative routes to survival cut off or being in a situation where you don't have options to begin with. Nothing demonstrates this more clearly than the fact that most women who enter the "profession" do so as children, at age sixteen or younger. Or the fact that the majority of women in prostitution in this country—most studies estimate 60-70%—have histories of sexual abuse in childhood Add to this the reality that the population targeted by pimps and traffickers is teenagers. It becomes clear that the majority of prostitutes are socialized into "sex work" in childhood and adolescence when consent is meaningless and choice an illusion.¹⁰³

Prostitutes are just as divided as feminist scholars. Some prostitutes vehemently reject the status of "victim" as victimizing in and of itself and celebrate their status as paid workers. As one prostitute stated:

If in fact we are those "poor, downtrodden women," it is because a prostitute can be evicted from her home for being a prostitute, because a dancer is arrested for doing her job, because our rights as human beings in this society are being taken away from us because of our chosen employment. It's not so much that we're being exploited by our trades or by the individuals that are in our trades, namely . . . pimps in prostitution. We are free individuals that do have a choice. It is society that stops us at every turn—

100. *Id.* at 45.

101. *Id.* at 47–53.

102. *Id.*

103. Dorchon Leidholdt, *Prostitution: A Violation of Women's Human Rights*, 1 CARDOZO WOMEN'S L. J. 133, 136 (1993–1994).

from having bank accounts, from acquiring loans, from seeking other employment, from using the knowledge and the street expertise that we have obtained in our professions as expertise or experience for any other line of work or any other way of life. That's where the *real* exploitation is.¹⁰⁴

Others find empowerment in perceiving prostitution as a form of exploitation from which they escaped:

My life was pretty screwed up by the time I realized I was in too deep. As a seemingly normal teenager from a suburban town, I battled depression, self-mutilation, and lack of self-esteem, as well as history of physical and sexual abuse. . . . I was prostituted by an old-school "pimp." I say that in quotes because "pimp" is defined by the public as someone who uses someone else to generate economic benefits for them. I define it as a lazy person who abuses and brainwashes others whose self-esteem and past history cause them to be susceptible to manipulation. I was a prostituted woman for two years, and suffered along with dozens of other women that were prostituted by my pimp. I was trafficked to other states, Florida, Detroit, and Canada. I was sold in the street, in cars or on the phone as an escort. I had no time to think about myself or my situation. I was being sold 24 hours a day, 7 days a week. I was raped and physically assaulted many times. The only reason I got out of the lifestyle was because I found time to think. . . . Once I was able to reason with myself, I was able to see the situation for what it was; this was not what I was worth. I have been recovering ever since and I am currently working on my master's degree in Social Work to try and help other women get out and stay out of this type of situation. Once you can see yourself for who you truly are, you will know.¹⁰⁵

The debate over prostitution emphasizes the vital but divisive role that consent plays in the determination of whether a person is a victim or a consensual participant. Given that prostitutes and feminists cannot agree on notions of consent and victimhood, it comes as little surprise that these concepts baffle U.S. legislators and policymakers as well.

104. Statement of Mary Johnson, *From the Floor*, in GOOD GIRLS/BAD GIRLS: SEX TRADE WORKERS AND FEMINISTS FACE TO FACE 118 (Laurie Bell ed., 1987); see also, Margo St. James, *The Reclamation of Whores*, in GOOD GIRLS/BAD GIRLS: SEX TRADE WORKERS AND FEMINISTS FACE TO FACE 84 (Laurie Bell ed., 1987):

I've always thought that whores were the only emancipated women. We are the only ones who have the absolute right to [f---] as many men as men [f---] women. In fact we are expected to have many partners a week, the same as any good stud. A woman who has many male lovers is regarded as a whore, whether she's getting paid or not.

105. Coalition Against Trafficking in Women, Volunteer's Anonymous Testimonial, available at http://www.change.org/coalition_against_trafficking_in_women_international_catw/testimonials (last visited Oct. 25, 2008).

3. *Issues of Consent and Autonomy in U.S. Anti-Trafficking Efforts*

Sex trafficking represents a hybrid of rape and prostitution, both in terms of what the trafficking victim endures, as well as how issues of consent and autonomy affect whether an individual is even identified as a trafficking victim. Many sex trafficking victims are raped as part of their initiation into forced sex work and then repeatedly raped by pimps, johns and traffickers during their captivity.¹⁰⁶ Even “willing” prostituted women who may have consented to sex work are forced to engage in prostitution under conditions to which they did not consent.¹⁰⁷ At some point, due to terrorization and trauma resulting from repeated rapes and beatings, many victims of sex trafficking might be perceived as voluntarily engaging in prostitution.¹⁰⁸ Given the hybrid nature of sex trafficking, it is unsurprising that the United States’ policies on dealing with trafficking victims mirror the rape and prostitution debates discussed above.

The lack of consensus on the issue of the legitimacy of prostitution is evident in the United States’ schizophrenic policies towards prostitution with regard to trafficking. The U.S. State Department rejects the notion that prostitution can ever be a freely chosen profession,¹⁰⁹ yet anti-trafficking legislation requires that force, fraud or coercion be present in order for an adult prostituted woman to be considered a victim of a severe form of trafficking.¹¹⁰ Moreover, the U.S. Department of Justice and other law enforcement agencies vehemently object to a definition of trafficking that places prostitution in the same category as sex trafficking.¹¹¹

U.S. anti-trafficking legislation requiring that force, fraud or coercion be present in order for an individual to be deemed a victim of a severe form of trafficking is similar to state rape statutes that require a threat of physical harm to be present.¹¹² Arguably, such a requirement indicates that U.S. law does not perceive women as weak, passive creatures whose will is easily bent or broken by mere bullying. The requirement suggests that if a woman does not want to have sex, she is capable of declining, even in the face of anger, wheedling or threats not involving physical injury.

There is a measure of cultural myopia involved in this perception, however. The United States’ emphasis on rugged individualism, the relatively equal status of women under U.S. law, and the relative economic and political power of women in U.S. society render the perception that women

106. See *supra* notes 19–32 and accompanying text.

107. See *supra* note 22 and accompanying text.

108. See LARA FERGUS, *TRAFFICKING IN WOMEN FOR SEXUAL EXPLOITATION* 25 (2005) (explaining the psychological enslavement of trafficking victims).

109. Chuang, *supra* note 1, at 475.

110. Trafficking Victims Protection Act, Pub. L. No. 106-386, § 103(8), 114 Stat. 1464, 1470 (2000), 22 U.S.C. § 7102(8) (2006).

111. See *supra* notes 71 and 72 and accompanying text.

112. For a discussion of state rape statutes, see *supra* notes 73 and 74.

have the power to refuse sex absent threats of physical force fairly reasonable. Such concepts, however, are often absent from the societies of countries from which many trafficking victims originate. The absence of these norms makes the challenge of defining consent even more difficult.

IV. CONCLUSION

Given the cultural and legal complexities involved with international human trafficking, the issue of who is a true “trafficking victim” and how far the law should go to protect her is unlikely to be resolved in the near future. Issues of consent, choice and personal autonomy are still in a state of flux, even among individuals with common goals, such as feminists, human rights advocates and anti-trafficking advocates. Until there is consensus about the nature of consent in an often unjust and unequal world, the struggle against human trafficking will not reach its full potential.