

NOTE

ADULT DOMESTIC TRAFFICKING AND THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT

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Adult domestic trafficking is a serious national issue that requires attention from the federal government in order to stop the traffickers, pimps, and johns who exploit countless women each year. The federal government refuses to recognize that the domestic trafficking of American citizens is a national issue, even though state laws have proven to be ineffective and have failed to curtail this industry's growth. Adult domestic trafficking victims are still not recognized by the legal system or by some feminist scholars as victims. These women, accordingly, do not receive the services and help they need to leave this system of abuse, and their pimps go unpunished and are free to abuse again. The most recent reauthorization of the federal Trafficking Victims Protection Reauthorization Act (TVPA)—the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA of 2008)—represents a step in the right direction to address human trafficking. It increases the services available to child domestic trafficking victims and international victims, and it lowers the legal barriers these victims face when they seek justice against their traffickers. The TVPRA of 2008, however, is only a first step toward addressing the issue of human trafficking because adult domestic victims are largely left out of its reforms. To successfully combat the issue of human trafficking in the next reauthorization of the TVPA, the federal government must address the inherent problems faced by adult domestic victims. Without a uniform and serious federal approach to the issue of human trafficking, which includes adult domestic trafficking, human trafficking will only continue to grow and adversely affect thousands of United States citizens and lawful permanent residents.

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“The Department [of Justice] prioritizes the prosecution of traffickers of girls and women brought into the United States from foreign countries. Are American citizens who have been subjected to trafficking any less worthy of the Department’s protection?”¹

INTRODUCTION

The Victims of Trafficking and Violence Protection Act of 2000 (TVPA) was created to combat human trafficking, a global issue that affects countless individuals.² The primary focus of the TVPA, however, was to combat the trafficking of women and children for commercial sexual exploitation.³ While this nonpartisan issue garnered strong support from feminist groups and the Religious Right,⁴ the TVPA’s emphasis was on international human trafficking and not on the domestic trafficking of United States citizens and lawful permanent residents.⁵

Human trafficking, however, does not require an individual to be transported into another country.⁶ This common misconception explains, in part, how domestic trafficking has, until recently, failed to gain serious attention from the federal government,⁷ and thus why it has been able to increase in the United States.⁸ Unfortunately, domestic trafficking is still

¹ See Letter from the Coalition Against Trafficking in Women (CATW) to the Honorable Peter Keisler, Acting Attorney General of the United States 3 (Oct. 5, 2007), available at <http://www.usdoj.gov/olp/pdf/catw-letter.pdf> [hereinafter CATW Letter].

² Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered titles of the U.S.C.) [hereinafter TVPA]. Human trafficking is the second largest criminal enterprise worldwide. It generates more than thirty-two billion dollars annually and is the fastest growing illicit market. See Angela A. Jones, *Post-Traumatic Stress Disorder and Victims of Human Sex Trafficking: A Perpetuation of Chronic Indignity*, 4 INTERCULTURAL HUM. RTS. L. REV. 317, 337, 337 n.99 (2009) (citations omitted).

³ See TVPA § 102(b)(2), 22 U.S.C. § 7101(b)(2) (2006).

⁴ See Jerry Markon, *How Widespread is Human Trafficking?; U.S. Estimates Thousands of Victims, But Efforts to Find Them Fall Short*, WASH. POST, Sept. 23, 2007, at A1.

⁵ See TVPA § 102(b)(24), 22 U.S.C. § 7101(b)(24).

⁶ See POLARIS PROJECT, DOMESTIC TRAFFICKING WITHIN THE U.S., <http://www.polarisproject.org/content/view/60/81/> (last visited Jan. 3, 2010) (“Victims of human trafficking in the United States also include U.S. citizens and residents trafficked within its borders. Much like the majority of other countries affected by human trafficking, the U.S. has a large internal or ‘domestic’ component of human trafficking for the purposes of both sexual and labor exploitation.”); Pam Louwagie, *Report Finds Gaps in Sex-trafficking Enforcement*, STAR TRIB., Sept. 23, 2008, at 1B.

⁷ Cf. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified in scattered titles of the U.S.C.) [hereinafter TVPRA of 2008]. Secretary of State Hillary Rodham Clinton recognizes that human trafficking occurs in the United States, as well as in the rest of the world. See Hillary Rodham Clinton, Op-Ed, *Partnering Against Trafficking*, WASH. POST, June 17, 2009, at A21.

⁸ See CONGRESSIONAL RESEARCH SERVICE, REPORT FOR CONGRESS, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 4–5 (Claire Ribando Seelke & Alison Siskin eds., updated Aug. 14, 2008) [hereinafter CRS REPORT]. Researchers predict that domestic

generally understood as prostitution in the United States, and the women involved in this abusive industry are treated like criminals while their “pimps” and customers are rarely ever prosecuted.⁹ Due to under-enforcement and uneven prosecution at the local level, pimping and pandering have flourished and are increasingly becoming interstate activities.¹⁰ Because prostitution occurs on a national level, it must be considered domestic trafficking, an issue that deserves more attention from the federal government.

Prostitution is also a controversial topic for scholars—feminist scholars in particular. Feminists are sharply divided over whether prostitution is an expression of sexuality or an institution of sexual dominance and power.¹¹ Radical feminists, such as Catharine MacKinnon, view prostitution as the embodiment of women’s inferior position in society, and the goal of these feminists is to end the practice through criminalization or state action.¹² On the other hand, pro-sex feminists and queer and critical theorists, such as Janet Halley, believe that prostitutes are not inherently subordinated simply because they are women, but rather that prostitution is, for some, an expression of sexual autonomy.¹³ This divi-

trafficking will continue to increase as demand for sexual services rises. See Cheryl Hanna, *Somebody’s Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love*, 9 WM. & MARY J. WOMEN & L. 1, 3, 16, 23 (2002).

⁹ Because prostitution is a crime in most localities, these women are not viewed as coerced or traumatized individuals, but as criminals. See Jones, *supra* note 2, at 343–44; Louwagie, *supra* note 6; Hanna, *supra* note 8, at 23, 26.

¹⁰ See John R. Miller, Op-Ed, *The Justice Department, Blind to Slavery*, N.Y. TIMES, July 11, 2008, at A17 (“[P]imping has long been recognized as an interstate activity with a federal role.”); Congresswoman Carolyn Maloney, *Foreword to MELISSA FARLEY, PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS*, xiv–xvi (2007); Suzanne L. Tiapula & Allison Turkel, *Identifying The Victims of Human Trafficking*, 42 JUN PROSECUTOR 10, 11–12 (2008) (calling for a reevaluation of state practices regarding prostitution and sex trafficking). The United States is still viewed as “primarily a destination country” for human trafficking, not as an active participant in the creation of human trafficking itself. See CATW Letter, *supra* note 1, at 5.

¹¹ See Joyce Outshoorn, *The Political Debate on Prostitution and Trafficking of Women*, 12 SOC. POL. (2005); Susan W. Tiefenbrun, *Sex Sells But Drugs Don’t Talk: Trafficking of Women Sex Workers*, 23 T. JEFFERSON L. REV. 199, 205–06 (2001).

¹² MacKinnon notes that the “[r]eal criminals are those who buy these women 20–30 times a day We need to understand the reality of sexual violence and recognize that this is a criminal act.” Rashme Sehgal, *Criminalising the Client Will Cause Prostitution to Drop by 80%: Catharine MacKinnon*, INFOCHANGE, Feb. 2009, <http://infochangeindia.org/200902187616/Women/Features/-Criminalising-the-client-will-cause-prostitution-to-drop-by-80-Catharine-MacKinnon.html>; see Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 29 (1993) [hereinafter MacKinnon, *Prostitution and Civil Rights*]; see also Tiefenbrun, *supra* note 11, at 205.

¹³ See Outshoorn, *supra* note 11; see also Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE 80, 89 (Wendy Brown & Janet Halley eds., 2002) [hereinafter Halley, *Sexuality Harassment*]; Tiefenbrun, *supra* note 11, at 206.

sion within feminism is one reason why significant legal reform concerning domestic trafficking has not occurred until recently.¹⁴

The William Wilberforce Trafficking Victims Protection Reauthorization Act (H.R. 3887), passed by the House in 2007, addressed the issue of domestic trafficking and drew upon these different feminist perspectives.¹⁵ But when H.R. 3887 was introduced in the Senate, its provisions were altered so that it no longer addressed the issue of domestic trafficking.¹⁶ These changes were made, in part, due to the Department of Justice's protestations that H.R. 3887 conflated prostitution with sex trafficking and encroached upon states' rights.¹⁷ A compromise was reached with the passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA of 2008) by the House and the Senate in 2008, which combined provisions from both H.R. 3887 and S. 3061, the Senate version of the Act.¹⁸

This Note will argue that the TVPRA of 2008 is an improvement over past TVPA reauthorizations because it addresses domestic trafficking, but its failure to eliminate the force, fraud, or coercion requirement for adult domestic trafficking prosecutions leaves adult domestic trafficking victims vulnerable to continued abuse. Part I will discuss the TVPA and its reauthorizations to demonstrate the federal government's shift from focusing primarily on international trafficking to addressing domestic trafficking as well. Part II will discuss the problem of domestic trafficking within the United States. Part III will address different feminist responses to the issue of prostitution and domestic trafficking. Finally, Part IV will argue that the TVPRA of 2008 represents an unfinished but important first step toward addressing domestic trafficking. Although the TVPRA of 2008 recognizes that the domestic trafficking of United States citizens is a legitimate concern, its emphasis is almost exclusively on the domestic trafficking of children and foreign victims, rather than on adult domestic victims.

¹⁴ Janie Chuang remarked that "[t]he prostitution reform debates reflect a troubling fragmentation of feminist advocacy projects, with a negative impact on the implementation of both the international law on trafficking, the UN Trafficking Protocol, and the arguably more influential U.S. law on trafficking." Darren Rosenblum, *Democracy, Gender, and Governance: Introduction*, 101 AM. SOC'Y INT'L L. PROC. 379, 381 (2007).

¹⁵ See H.R. 3887, 110th Cong. (1st Sess. 2007).

¹⁶ See S. 3061, 110th Cong. (2d Sess. 2008).

¹⁷ See Letter to John Conyers Jr., Chairman Committee on the Judiciary, U.S. House of Representatives, from Brian A. Benczkowski, Principal Deputy Assistant Attorney General (Nov. 9, 2007) [hereinafter Benczkowski, DOJ Letter].

¹⁸ 154 CONG. REC. H10888-01 (Dec. 10, 2008) (statement of Rep. Berman).

I. BACKGROUND: THE TRAFFICKING VICTIMS PROTECTION ACT

The TVPA demonstrates the United States' commitment to fighting human trafficking. Since 2000, the federal government has spent more than half a billion dollars in its effort to combat human trafficking.¹⁹ Moreover, the TVPA has enjoyed significant support because trafficking, from the beginning, has been a nonpartisan issue. The groups supporting the TVPA have included feminist organizations, religious groups, and numerous non-profits.²⁰ The breadth of this coalition demonstrates that trafficking is a human issue and not merely a women's issue. The TVPA, however, has not been fully successful in addressing the issue of human trafficking because it does not effectively address adult domestic trafficking.

A. *TVPA of 2000*

In 2000, Congress passed the Victims of Trafficking and Violence Protection Act (TVPA). Although the TVPA was created to "combat trafficking in persons," it has been used primarily to combat the trafficking of women and children for commercial sexual exploitation.²¹ The TVPA was drafted in response to the grave international humanitarian crisis involving the trafficking of over 700,000 persons worldwide and 50,000 persons in the U.S., mostly women and children, for sexual and labor exploitation.²² Before the TVPA, trafficking victims had few resources and little hope of being granted asylum in the United States.²³ Traffickers knew this and used their victims' vulnerability to their advantage.²⁴

To combat traffickers, the TVPA created a number of provisions to monitor foreign nations' human rights practices and to help those nations fight human trafficking. For example, the TVPA authorized the Secretary of State to publish annual reports regarding foreign nations' efforts or failure to combat human trafficking.²⁵ If a nation failed to take active steps to prevent trafficking, the President could determine whether to

¹⁹ Markon, *supra* note 4.

²⁰ Miller, *supra* note 10.

²¹ See TVPA § 102(a), (b)(2), 22 U.S.C. § 7101(a), (b)(2) (2006).

²² See TVPA § 102(b)(1), 22 U.S.C. § 7101(b)(1). Congress has since lowered this latter number to about 14,500–17,500 persons. Markon, *supra* note 4. It is important to note that boys are also trafficked for commercial sexual exploitation, but boys are significantly less likely to be controlled or coerced by pimps, as compared to many female prostitutes. See RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA, AND MEXICO: EXECUTIVE SUMMARY 16* (Univ. of Pa. Press 2002). Still, "[t]he overwhelming majority of those trafficked are women and children." CRS REPORT, *supra* note 8, at 3.

²³ See TVPA § 102(b)(18), 22 U.S.C. § 7101(b)(18).

²⁴ See TVPA § 102(b)(4), 22 U.S.C. § 7101(b)(4).

²⁵ See TVPA § 110(b)(1), 22 U.S.C. § 7107(b)(1).

cease non-humanitarian or non-trade-related foreign assistance until the nation complied.²⁶ Through the TVPA, Congress hoped to foster cooperation between the United States and foreign nations in order to prevent and protect victims of trafficking.

The TVPA also provided special protections for victims of “severe forms of trafficking in persons.”²⁷ For instance, victims who commit commercial sex acts under force, fraud, or coercion, or victims who are under the age of eighteen, could receive federal assistance.²⁸ Through a government granted T-visa, the victims—if they agreed to help law enforcement officials in the trafficking investigation or qualified for an exception from such assistance—could remain in the United States for a period of time.²⁹ No more than 5,000 aliens, however, could receive a T-visa per year,³⁰ and rarely could the victims’ spouses, children, or parents obtain one.³¹ In certain situations, the victims could apply to remain in the United States permanently,³² but the TVPA limited this opportunity to those who “would suffer extreme hardship involving unusual and severe harm” if deported.³³

Additionally, the TVPA focused on increasing the number of prosecutions of traffickers. For example, the TVPA codified the criminal offense of trafficking with respect to peonage (bonded labor), slavery, involuntary servitude, forced labor, sex trafficking of children, and trafficking by force, fraud, or coercion.³⁴ The TVPA also made it illegal for traffickers to destroy or conceal the passport or identification of the trafficking victims as a means of restricting their liberty.³⁵ Finally, convicted traffickers could be forced by the courts to provide restitution to the victims.³⁶

While the goal of the TVPA was clearly to focus on eliminating the trafficking of international persons, the TVPA recommended funding for research on domestic trafficking.³⁷ At the time of the TVPA’s passage, however, it is likely that the term “domestic trafficking” referred only to

²⁶ See TVPA § 110(a), 22 U.S.C. § 7107(a).

²⁷ TVPA § 107(b)(1)(A), 22 U.S.C. § 7105(b)(1)(A) (2006).

²⁸ TVPA § 107(b)(1)(C), 22 U.S.C. § 7105(b)(1)(C). From 2000 to 2007, only 1,379 victims of human trafficking were certified or deemed eligible by the Department of Health and Human Services to receive benefits and services. CRS REPORT, *supra* note 8, at 24. In 2008, 286 foreign adult victims and 31 foreign minors were certified. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 57 (2009) [hereinafter U.S. DEP’T OF STATE, TIP REPORT].

²⁹ See TVPA § 107(c)(3), 22 U.S.C. § 7105(c)(3).

³⁰ See TVPA § 107(f), 8 U.S.C. § 1255(i)(4)(A) (2006).

³¹ See TVPA § 107(c)(3), 22 U.S.C. § 7105(c)(3).

³² TVPA § 107(f), 8 U.S.C. § 1255(i).

³³ *Id.*

³⁴ See TVPA § 112(a)(2), 18 U.S.C. §§ 1590, 1591 (2006).

³⁵ See TVPA § 112(a)(2), 18 U.S.C. § 1592.

³⁶ See TVPA § 112(a)(2), 18 U.S.C. § 1593.

³⁷ See TVPA § 105(d)(3), 22 U.S.C. § 7103(d)(3) (2006).

the trafficking of international persons within the United States.³⁸ It would be some time before Congress began to focus on the needs of American domestic trafficking victims.

B. *TVPRA of 2003*

In December of 2003, Congress passed the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA of 2003).³⁹ Most notably, the TVPRA of 2003 provided trafficking victims with a civil cause of action against their traffickers in order to recover damages and attorneys fees.⁴⁰ Unlike the criminal prosecutions permitted under the TVPA, civil actions allow victims to escape prosecutorial bias and to sue for punitive and compensatory damages.⁴¹ Also, civil suits permit direct enforcement of awards by victims.⁴² The addition of civil suits in the TVPRA of 2003 was a significant improvement over the original TVPA because it gave victims an effective means of recovering traffickers' forfeited assets.

The TVPRA of 2003 also amended the T-visa requirements to make it easier for more victims and their families to remain in the United States. For example, Congress increased the age of those who could receive a T-visa, without having to cooperate with the authorities, from fifteen to eighteen years of age.⁴³ In addition, unmarried siblings under the age of eighteen and parents of victims under the age of twenty-one could now receive T-visas.⁴⁴ The total number of available T-visas, however, remained the same under the TVPRA of 2003.

In addition, the TVPRA of 2003 expanded federal jurisdiction over human trafficking crimes. For instance, Congress extended federal jurisdiction to cover crimes that affected foreign commerce and crimes that occurred in international waters.⁴⁵ Furthermore, the TVPRA of 2003 broadened the offense of human trafficking to include enticing, recruiting, harboring, providing, obtaining, or transporting a person for sex trafficking.⁴⁶ Moreover, through the TVPRA of 2003, Congress began to address the needs of domestic trafficking victims, however slightly, by

³⁸ See *id.*

³⁹ Pub. L. 108-193, 117 Stat. 2875 (2003) (codified in scattered titles of the U.S.C.) [hereinafter TVPRA of 2003].

⁴⁰ TVPRA of 2003 § 4(a)(4)(A), 18 U.S.C. § 1595 (2006).

⁴¹ *Id.*

⁴² See MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 29 (stating that civil suits permit victims to use the law themselves).

⁴³ TVPRA of 2003 § 4(b)(1)(A), 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb) (2006).

⁴⁴ TVPRA of 2003 § 4(b)(1)(B), 8 U.S.C. § 1184(a)(15)(T)(ii)(I).

⁴⁵ TVPRA of 2003 § 5(a)(2), 18 U.S.C. § 1591(a)(1).

⁴⁶ TVPRA of 2005 § 5(a)(3), 18 U.S.C. § 1591(b) (2006).

calling for research and grants for non-profits and federal agencies to help victims in the United States.⁴⁷

C. *TVPRA of 2005*

In 2006, Congress again reauthorized the TVPA. The Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA of 2005) provided increased federal funding and enhanced the existing provisions of the TVPA.⁴⁸ The TVPRA of 2005 provided these improvements in part because Congress found that 600,000 to 800,000 persons were still being trafficked worldwide for exploitative purposes.⁴⁹ As a result, Congress developed a pilot program to provide rehabilitative services for trafficking victims, including shelter and the resources necessary for them to start independent lives.⁵⁰ The TVPRA of 2005 also created extraterritorial jurisdiction to prosecute federal government employees and their dependents who traffic in persons outside of the United States.⁵¹

Most notably, with the TVPRA of 2005, the federal government began to actively address the issue of domestic trafficking of American citizens and lawful permanent residents within the United States. Congress created a new title to the TVPA, “Combating Domestic Trafficking in Persons,” with the purpose of reducing domestic trafficking and the demand for commercial sexual acts in the United States.⁵² Congress likely took this step to alter the perception that United States citizens and lawful permanent residents were not or could not be victims of sexual exploitation.

The TVPRA of 2005 also provided for two studies to be conducted by the Attorney General, through which Congress hoped to show the actual rate of domestic trafficking in the United States and to help improve law enforcement tactics.⁵³ The first proposed study was to focus on the estimated number and characteristics of domestically trafficked persons.⁵⁴ The second study was to focus on the rate of domestic sex trafficking and illegal commercial sex acts.⁵⁵ The TVPRA of 2005 also established a grant program through the Department of Health and Human Services (HHS), which made money available to local govern-

⁴⁷ TVPRA of 2003 § 6(g)(1), 22 U.S.C. § 7108(a) (2006).

⁴⁸ Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified in scattered titles of the U.S.C.) [hereinafter TVPRA of 2005].

⁴⁹ *Id.* § 2(2) (“80 percent of such individuals are women and girls.”).

⁵⁰ TVPRA of 2005 § 102(b), 22 U.S.C.A. § 7105 (West 2009).

⁵¹ TVPRA of 2005 § 103(a)(1), 18 U.S.C.A. § 3271 (West 2009).

⁵² *See* TVPRA of 2005 § 201, 42 U.S.C.A. § 14044a (West 2009).

⁵³ *See* TVPRA of 2005 § 201(a)(1)(B), 42 U.S.C.A. § 14044(a)(1)(B); H.R. REP. NO. 109-317, pt. 2 (2005).

⁵⁴ TVPRA of 2005 § 201(a)(1)(B)(i), 42 U.S.C.A. § 14044(a)(1)(B)(i).

⁵⁵ TVPRA of 2005 § 201(a)(1)(B)(ii), 42 U.S.C.A. § 14044(a)(1)(B)(ii).

ments and non-profit organizations that provide services to American victims of domestic trafficking.⁵⁶ The goal of both the program and the studies was to establish, expand, and strengthen assistance programs for United States citizens and lawful permanent residents who are victims of sex trafficking.

Finally, the TVPRA of 2005 sought to increase state and local efforts to fight trafficking. For instance, the TVPRA of 2005 authorized the Attorney General to make grants available to state and local law enforcement to investigate and prosecute domestic trafficking cases.⁵⁷ These grants were also intended to educate and prosecute persons who purchase commercial sex acts, as well as to instruct law enforcement officials on how to communicate and work with trafficking victims.⁵⁸ Unfortunately, no grants were distributed, and neither of the aforementioned surveys were completed at this time.⁵⁹ Nevertheless, Congress' first active step toward addressing the issue of domestic trafficking through the TVPA, though incomplete, indicated some progress.

II. DOMESTIC TRAFFICKING: THE SALE OF HUMAN BEINGS WITHIN OUR BORDERS

“Prostitute” has long been a pejorative word in the United States, and the denigration of prostitutes has allowed law enforcement and society to turn a blind eye to the coercion and violence often connected with prostitution.⁶⁰ The reality is that the average age of entry into prostitution is much younger than previously reported,⁶¹ and an ever-increasing number of women and children are being recruited, trafficked, and forced into prostitution.⁶² This is due, in part, to the proliferation and increased

⁵⁶ See TVPRA of 2005 § 202(a), 42 U.S.C.A. § 14044a(a); 51 CONG. REC. E269 (daily ed. Feb. 17, 2005) (statement of Rep. Smith).

⁵⁷ See TVPRA of 2005 § 204(a)(1)(A), 42 U.S.C.A. § 14044c(a)(1)(A).

⁵⁸ See TVPRA of 2005 § 204(a)(1)(B), (D), 42 U.S.C. § 14044c(a)(1)(B), (D) (West 2009).

⁵⁹ CATW Letter, *supra* note 1, at 4.

⁶⁰ Sixty to seventy-five percent of women in prostitution were raped while seventy to ninety-five percent were assaulted physically, and sixty-eight percent of these women were suffering from some form of post-traumatic stress disorder, similar to combat-veterans. See U.S. DEP'T OF STATE, *THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING* (2007) (citing Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. TRAUMA PRAC. 3, 33–74 (2003)); MELISSA FARLEY, *PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS* (Haworth Press 2003).

⁶¹ See *Exploitation of Children and Others in the U.S.: Comm'n on Security and Cooperation in Europe U.S. Helsinki Comm.* (2005) (statement of Chris Swecker, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation), available at <http://www.fbi.gov/congress/congress05/swecker060705.htm> [hereinafter Statement of Chris Swecker] (“The average age of a child first used in prostitution is 11 to 14, with some as young as 9 years of age.”).

⁶² Amy Siniscalchi, Program Director of My Sister's Place in Westchester, NY, a service agency that works with trafficking victims, has said, “[E]verybody in the field thinks that the

accessibility of erotic services⁶³ and the profitable nature of prostitution for pimps.⁶⁴ The increased visibility of prostitution in the United States, however, has failed to draw attention to its inherent problems.⁶⁵

In actuality, domestic trafficking is modern-day slavery that occurs widely in the United States. The exact number of trafficked individuals, however, is unknown and difficult to determine due to the unwillingness and inability of most victims to come forward.⁶⁶ At any given time, between 100,000 to 300,000 children are at risk of being forced or coerced into commercial sexual exploitation in the United States.⁶⁷ Also, according to one report, service providers have only been able to help a fraction of these victims.⁶⁸ While prostitution may represent a chosen profession for a few, it is not a choice for the vast majority.

crime of human trafficking is increasing.” Joseph Berger, *Sex Trafficking Arrests are Few, Despite Laws*, N.Y. TIMES, Dec. 4, 2009, at A32. Others in the field have noted that the increase may be attributed in part to the current global economic crisis. See Hanna, *supra* note 8, at 16.

⁶³ Due to globalization, more persons are moving across borders through valid and invalid means, generally from poorer to wealthier nations. International crime organizations have benefited from this flow of people and information. See CRS REPORT, *supra* note 8, at 4; Hanna, *supra* note 8, at 23.

⁶⁴ One pimp with three girls can make 24,000 dollars a month and 624,000 dollars a year, tax free, if each girl makes 500 dollars a night for him. Tina Frundt, *Enslaved in America: Sex Trafficking in the United States*, WOMEN’S FUNDING NETWORK, available at <http://www.womensfundingnetwork.org/resource/past-articles/enslaved-in-america-sex-trafficking-in-the-united-states> (last visited Jan. 3, 2010). In the United States alone, domestic trafficking is a multi-billion dollar industry. See CATW Letter, *supra* note 1, at 1.

⁶⁵ See Hanna *supra* note 8, at 23–26 (explaining that girls arrested for prostitution are still treated like criminals and do not receive the help or support they need, and their pimps are rarely held accountable).

⁶⁶ Of the approximated 600,000 to 800,000 persons trafficked across international borders in 2004, eighty percent were women and girls and as many as fifty percent of these persons were minors. U.S. DEP’T OF STATE, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING 1 (2004) [hereinafter U.S. DEP’T OF STATE, PROSTITUTION AND SEX TRAFFICKING]. The number of domestically trafficked victims, if accounted for, likely raises the total number to around 2–4 million annually. See CRS REPORT, *supra* note 8, at 2. According to the International Labor Organization (ILO) there may be more than twelve million people globally in forced labor or commercial sexual servitude. See *id.* The number of victims is difficult to determine accurately, in part because pimps psychologically manipulate their victims and thus make it difficult for victims to come forward. See Equality Now, Trafficking Victims Protection Reauthorization Act, http://www.equalitynow.org/english/campaigns/sex-tourism-trafficking/tvpa/tvpa_en.html (last visited Jan. 3, 2010). Since the passage of the TVPA, for example, less than seventy American sex trafficking cases have been successfully prosecuted. See *id.*

⁶⁷ See ESTES & WEINER, *supra* note 22, at 11–14.

⁶⁸ Uttam Das, *Human Trafficking Drives Victims to Shambles*, MINN. DAILY, Dec. 10, 2009, available at <http://www.mndaily.com/2009/12/10/human-traffick-heavy-justice-issue> (referencing a 2007 report, which found that in the preceding three years, service providers in Minnesota only helped 637 victims of sex trafficking).

A. *Domestic Trafficking and International Trafficking: Two Fruits From the Same Tree*

Although international trafficking has garnered more federal attention than domestic trafficking, the similarities between the two are startling, and thus require a reframing of the issue of human trafficking. With the passage of The White Slave Traffic Act (Mann Act) in 1910, the phrase “traffic in women and children” was used to demarcate “white slavery,” or international trafficking, from local prostitution.⁶⁹ This demarcation focused attention on international trafficking victims and diverted it away from the continuing enslavement of American women in local prostitution.⁷⁰ The TVPRA of 2005, however, was amended in part to draw attention to the fact that, under the TVPA, foreign trafficking victims are treated as victims while American trafficking victims are treated as criminals.⁷¹ Because of this disparate treatment, American domestic trafficking victims do not receive the services they need to free themselves from an abusive industry.⁷²

Like international trafficking victims, most of the women and children who work as prostitutes in the United States do so against their will.⁷³ For example, they are forced into prostitution because of the bru-

⁶⁹ MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 24 n.47 (citing KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 32–33 (1979)). Not to mention, the purpose of the Act, also known as the Mann Act, was to prevent female promiscuity and interracial sexuality, not trafficking. See Melissa Ditmore, *Who's Trafficked?*, RH REALITY CHECK, May 19, 2008, www.rhrealitycheck.org/blog/2008/05/16/whos-trafficked.

⁷⁰ See U.S. DEP'T OF STATE, *PROSTITUTION AND SEX TRAFFICKING*, *supra* note 66, at 2 (“International trafficking in human beings could not flourish but for the existence of local prostitution markets where men are willing and able to buy and sell women and children for sexual exploitation.”) (internal citation omitted). MacKinnon believes prostitution should be seen as unconstitutional slavery in order to draw attention to it. See MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 24 n.47.

⁷¹ American adult trafficking victims are typically treated as prostitutes or common criminals, and child victims are seen as juvenile delinquents. See H.R. REP. NO. 109-317, pt. 2, at 22–23 (2005); Maloney, *supra* note 10, at xv.

⁷² See Wendi J. Adelson, *Child Prostitutes or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 121–22 (2008) (explaining that U.S. citizens in Florida, for example, are not certified by Health and Human Services (HHS) for Victim's Compensation funding because they already have citizenship, but without certification they cannot receive victim's compensation); cf. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2008 9 (2009), available at <http://www.justice.gov/olp/pdf/agr-report-fy2008.pdf> [hereinafter U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT] (noting that the TVPRA of 2008 directed studies to address the potential “service gap” between foreign nationals and U.S. victims).

⁷³ Sixty-nine percent of women interviewed in a survey of indoor prostitution in New York City said that they would like to leave sex work at some point. But “[f]or those who are working in conditions that are coercive and the sex workers' safety is threatened, leaving is problematic and potentially dangerous.” SEX WORKERS PROJECT, URBAN JUSTICE CTR., *BEHIND CLOSED DOORS: AN ANALYSIS OF INDOOR SEX WORK IN NEW YORK CITY: EXECUTIVE SUMMARY* 7 (2005); see also ESTES & WEINER, *supra* note 22, at 7 (noting that fifty-five

tal tactics of their pimps, who are responding to the high demand for sexual services.⁷⁴ Pimps, like international traffickers, often control the victims' identification, money, and freedom, and use physical and psychological abuse to further control their prostitutes.⁷⁵ Through sleep deprivation, sexual and physical violence, learned helplessness, false promises, and favors, pimps create a cycle of abuse and affection, which creates a trauma bond between the pimp and the victim.⁷⁶ Pimps actively exploit this bond in order to force women to prostitute for them.⁷⁷

Moreover, these women, like foreign victims, are often already vulnerable to exploitation because of poverty or past abuse.⁷⁸ For instance, it is well known that women in the United States and abroad, on average, make less money than their male counterparts and have, due to societal norms, fewer economic alternatives.⁷⁹ In addition, many of these women are homeless, have children to support, or suffer from drug addiction.⁸⁰

percent of girls living on the street engaged in formal prostitution, and pimps controlled about seventy-five percent of them).

⁷⁴ The high demand for prostitutes, not including the demand for domestic workers and laborers, fuels the human trafficking market. CRS REPORT, *supra* note 8, at 4.

⁷⁵ Traffickers starve, rape, and repeatedly abuse trafficking victims. Their passports are often taken from them as well, to prevent them from escaping or seeking help from law enforcement. See CRS REPORT, *supra* note 8, at 5–6. One indication of trafficking for law enforcement agents is whether trafficking victims have control over their own identification or travel documents. See U.S. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT: HUMAN TRAFFICKING INDICATORS 2 (2008), available at http://api.ning.com/files/8gROj35Ji5HH*MASqBvnoOM8zcabEuLmqRBUf0oDyTvSIDABg7zD8pAjeM*Us-Ht hpgjy2CGumEwb2KTfzYzIE04WTK8aS2S/HT_PamphletEnglish.pdf.

⁷⁶ HARVEY SCHWARTZ ET AL., *Pimp Subjugation of Women by Mind Control*, in FARLEY, *supra* note 10, at 49–50.

⁷⁷ See *id.* at 52, 67–68; see also Nicholas D. Kristof, Op-Ed, *The Pimps' Slaves*, N.Y. TIMES, Mar. 16, 2008, at WK 12 (noting that pimping has an almost uniform “business model” across the country—pimps target vulnerable women and runaways, who are coerced through violence and affection to prostitute).

⁷⁸ See Jones, *supra* note 2, at 339 (“Observe that for both U.S. and foreign victims, the striking common thread of their pre-trafficking history reveals the absence of a support structure even before the Trafficker begins to destroy their lives.”); CRS REPORT, *supra* note 8, at 5–6.

⁷⁹ As of 2007, women working full-time earned seventy-eight percent of what men did in the United States. U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007 11 (2008). Moreover, a minimum wage worker in the United States could not afford an average one-bedroom apartment in 2009. See NAT'L LOW INCOME HOUSING COALITION, OUT OF REACH 2009 4 (2009). Sixty-seven percent of the indoor prostitutes interviewed in New York City said they did not make enough money at their previous job to live on. “[I]t was clear that the economic gain of sex work was the driving factor behind their participation in the sex industry.” SEX WORKERS PROJECT, *supra* note 73, at 4. The same is true for international trafficking victims. Due to the cultural norms of their home countries, these women, who generally come from developing countries, often lack job opportunities outside of the home. Their economic and social vulnerability is further exacerbated by destabilization within their nations. See CRS REPORT, *supra* note 8, at 5–6; U.S. DEP'T OF STATE, TIP Report, *supra* note 28, at 34–36.

⁸⁰ See Elizabeth Bernstein, *What's Wrong with Prostitution? What's Right with Sex Work? Comparing Markets in Female Sexual Labor*, 10 HASTINGS WOMEN'S L.J. 91, 104–06,

Thus, many women enter prostitution and stay in prostitution due to economic necessity. In addition, an estimated eighty percent of the prostitutes in America began working as children,⁸¹ and sixty to seventy percent of them have histories of childhood sexual abuse,⁸² which pimps exploit for financial gain.⁸³ Pimps often promise these women a new life or a new job to lure them into prostitution, similar to the false promises used by international traffickers.⁸⁴

Furthermore, like numerous foreign trafficking victims, many domestic victims come from unstable homes.⁸⁵ Their parents often abandon them, or they run away due to sexual or physical abuse.⁸⁶ Although the parents of domestic trafficking victims may not sell them to pimps outright, as some foreign victims' families do,⁸⁷ the victims' vulnerable position on the streets lead about 40,000 of the estimated 1.6 million runaway children each year to become involved with sex trafficking.⁸⁸ The similarities between domestic and international trafficking victims are striking, and it is clear that both groups need to be thought of as victims—worthy of assistance and protection—and not as criminals.

It is important to note, however, that there are independent prostitutes in the United States who are not being exploited. Due to their financial stability and autonomy, these prostitutes can refuse customers, keep the money they earn, and have other economic options beside prostitution.⁸⁹ These individuals engage in sex work for a variety of reasons,

114–16 (1999); Dorchen Leidholdt, *Prostitution: A Violation of Women's Human Rights*, 1 CARDOZO WOMEN'S L.J. 133, 136–37 (1993); see also *United States v. Paris*, No. 3:06-CR-64, 2007 WL 3124724, at **2–3 (D. Conn. Oct. 24, 2007) (where a pimp exploited women's addiction to drugs in order to force them to prostitute for him).

⁸¹ See POLARIS PROJECT, *supra* note 6 (“Domestic sex traffickers, commonly referred to as pimps, particularly target vulnerable youth, such as runaway and homeless youth, and reinforce the reality that the average age of entry into prostitution is 12–13 years old in the U.S.”); Hanna, *supra* note 8, at 12.

⁸² See Leidholdt, *supra* note 80, at 136.

⁸³ Pimps have actively developed specific tactics to exploit the emotional and mental consequences of these women's childhood sexual and physical abuse. They are repeatedly told by their pimps that their only worth is as a “sexual commodity.” FARLEY, *supra* note 10, at 33; see TVPA § 102(b)(4), 22 U.S.C. § 7101(b)(4) (2006).

⁸⁴ See CRS Report, *supra* note 10, at 8 (“Traffickers entice victims to migrate voluntarily with false promises of well-paying jobs in foreign countries as au pairs, models, dancers, domestic workers, etc.”); see, e.g., *U.S. v. Norris*, 188 F. App'x 822 (11th Cir. 2006) (where pimp promised to train women as professional wrestlers, but instead forced them to prostitute for him).

⁸⁵ See Frundt, *supra* note 64.

⁸⁶ *Id.* (recounting her experiences, Polaris Project's Outreach Coordinator talks about her experience when she was fourteen and forced into prostitution by her pimp after she ran away from home).

⁸⁷ See TVPA § 102(b)(4), 22 U.S.C. § 7101(b)(4).

⁸⁸ Statement of Chris Swecker, *supra* note 61.

⁸⁹ See Bernstein, *supra* note 80, at 97, 110–14 (also illustrating how some women experience excitement and a sense of power from prostitution).

but they do so voluntarily, which distinguishes them from the women mentioned above.⁹⁰ Independent prostitutes, unlike other prostitutes in the United States, are primarily white, middle-class, and educated, and they are not the norm.⁹¹ Because independent prostitutes are autonomous individuals, capable of controlling their sexuality and effectuating meaningful consent, they should be thought of as distinct from women who are coerced into prostitution, and they should be treated with respect—not with paternalism.

B. *Domestic Trafficking: State Action and Federal Inaction*

As articulated earlier, trafficking does not solely mean the transportation or enticement of individuals into another country. Rather, trafficking has a broader definition that includes the forcible prostitution of American citizens and lawful permanent residents within the United States.⁹² It would otherwise be incorrect to make a distinction between trafficking and prostitution because the emphasis would then be placed upon the distance the woman is moved for sex rather than upon the fact that a woman is for sale for sex.⁹³ Melissa Farley writes, “The distance is irrelevant. What’s relevant is what is done to her in prostitution, the sale of and sexual use of a human being.”⁹⁴ Since pimping and pandering are becoming large interstate activities, it is imperative for better coordination to exist on a national level to combat domestic trafficking.

While the federal government has only recently begun to provide American trafficking victims with some of the assistance and protection it offers foreign victims, many states have been providing American trafficking victims with support. For example, Minnesota law “recognizes that a person can never consent to being sexually exploited and considers individuals who have been prostituted by others as trafficking victims.”⁹⁵ Accordingly, the Minnesota statute allows victims of domestic trafficking to receive the same funds and protections under the TVPA as interna-

⁹⁰ See *id.* But it is “the existence or non-existence of a pimp in the equation [that] radically alters the nature of the exchange.” *Id.* at 107.

⁹¹ There is a “pyramid-like hierarchy in prostitution” wherein: 1) very few women have sex with men for a lot of money in a short period of time and then leave the profession; 2) women who need the money, have a history of child sexual abuse, or have children to support; and 3) the largest number of women are the poorest and have the fewest economic choices. FARLEY, *supra* note 10, at 98. Even independent prostitutes wish to distance themselves from the word “prostitute,” preferring the term “sex worker” instead. Bernstein, *supra* note 80, at 110–11; see also Kristof, *supra* note 77 (referring to Eliot Spitzer’s call girl as a “dangerously unrepresentative glimpse of prostitution in America”).

⁹² FARLEY, *supra* note 10, at 198. In fact, “[w]omen are often moved from state to state so that they cannot develop connections, and their freedom of movement is restricted.” Maloney, *supra* note 10, at xvi.

⁹³ See FARLEY, *supra* note 10, at 198.

⁹⁴ *Id.*

⁹⁵ Louwagie, *supra* note 6.

tional victims.⁹⁶ Similarly, Iowa provides domestic trafficking victims with basic support, such as food, shelter, and health care.⁹⁷ These states' categorization of these women as human trafficking victims lends further support to the idea that individuals who are prostituted against their will are trafficking victims in need of assistance not currently provided by the federal government.

Because the prosecution of domestic traffickers is still largely left to the states, inconsistent and unsuccessful local law enforcement persists.⁹⁸ For instance, states' criminal codes vary widely.⁹⁹ As of April 2009, forty-two states had enacted criminal anti-trafficking legislation,¹⁰⁰ but there is still no uniform approach or consistent success rate for trafficking prosecutions in the United States.¹⁰¹ Many states still criminalize the acts of exploited prostitutes while failing to enforce criminal laws against their pimps.¹⁰² Moreover, the demand side of domestic trafficking is rarely, if ever, addressed.¹⁰³ Hence, a more uniform legal approach to domestic trafficking must be achieved to effectively end this abuse.¹⁰⁴

⁹⁶ See MINN. STAT. ANN. § 609.325 (2005).

⁹⁷ SF 2219, 81st Gen. Assem., 2d Sess. (Iowa 2006).

⁹⁸ Police are not trained to recognize the signs and do not ask enough questions. Janet DiFiore, Westchester County, NY, District Attorney, explains, "It's very reminiscent where we were 30 years ago on the domestic violence stuff People just don't get it yet." Berger, *supra* note 62, at A32.

⁹⁹ Hawaii does not have a human trafficking law, so while a trafficker would be charged with a felony in another state, in Hawaii, he is only charged with promoting prostitution, a misdemeanor; the enslaved girl is charged with the same crime because she made the transaction. Craig Kielburger & Marc Kielburger, *Lack of Law Put Minors at Risk in Hawaii*, HUFFINGTON POST, Dec. 11, 2009, http://www.huffingtonpost.com/craig-and-marc-kielburger/lack-of-law-put-minors-at_b_389083.html.

¹⁰⁰ U.S. DEP'T OF STATE, TIP Report, *supra* note 28, at 51. There are now forty-two domestic task forces that allow state and local law enforcement work with non-governmental organizations to fight trafficking. Clinton, *supra* note 7.

¹⁰¹ See Miller, *supra* note 10 ("[T]he states have had very limited success when trying to convict traffickers.").

¹⁰² State and local law enforcement should be the entities most capable of finding victims of sexual exploitation, but because prostitution is a crime in most localities, these women are not viewed as non-consenting or traumatized individuals, but as criminals. See Jones, *supra* note 2, at 343–44; CATW Letter, *supra* note 1, at 5 (referring to the few prosecutions and convictions of traffickers that have occurred at the state level under the current system); see also MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 15.

¹⁰³ The men who buy prostitutes are rarely prosecuted. See MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 18. End Demand Illinois is Illinois' response to the issue of human trafficking and modeled on the Swedish model championed by many abolitionists. Enforcement resources are in effect shifted from the supply side to the demand side. Pimps and johns are arrested, and the women are sent to social services. It is estimated that social services for these women would be less expensive than the "unending cycle of arrest, release, and rearrest." See Mark P. Lagon, *Mark P. Lagon: Taking a Swedish Cue on Prostitution*, WASH. EXAMINER, Nov. 9, 2009, available at <http://www.washingtonexaminer.com/opinion/columns/OpEd-Contributor/Taking-a-Swedish-cue-on-prostitution-8503882-69523472.html>.

¹⁰⁴ "State-based laws alone will not increase the likelihood that a victim of trafficking will be heard or believed by law enforcement." Dina Francesca Haynes, *Good Intentions Are*

Although the federal government generally continues to treat the domestic trafficking of adult victims as a matter primarily of state concern, it has recognized that the domestic trafficking of children within the United States deserves attention.¹⁰⁵ For instance, through the Innocence Lost National Initiative, established in 2003, the federal government has created thirty-four task forces and working groups at the state and local levels to address the problem of domestic trafficking of children for the purpose of prostitution.¹⁰⁶ The federal government even developed a pilot program to provide rehabilitative services and housing for juvenile prostitutes.¹⁰⁷ But these programs failed to receive funding; thus, no domestic victims ever benefited from them.¹⁰⁸ It is clear that more needs to be done by both federal and local governments to combat domestic trafficking.

III. FEMINIST AND CRITICAL THEORIST RESPONSES TO PROSTITUTION

Feminists have very strong and divided viewpoints when it comes to prostitution. In short, most feminists believe prostitution is either an expression of sexual autonomy or a harmful institution of sexual hierarchy and power.¹⁰⁹ Radical feminists, like Catharine MacKinnon, view prostitution as emblematic of the status of women in society.¹¹⁰ Pro-sex feminists and queer and critical theorists, such as Janet Halley, think that

Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act, 6 U. ST. THOMAS L.J. 77, 87 (2008).

¹⁰⁵ See U.S. DEP'T OF JUSTICE, *FACTS ABOUT THE DEPARTMENT OF JUSTICE'S ANTI-TRAFFICKING EFFORTS* (2008), available at <http://www.usdoj.gov/olp/pdf/myths-and-facts.pdf>; U.S. v. Evans, 476 F.3d 1176 (11th Cir. 2007) (successful prosecution of solicitation of a child prostitute under the TVPA. Even though the defendant's acts occurred within one state, his use of a telephone was found to have affected interstate commerce.).

¹⁰⁶ Since 2003, 886 children have been rescued and 510 convictions have been achieved through the Initiative. Federal Bureau of Investigation, *Innocence Lost National Initiative*, available at <http://www.fbi.gov/innolost/innolost.htm> (last visited Jan. 3, 2010).

¹⁰⁷ See TVPRA of 2005 § 203(a), 42 U.S.C.A. § 14044b(a) (West 2009). The Department of Justice explained:

HHS's U.S. Domestic Trafficking in Persons Pilot Program constituted HHS's first initiative to: 1) identify U.S. citizen and [legal permanent resident] LPR trafficking victims, 2) track their progress through victim services and case management, and 3) solicit frontline feedback regarding the challenges the victims encounter in accessing benefits and services. The TVPRA of 2005 gave HHS authority to conduct new initiatives with this victim population, including direct services and shelters for minor sex trafficking victims.

U.S. DEP'T OF JUSTICE, *ATTORNEY GENERAL'S ANNUAL REPORT*, *supra* note 72, at 5.

¹⁰⁸ "However, these initiatives did not receive funding." U.S. DEP'T OF JUSTICE, *ATTORNEY GENERAL'S ANNUAL REPORT*, *supra* note 72, at 5.

¹⁰⁹ See Outshoorn, *supra* note 11; Tiefenbrun, *supra* note 11, at 205–06.

¹¹⁰ See MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 29; see also Bernstein, *supra* note 80, at 95–96 (using "radical feminist" to describe MacKinnon); Tiefenbrun, *supra* note 11, at 205 (using the word "neo-abolitionists" to describe feminists like MacKinnon).

prostitution is not necessarily the subordination of women by men but rather an exercise of sexual autonomy for some women.¹¹¹ Although their opinions and approaches to prostitution differ greatly, these feminists agree that, with forced sex trafficking, the status quo is inadequate to address the severity of the situation.¹¹²

A. *Radical Feminists View Prostitution as Emblematic of Women's Subordination to Men in Society and Believe State Action Can Abolish It*

Radical feminists believe that prostitution consists of a woman "being sold by men to men for what men value women for, and then being devalued and considered a criminal for it."¹¹³ They see this exchange of money for sex as a sexual contract, typical of all men and women in society.¹¹⁴ Whether women are considered wives or whores is irrelevant because patriarchy and society rest on this same sexual contract.¹¹⁵ Unlike our usual conception of a freely entered into contract, this contract is not made between social equals.¹¹⁶ Men and women are not social equals because "[t]o be a means to the end of the sexual pleasure of one more powerful is, empirically, a degraded status and the female position."¹¹⁷ Since sexuality is at the base of gender inequality in our society, the sexual objectification of prostitutes ultimately leads to their subjection.¹¹⁸ And because men disproportionately have the power to

¹¹¹ See, e.g., Elizabeth Kaigh, *Whores and Other Sex Slaves: Why the Equation of Prostitution with Sex Trafficking in the William Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimination*, 12 SCHOLAR 139, 158 (2009) ("To say that all women who sell sex are enslaved only perpetuates the objectification of women instead of defying it by acknowledging that choice involved in a woman's sexual activities."); Halley, *Sexuality Harassment*, *supra* note 13, at 89.

¹¹² See MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 30–31; Tiefenbrun, *supra* note 11, at 205–06 (explaining that feminists who support prostitution as a legitimate career choice do not support it when it is non-consensual or when the conditions are inhumane or unexpected); see also Bernstein, *supra* note 80, at 92 ("[M]ost feminists have tended to agree that the current criminalized status of prostitution and the selective enforcement of prostitution laws are unsatisfactory.").

¹¹³ CATHARINE A. MACKINNON, *Law in the Everyday Life of Women*, in WOMEN'S LIVES, MEN'S LAWS 32, 33 (2005) [hereinafter MACKINNON, *Everyday Life of Women*].

¹¹⁴ See Bernstein, *supra* note 80, at 96.

¹¹⁵ See *id.*

¹¹⁶ See CATHARINE A. MACKINNON, *Reflections on Sex Equality under Law*, in WOMEN'S LIVES, MEN'S LAWS, *supra* note 113, at 116–17, 129 [hereinafter MACKINNON, *Reflections on Sex Equality*].

¹¹⁷ See *id.* at 116, 129; Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS (no. 3) 515, 530–31 (1982) ("Socially, femaleness means femininity, which means attractiveness to men, which means sexual attractiveness, which means sexual availability on male terms. What defines woman as such is what turns men on.").

¹¹⁸ APNEAAP, *Prostitution is Sexual Exploitation, Not Work: Catharine MacKinnon*, Jan. 7, 2009, <http://www.apneAAP.org/news/media/pressreleases/oldpressreleases/prostitution->

construct our laws and our social reality, the harm to these women is invisible.¹¹⁹ Thus, to achieve gender equality, sexual violation must be addressed directly,¹²⁰ and prostitution is the paradigm of this inequality.¹²¹

1. Radical Feminism and the Law

To Catharine MacKinnon, radical feminism and its focus on male dominance is a theory of social and political inequality.¹²² Radical feminism does not view all women as the same. Rather, MacKinnon explains that “[t]o be treated ‘as a woman’ . . . is to be disadvantaged in these ways incident to being socially assigned to the female sex.”¹²³ Accordingly, MacKinnon claims that all women are seen and treated as women in some way under male supremacy.¹²⁴ Thus, radical feminism holds that the unequal distribution of power in society between men and women is at the root of gender inequality and discrimination.¹²⁵

The law actively participates in this inequality between the sexes, and women are largely excluded from participating in the legal process.¹²⁶ Women are excluded from this process because, in law, “the private” is the space where the law cannot and does not normally reach.¹²⁷ Unfortunately, the private is also where many women live and

sexual-exploitation-not-work-catharine-mackin; see MACKINNON, *Reflections on Sex Equality*, *supra* note 116; Bernstein *supra* note 80, at 95–96.

¹¹⁹ See MACKINNON, *Everyday Life of Women*, *supra* note 113, at 32, 35.

¹²⁰ MACKINNON, *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 113, at 2. If the point of equality law is to end group-based dominance and subordination, rather than to recognize sameness or accommodate difference, a greater priority must be placed on rectifying the legal inequality of groups that are historically unequal in society. MACKINNON, *Reflections on Sex Equality*, *supra* note 116, at 147. MacKinnon explains that “[p]rostitution is male violence against women.” Sehgal, *supra* note 12.

¹²¹ “Gender equality will remain unattainable so long as men buy, sell and exploit women and children by prostituting them.” Sehgal, *supra* note 12. As MacKinnon says:

Women do not choose to enter prostitution but are forced by men who exploit their inequality based on sex, caste, class and race. Nor do women want to stay in prostitution. Prostitution does not free women from poverty. In fact, prostitution is physical and mental oppression and is inherently harmful.

APNEAAP, *supra* note 118.

¹²² See MACKINNON, *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 113, at 3–4.

¹²³ CATHARINE A. MACKINNON, *From Practice to Theory*, in *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 113, at 25.

¹²⁴ See MACKINNON, *Everyday Life of Women*, *supra* note 113, at 38; see also CATHARINE A. MACKINNON, *Keeping It Real: On Anti-Essentialism*, in *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 113, at 90.

¹²⁵ See *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 113, at 3–4.

¹²⁶ See MACKINNON, *Everyday Life of Women*, *supra* note 113, at 32, 35.

¹²⁷ See *id.* at 38.

where they are subjected to male power and domination through sexual violence and prostitution.¹²⁸

Inequality between men and women is allowed to persist under our laws because the neutrality of law is a fiction propagated by a historically male legal system.¹²⁹ Because laws are the culmination and articulation of judicial biases and agendas of the powerful, the law is not actually neutral—it is inherently biased.¹³⁰ And because law is latently gendered, it affects the distribution of power in society.¹³¹ As a result, law creates social power among select groups, formulates rules pursuant to the social norms of these select groups, and distributes resources accordingly.¹³² Therefore, this “*has . . . made the exercise of legal power less transparent and accountable*”¹³³ and more difficult for those without power to challenge prevailing legal regimes.

Thus, MacKinnon believes that legal theory should analyze legal issues in terms of the real issues affecting women, not just the issues male-dominated legislatures and the legal bar consider important.¹³⁴ Accordingly, feminists must work to move law so that the issues affecting women are, in fact, the issues considered central to law itself.¹³⁵ By challenging judicial opinions and precedents on the actual basis they were decided, women will successfully achieve their goal of attaining equal treatment through the legal process.¹³⁶ MacKinnon believes that

¹²⁸ See MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 14–15 (explaining that although a prostitute’s actions occur in the public sphere, prostitution is commonly seen as a private act between consenting adults, like marriage. “The result is to extend the aura of privacy and protection from public intervention from sex to sexual abuse.”).

¹²⁹ See Opeyemi Akinbamidele, *Activist Details Sexism in World Legal System*, THE BROWN & WHITE (Oct. 20, 2009), <http://media.www.thebrownandwhite.com/media/storage/paper1233/news/2009/10/20/News/Activist.Details.Sexism.In.World.Legal.System-3806165.shtml>. State law is ineffective because the states are “male institutions, socially and politically.” *Id.*

¹³⁰ See MACKINNON, *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 113, at 6. Judges’ unconscious bias against certain groups and individuals permeates this neutral principle of law causing their decision-making to turn more on substantive biases than on a neutral application of law. *Id.* For example, in *Lochner* abstraction obscured the substance of the decision and the fact that the decision was substantive. *Id.* at 7–8.

¹³¹ *Id.* at 3.

¹³² CATHARINE A. MACKINNON, *The Power to Change*, in *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 116, at 103 [hereinafter MACKINNON, *Power to Change*]. The Supreme Court substantively intervened in the distribution of power between women and men institutionalized by law when it held that the Violence Against Women Act (VAWA) was unconstitutional. See MACKINNON, *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 113, at 9. Federalism had institutionalized male dominance, and the VAWA tried to deinstitutionalize it through a woman’s right to bring a civil cause of action against her abuser. *Id.*

¹³³ MACKINNON, *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 113, at 8.

¹³⁴ See *id.* at 6.

¹³⁵ See *id.* To MacKinnon, the real issues are falsely molded into what the legal system says are the legal issues. *Id.*

¹³⁶ See *id.* at 6, 9–10 (“Under law, reality is on the side of the unequal in an unequal world with equality rules.”).

“[w]omen who work with law have learned that while legal change may not always make social change, sometimes it helps, and law *unchanged* can make social change impossible.”¹³⁷ Thus, through legislation lobbied for by women, the real issues women face in our society can be addressed and corrected.

2. Prostitution as a Violation of Women’s Human Rights

Radical feminists believe that most prostitutes do not consent to prostitution, but rather are forced by pimps or by circumstance to sell themselves.¹³⁸ MacKinnon suggests that sexual and economic subordination of women in society creates an environment in which such coercion exists and persists.¹³⁹ These women have no meaningful alternatives. As government assistance dries up and the costs of child-care and housing become unmanageable, “welfare-to-prostitution” becomes the only spectrum of choice.¹⁴⁰

Furthermore, because of the degradation implicit in prostitution, it is a human rights violation and a form of modern day slavery.¹⁴¹ MacKinnon notes that “[p]rostitution . . . [is] a violation of the human rights of the prostitute[s] [and] misconceived as a crime they commit[].”¹⁴² Prostitutes are routinely treated like criminals and denied basic civil rights. For instance, they are vulnerable to arbitrary arrest by the police.¹⁴³ In addition, these women are denied their right to property because their pimp controls their wages.¹⁴⁴ Nor do prostitutes have a right to privacy

¹³⁷ MACKINNON, *Power to Change*, *supra* note 132, at 103.

¹³⁸ See Melissa Farley, *Unequal*, Coalition Against Trafficking in Women, Aug. 30, 2005, available at <http://action.web.ca/home/catw/readingroom.shtml?x=81265> [hereinafter Farley, *Unequal*] (“Prostitution is a choice based on a lack of survival options. Sex discrimination, poverty, and racism are the forces that drive girls into prostitution.”); MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 25–27; see also FARLEY, *supra* note 10, at 99–100.

¹³⁹ See MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 24–26 (poverty, sexual abuse, a lack of education are all forms of indirect coercion).

¹⁴⁰ FARLEY, *supra* note 10, at 99–100. Leidholdt explains:

[T]he belief women in conditions of prostitution enjoy real power and exercise meaningful self-determination is a denial of reality. Feigning sexual pleasure while stranger after stranger uses your body to assert his sexual prowess is the most stereotypical of sex roles and the ultimate expression of powerlessness.

Leidholdt, *supra* note 80, at 143.

¹⁴¹ See Brief for the Coalition Against Trafficking in Women as Amicus Curiae, Dart v. Craigslist 1, 665 F. Supp. 2d 961 (N.D. Ill. 2009) (“Commercial sexual exploitation not only violates the human rights of women and children, it is inextricably tied to sex trafficking.”).

¹⁴² MACKINNON, *WOMEN’S LIVES, MEN’S LAWS*, *supra* note 113, at 1; see MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 24–25; Takiyah Rayshawn McClain, *An Ounce of Prevention: Improving the Preventative Measure of the Trafficking Victims Protection Act*, 40 VAND. J. TRANSNAT’L L. 579, 593–99 (2007) (arguing that the TVPA should focus on the violation of the individual’s human rights, not on their status as a victim).

¹⁴³ See MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 15.

¹⁴⁴ *Id.*

since their actions often occur in the public sphere, where pimps directly control their actions or movements.¹⁴⁵ Due to the curtailment of their basic freedoms, these women are, in effect, slaves—subservient and wholly dependent on their pimps.¹⁴⁶ MacKinnon argues that prostitution should be thought of as unconstitutional slavery in order to restore proper attention to its inherent problems.¹⁴⁷

3. Radical Feminists' Push for Legislative Action and Abolition

Through criminalization and state action, radical feminists hope to abolish prostitution.¹⁴⁸ Most radical feminists advocate for decriminalizing the acts of prostitutes while pressing for harsher penalties for pimps and customers.¹⁴⁹ These feminists believe that by taking strong legal action against pimps, these men (and some women) will be sufficiently deterred from pimping due to the increased risk of punishment.¹⁵⁰

Radical feminists, due to their strong preference for the use of legislative actions, have also been referred to as governance feminists.¹⁵¹ Radical feminists view women using the law for themselves as a direct challenge to the male hierarchy integral to our legal system.¹⁵² If women do not use the law because they view it as unhelpful to them, men's domination over women remains unchallenged.¹⁵³ Thus, for these femi-

¹⁴⁵ See *id.* at 14–15, 26.

¹⁴⁶ See *id.* at 24–25.

¹⁴⁷ See *id.* at 26. According to Melissa Farley, “[W]e [abolitionist] feminists think that women in prostitution deserve the right NOT to prostitute.” Moreover, “[w]herever prostitution thrives, sex trafficking does too.” Farley, *Unequal*, *supra* note 138. To MacKinnon there is no difference between sex trafficking and prostitution because “sex trafficking is for the purposes of prostitution.” Pamela Foohey, *Trafficking, Prostitution, Pornography: A Play in Three Acts*, THE HARV. REC., Oct. 12, 2007, available at <http://www.hlrecord.org/2.4463/trafficking-prostitution-pornography-a-play-in-three-acts-1.578020>. She would call prostitution “sex for sale,” thus equating prostitution with the illicit sex trafficking. *Id.*

¹⁴⁸ See Outshorn, *supra* note 11, at 153; see also JANET HALLEY, *SPLIT DECISIONS* 29 (Princeton Univ. Press 2006) [hereinafter HALLEY, *SPLIT DECISIONS*].

¹⁴⁹ Abolishing prostitution is necessary for abolishing trafficking—both are achieved through legal action against the pimps and traffickers. See HALLEY, *SPLIT DECISIONS* at 29. MacKinnon believes that prostitutes should be decriminalized and seen as victims while their pimps and johns should be prosecuted. Akinbamidele, *supra* note 129; see also Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137, 170 (2004) (“The veneer of consent conceals the exercise of the customer's power free of responsibility and reinforces the already existing economic and social hierarchies.”).

¹⁵⁰ See Akinbamidele, *supra* note 129.

¹⁵¹ HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 20 (providing some examples of governance feminism: laws against sexual harassment, pornography, and sexual violence). Through alliances with social and religious conservative groups, governance feminists have made significant progress through legal reforms. *Id.* at 29.

¹⁵² See MACKINNON, *Power to Change*, *supra* note 132, at 107 (women's active use of the law to rectify their harm has demonstrated that the law, as it is, empowers the sex that created the law—men).

¹⁵³ See *id.*

nists, women's active use of legislative action and criminalization—both institutions of male domination and inequality—will ensure the abolition of prostitution.

Radical feminists also believe that laws against prostitution should be framed like sexual harassment laws because they view prostitution as an example of gender inequality.¹⁵⁴ Sexual harassment laws, according to radical feminists, place the harm “within the collective reality of gender,” thus giving the harm legal expression and legitimacy to public sanction.¹⁵⁵ By framing laws against prostitution in this way, radical feminists believe that gender-based laws against pimping will be more successful than the current Mann Act, which is outdated and has questionable legitimacy.¹⁵⁶

Also, since radical feminists view prostitutes as victims of gender-based violence, rather than as criminals, they believe that prostitutes should be able to receive funds under the Violence Against Women Act (VAWA) and other similar programs.¹⁵⁷ In addition, radical feminists see civil remedies for the harms inflicted on prostitutes as a form of empowerment because they give victims a sense of control and increase the likelihood of a successful outcome.¹⁵⁸ Radical feminists believe that the law can give women back the “humanity that the violation took away,”¹⁵⁹ and to them, this is what gives law the power to change.

B. *A Critical Approach to Prostitution Would Address the Possible Ramifications of Criminalization to Come to a Better Resolution*

Pro-sex feminists and critical and queer theorists like Janet Halley, who do not align themselves with radical feminists, believe that prostitutes are not necessarily subordinated in society because they are women.¹⁶⁰ Instead, they believe that radical feminism relies too heavily on

¹⁵⁴ See Balos, *supra* note 149, at 149 (explaining that the “focus on consent obscures the larger issue of gender inequality that underlies and fuels the sex trafficking and prostitution industries”).

¹⁵⁵ See MacKinnon, *Everyday Life of Women*, *supra* note 113, at 40.

¹⁵⁶ See Hanna, *supra* note 8, at 24. MacKinnon “believes prostitution should be a sexual law and not a criminal law.” Akinbamidele, *supra* note 129. “[U]nder criminal law, all partners involved, especially the prostitutes, are held accountable as criminals. . . . I don’t think everyone in prostitution should be a criminal. . . . They are being bought and sold for sex, as victims, it’s outrageous.” *Id.* Under MacKinnon’s sexual law, prostitutes would be decriminalized and seen as victims while their pimps and johns would be prosecuted. *Id.*

¹⁵⁷ CATW Letter, *supra* note 1, at 1, 3–4.

¹⁵⁸ See MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 29; April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 253–56 (2007).

¹⁵⁹ MacKinnon, *Power to Change*, *supra* note 132, at 108.

¹⁶⁰ See Halley, *Sexuality Harassment*, *supra* note 13, at 89; Outshoorn, *supra* note 11, at 145–46.

the subordination theory—the belief that improving social welfare is achieved by undoing women’s subordination to men.¹⁶¹ This theory is typically deployed prescriptively, although it is not always practical or applicable to the situation.¹⁶² To Halley, feminism is not an indispensable part of an overarching theoretical structure of sexuality or gender.¹⁶³ Thus, to Halley, gender-based legislation, as with prostitution, may actually hurt rather than help women.

1. The Power of Theoretical Critique

When approaching an issue like prostitution, critical theorists believe that it is best to employ a number of theories or interpretations.¹⁶⁴ Through application of numerous theories and active critique of these theories, the social impact of a political or legal decision can be determined.¹⁶⁵ This is because theoretical critique is important to understanding how legalism can change and alter values and goals.¹⁶⁶ Through critique, the most practical and pragmatic uses of theories are applied, rather than the dogmatic adherence to one theory to the exclusion of all others.¹⁶⁷

This broader, more responsive approach to theory allows decision-makers to alter their goals and perception of reality throughout the decision-making process.¹⁶⁸ Accordingly, these decision-makers are situated “in the problem” and are not constrained because they are “in the theory.”¹⁶⁹ Halley writes, “Critique is thus a practice that allows us to scrutinize the form, content, and possible reworking of our apparent political choices; we no longer have to take them as givens.”¹⁷⁰ Therefore, with a critical approach to an issue, like prostitution, no theory is controlling,

¹⁶¹ See HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 4–6; LEFT LEGALISM/LEFT CRITIQUE, *supra* note 13, at 23–24.

¹⁶² See HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 5–6. This belief that one theory will tell us everything we need to know about morality or emancipation leads to the prescriptive deployment of that theory because it becomes the indispensable emancipatory aspiration. *Id.*; see also Bernstein, *supra* note 80, at 97–98 (discussing pro-sex feminism).

¹⁶³ See HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 5.

¹⁶⁴ *Id.* at 6–7.

¹⁶⁵ *Id.*

¹⁶⁶ LEFT LEGALISM/LEFT CRITIQUE, *supra* note 13, at 4.

¹⁶⁷ Halley concedes that one theory can be powerful and effective, but generally only when it is new because reality presents situations that do not jive with the theory, causing believers to “become paranoid and theory becomes dogma.” HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 6–7.

¹⁶⁸ *Id.* at 7.

¹⁶⁹ *Id.*

¹⁷⁰ LEFT LEGALISM/LEFT CRITIQUE, *supra* note 13, at 26–27 (“With critique, the goal is not to reveal the truth of or about a discourse, but rather to reveal ‘subterranean structures’ or aspects of a certain discourse.”).

and the best political or legal results are achieved through persistent inquiry.

2. Critiquing Feminism and the Issue of Prostitution

To Halley, one need not forget about feminism when approaching an issue like prostitution.¹⁷¹ Rather, it is best to utilize many theories of sexuality, including but not limited to feminism, in order to understand the realities of prostitution and to consider political goals that may not fit directly into feminism.¹⁷² For instance, sex work has roots in other theories of sexuality.¹⁷³ Thus, through the use of competing theories of sexuality, one comes to better understand the social relationships inherent in an issue like prostitution and the possible consequences of deciding whether it is socially good or bad.¹⁷⁴ Halley believes that “no one theory . . . is nearly as valuable as the invitation to critique . . . [since] [w]e decide immense questions of social distribution and social welfare—substantive, strategic, and tactical—when we commit to one of these theories over another.”¹⁷⁵ Thus, critique will lead to more responsible decision-making.¹⁷⁶ According to Halley, feminism, although helpful, is tied to a restricted view of sexuality, which may not be applicable to an issue like prostitution.¹⁷⁷

Therefore, Halley calls for conceptualizing sexuality and prostitution in broader terms than just male and female or dominant and subordinate. According to queer theory, for instance, “gender and power circulate far more complexly . . . than is thought in feminisms focused on woman’s sexual subordination.”¹⁷⁸ This is contrary to MacKinnon’s radical feminism, but it is a necessary shift according to Halley because MacKinnon’s policy choices concerning prostitution focus solely on the negative effects of male sexuality and deny female sexuality.

Moreover, MacKinnon fails to address gay, lesbian, and queer sexuality under her binary male/female structure.¹⁷⁹ For example, she believes that even homosexuality and homoeroticism can be fully explained under radical feminism.¹⁸⁰ To MacKinnon, “homosexuality is really fun-

¹⁷¹ See HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 10.

¹⁷² *Id.* at 8–10; see *id.* at 13–14 (“[F]eminism itself is internally riven and has seen parts of itself break off and become . . . something else.”).

¹⁷³ *Id.* at 8, 11.

¹⁷⁴ See *id.* at 8–9.

¹⁷⁵ *Id.* at 9.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.* at 320–21; Halley, *Sexuality Harassment*, *supra* note 13, at 100.

¹⁷⁸ Halley, *Sexuality Harassment*, *supra* note 13, at 100.

¹⁷⁹ *Id.* For instance, under MacKinnon’s theory, the wrong suffered by a sexually harassed man is the loss of masculine super ordination. In effect, he loses his gender and is feminized. See *id.* at 90.

¹⁸⁰ See HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 56.

damentally male/female gender all over again: the sex of one's sexual object choice is a 'powerful constituent' of one's gender"¹⁸¹ Gender is thus socially constructed where males are defined by their sexual dominance and women are defined by their sexual submission.¹⁸² Furthermore, sexuality is a structural distribution of power, which can explain homosexuality and homosexual relationships.¹⁸³ But Halley wants to move beyond discrete homosexual and heterosexual identities to notice both that sexual superordination and subordination can be complex objects of desire within particular configuration of bodies, genders, or homosexual and heterosexual identifications.¹⁸⁴ Therefore, with a broader definition of sexuality, a more complete set of orientations, desires, and their effects on social relationships can be considered.

Thus, to Halley, prostitutes who are autonomous actors, or are gay, lesbian, or bisexual, are not necessarily subordinated by male dominance in society. Instead, they can be understood as distinct from coerced prostitutes because they freely exercise their sexual autonomy and consent to prostitution.¹⁸⁵ Halley argues that MacKinnon's theory is inadequate to evaluate specific effects and defects of its legal projects concerning prostitution because it explains all forms of sexuality under feminism.¹⁸⁶ Because sexuality is central to women's subordination under MacKinnon's theory, this can lead to totalitarian regulatory projects.¹⁸⁷ To Halley, a broader notion of sexuality and the theories behind it will lead to a wider range of possible solutions for the problems inherent in prostitution.¹⁸⁸

3. Critical Theorists Believe State Inaction May be Wiser Than State Action

To many critical theorists and pro-sex feminists, the complete abolition of prostitution denies autonomous female agency and may cause un-

¹⁸¹ *Id.* at 57.

¹⁸² See Halley, *Sexuality Harassment*, *supra* note 13, at 83.

¹⁸³ See HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 57.

¹⁸⁴ Halley, *Sexuality Harassment*, *supra* note 13, at 94. But queer theorists would minimize the difference between same-sex eroticism and cross-sex eroticism, unlike gay identity theorists. *Id.* at 100.

¹⁸⁵ See HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 320–21; Outshoorn, *supra* note 11, at 145–46; see also Bernstein, *supra* note 80, at 110–14 (describing the seeming autonomy and enjoyment of high class sex workers); Melissa Ditmore, *Sex Work, Trafficking: Understanding the Difference*, RH REALITY CHECK, May 6, 2008, <http://www.rhrealitycheck.org/blog/2008/05/05/sex-work-trafficking-understanding-difference> (noting that sex workers can be male, female, or transgendered, and the services they offer in exchange for money varies. Their reasons for engaging in commercial sex acts also differ. But what distinguishes them is that they perform these acts voluntarily.).

¹⁸⁶ See Halley, *Sexuality Harassment*, *supra* note 13, at 13–14, 89; see also HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 193, 320–21.

¹⁸⁷ Halley, *Sexuality Harassment*, *supra* note 13, at 89.

¹⁸⁸ See *id.*

seen adverse effects for others.¹⁸⁹ This approach of radical feminists and their turn to the state and criminalization is contrary to the approach of queer and critical theorists, as well as pro-sex feminists.¹⁹⁰ To them, radical feminists' "absorption with legal strategies" means that the goals these feminists hope to achieve will be limited and misguided.¹⁹¹ Instead, these theorists and feminists propose a more inclusive solution that incorporates other disciplines and approaches beyond legislation and criminalization.

Halley notes that although radical feminists have made important progress, they can no longer follow feminism blindly. She believes that radical feminists must consider issues or arguments outside of the feminist construct¹⁹² because vindicating the rights of the minority may actually lead to a new dominant class.¹⁹³ To Halley, responsible governance requires divergence, or the utilization of numerous theories when addressing an issue.¹⁹⁴ A responsible governance approach requires divergence because the true effects of a law or theory are complex, multiple, and contingent.¹⁹⁵ According to Halley, radical feminists often fail to understand that these effects are "mutable, contestable entries into complex discursive and distributive systems."¹⁹⁶

Because legal projects, dependent upon legalism and liberalism, can lead to unforeseen consequences, critique is necessary to predict their adverse side effects. For instance, legalism conveys specific political be-

¹⁸⁹ See HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 20–21; Outshoorn, *supra* note 11, at 145–46. Chuang explained that with trafficking, it is best to "look[] beyond the criminalization paradigm to focus on strengthening labor and migration frameworks." Rosenblum, *supra* note 14, at 387.

¹⁹⁰ See HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 20. This governance legalism, which queer and pro-sex feminists resist, "[is the] kind of left legalism [that] seeks to involve the left directly in governance: once you win, you *are* the state." LEFT LEGALISM/LEFT CRITIQUE, *supra* note 13, at 10.

¹⁹¹ LEFT LEGALISM/LEFT CRITIQUE, *supra* note 13, at 5; see Anne Carline & Zoe Pearson, *Complexity and Queer Theory Approaches to International Law and Feminist Politics: Perspectives on Trafficking*, 19 CAN. J. WOMEN & L. 73, 100 (2007) (explaining that focusing only on legal reform of trafficking obscures the human rights issues implicit in trafficking).

¹⁹² See HALLEY, *SPLIT DECISIONS*, *supra* note 148, at 32–33.

¹⁹³ LEFT LEGALISM/LEFT CRITIQUE, *supra* note 13, at 10. Rather, critique would allow isolated groups previously silenced or excluded by constraining legal and political strategies to have a voice. *Id.* at 31.

¹⁹⁴ *Id.* at 34.

¹⁹⁵ See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 336 (2006) (providing various examples of these effects).

¹⁹⁶ LEFT LEGALISM/LEFT CRITIQUE, *supra* note 13, at 13. Foucault articulated that given the way powers of regulation operate and regulate extralegal and legal domains, the degree to which the modern liberal state itself can operate as micro power is underestimated. Law is prohibitory, but it is also managerial and normativising—often in ways indistinguishable from its juridical form. *See id.*

liefs and is not just a tool used for achieving goals outside of the political realm.¹⁹⁷ Halley cautions against strong state action because legal inquiry takes political questions off the table for debate and frames them so narrowly that creative discussions about collective society, values, and prohibitions cannot occur.¹⁹⁸ In sum, critical theorists caution against strong state action and believe instead that responsible governance can be achieved through non-legal means that focus on promoting human rights.¹⁹⁹

The use of legal remedies for gender subordination issues, like with prostitution, are examples of strong state action. Critical theorists believe these remedies have been improperly appropriated by restrictive sexual regulation.²⁰⁰ Halley links this to the failure of second-wave feminists to effectively change the social construction of women and men.²⁰¹ She believes that, with regulation, radical feminists give up on the project of revolutionizing gender in order to protect women from the effects of their subordination.²⁰² As a result, radical feminists end up defining women through those negative effects, instead of establishing women as equals of men.²⁰³ Thus, Halley believes that because not all women are inherently subordinated through prostitution, the radical feminist approach is unnecessarily broad.²⁰⁴ Instead, a “contestatory engagement of various feminisms with their gay identity and queer critiques”²⁰⁵ and non-legal means should be used because they are more effective responses to the issue of prostitution.

¹⁹⁷ *Id.* at 19.

¹⁹⁸ *Id.* at 19–20. Halley thinks it is better to “recover radically democratic political aims from legalism’s grip in order to cultivate collective political and cultural deliberation about governing values and practices.” *Id.*

¹⁹⁹ *Id.* at 19. See Carline & Pearson, *supra* note 191, at 114 (instead of sanctions and penalties). Halley has remarked, “The criminalize-or-liberate model occludes law as management . . . law as a series of disparate consequences—and blocks out or defers a more consequentialist vision of what law is all about.” Rosenblum, *supra* note 14, at 383. To Halley, getting criminalization is “a victory of some feminists over other feminists, which you could either like or not like.” *Id.*

²⁰⁰ LEFT LEGALISM/LEFT CRITIQUE, *supra* note 13, at 20.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* Halley and Brown point out that the feminist’s legal project—to prove that sexuality is subordinating women especially—may be contrary to the political project of showing that women are men’s equals, in that they cannot be “reduced to their gender” through an unwanted sexual touch or word. *Id.*

²⁰⁴ Janie Chuang explained that Third World feminists view Third World women as victims “incapable of choice” and this “[t]his criminalization paradigm masks the complex interaction of globalizing trends and gender-based discrimination that cause women to undertake risky labor migration projects in the first place.” Rosenblum, *supra* note 14, at 382. She agrees with Halley to “seek a more critical engagement with the power wielded by feminists in the trafficking context.” *Id.*

²⁰⁵ Halley, *Sexuality Harassment*, *supra* note 13, at 103.

IV. THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS REAUTHORIZATION ACT OF 2008: AN UNEVEN COMPROMISE

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA of 2008) is a laudable piece of legislation because it increases the United States' efforts against human trafficking worldwide, provides increased penalties for traffickers and their accomplices, and ensures greater support for their victims.²⁰⁶ Further, this Act does not deny sex workers agency or autonomy.²⁰⁷ The TVPRA of 2008, however, represents an uneven compromise between two previous competing versions of the William Wilberforce Trafficking Victims Protection Reauthorization Act, H.R. 3887 and S. 3061.²⁰⁸ The failings of the TVPRA of 2008 are based in part on the failure of Congress to reconcile these two bills and to reach a consensus that ensures the protection of all victims of human trafficking—not just foreign-born and child domestic trafficking victims—but adult domestic trafficking victims as well.

A. *The H.R. 3887 and S. 3061 Controversy*

In December 2007, the House of Representatives passed a TVPA reauthorization bill (H.R. 3887) that was an appropriate response to years of under-prosecution of pimps, the inability of local law enforcement to handle these cases, and the increase of commercial sexual exploitation of women and children in the United States.²⁰⁹ When H.R. 3887 was presented in the Senate, the Senate Judiciary Committee considered it and, as explained earlier, significantly modified its provisions.²¹⁰ The Senate made this decision, in part, because it was under pressure from both the Department of Justice (DOJ) and the American Civil Liberties Union (ACLU) not to pass the bill.²¹¹ The DOJ viewed H.R. 3887 as an invasion of state and local rights while the Erotic Service Providers Union and the ACLU opposed the bill because they believed it conflated

²⁰⁶ See TVPRA of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified in scattered titles of the U.S.C.); Taina Bien-Aime, HUFFINGTON POST, *Still Time to do the Right Thing*, Sept. 22, 2008, http://www.huffingtonpost.com/taina-bienaime/still-time-to-do-the-right_b_127870.html [hereinafter Bien-Aime, *Still Time to do the Right Thing*].

²⁰⁷ TVPRA of 2008 does not create a crime of prostitution, but rather focuses on the actions of pimps and customers. See Christa Hillstrom, *A Way Out: Stalled Federal Legislation Targets the Pimps*, WINDY CITIZEN, Aug. 24, 2008, <http://www.windycitizen.com/news/the-loop/2008/08/24/one-way-out>.

²⁰⁸ See 154 CONG. REC. H10888-01 (Dec. 10, 2008) (statement of Rep. Berman).

²⁰⁹ See H.R. 3887, 110th Cong. (1st Sess. 2007).

²¹⁰ See S. 3061, 110th Cong. (2d Sess. 2008); *supra* notes 15–18 and accompanying text.

²¹¹ Miller, *supra* note 10; see Benczkowski, DOJ Letter, *supra* note 17.

prostitution with sex trafficking.²¹² Accordingly, they believed that H.R. 3887 impermissibly affected women who chose to engage in prostitution as a profession. S. 3061 thus significantly changed numerous provisions in H.R. 3887.²¹³

H.R. 3887 would have made federal anti-trafficking enforcement more effective and efficient.²¹⁴ Most significantly, it provided harsher penalties for both international and domestic traffickers. H.R. 3887 repealed the existing provision that required adults to have been trafficked for commercial sex acts through force, fraud, or coercion.²¹⁵ It also made the traffickers' acts of force, fraud, or coercion a basis for enhanced punishment, thereby making it easier to prosecute traffickers.²¹⁶ This provision represented the integration of the Mann Act, with its lower burden of proof, into the existing trafficking framework.²¹⁷

H.R. 3887 also instructed the Attorney General to draft a model statute for states to adopt in order to combat trafficking at the local level.²¹⁸ This model statute included amendments related to the use of force, fraud, or coercion in sex trafficking as the bases for aggravated crimes or sentencing enhancements, not as requirements for convictions.²¹⁹ Also, under H.R. 3887, traffickers could no longer claim that they did not know the victim's true age to mitigate their punishment for trafficking minors.²²⁰ This further aligned the prosecutions of traffickers with the prosecutions of other sex crimes against children.²²¹

²¹² See Press Release, ACLU, ACLU Hails Senate Markup of Trafficking Victims Protection Reauthorization Act (July 31, 2008), available at <http://www.aclu.org/womensrights/gen/36230prs20080731.html>; Miller, *supra* note 10.

²¹³ See S. 3061.

²¹⁴ See Bien-Aime, *Still Time to do the Right Thing*, *supra* note 206.

²¹⁵ H.R. 3887, 110th Cong. § 221(a)(2) (1st Sess. 2007).

²¹⁶ H.R. 3887 established and provided penalties for the crimes of "sex trafficking" and "aggravated sex trafficking," which apply to both domestic and international traffickers. See *id.* § 221(a)(1). Sex trafficking is the inducement or enticement of an individual to engage in prostitution. See *id.* § 221(f). On the other hand, aggravated sex trafficking is the recruiting or transporting of a person through force, fraud, or coercion, or that of a minor by any means, to cause them to engage in a commercial sex act from which the person benefits financially. See *id.* § 221(a)(1).

²¹⁷ The new crime of sex trafficking was to be codified in the Mann Act. The House would also have amended the Victims of Crime Act to provide compensation for all victims of a crime under the Mann Act. See *id.* § 221(f); ALISON SISKIN & CLAIRE RIBANDO SEELKE, CONGRESSIONAL RESEARCH SERVICE, SELECT DIFFERENCES BETWEEN S. 3061 AND H.R. 3887, 3-4, 8, June 24, 2008, available at www.lexisnexis.com/documents/pdf/20090504045649_large.pdf.

²¹⁸ H.R. 3887 § 224(a).

²¹⁹ *Id.* The federal government cannot combat trafficking alone; strict state laws are needed as well. See Maloney, *supra* note 10, at xviii.

²²⁰ H.R. 3887 § 221(a)(1).

²²¹ POLARIS PROJECT, ANALYSIS OF H.R. 3887 AND S. 3061, July 2008, available at <https://www.polarisproject.org/images/docs/final%20polaris%20analysis%20of%20hr%203887.pdf>

Furthermore, H.R. 3887 made sex tourism a separate offense, defined as the procurement or enticement and financial benefit from the travel of another person in order for them to engage in a commercial sex act.²²² Thus, tour operators could be prosecuted if the commercial sex acts were illegal in the United States, even if they were legal in the destination country.²²³ Finally, the House bill required the DOJ to conduct the study on the illegal commercial sex industry in the United States, as required under the TVPRA of 2005.²²⁴ The House's enhancements of the TVPA were sensible reactions to the inability of local law enforcement to curb domestic trafficking in the United States.

On the other hand, S. 3061, which also amended the TVPA, was not as broad as H.R. 3887. S. 3061 did not increase the United States' fight against the domestic trafficking of United States citizens and lawful permanent residents.²²⁵ S. 3061, likewise, did not increase the penalties for traffickers or simplify the prosecution of pimps in the United States.²²⁶

S. 3061 did create new penalties for third-party beneficiaries of trafficking and for those who obstruct or attempt to obstruct the prosecution of trafficking cases.²²⁷ Unfortunately, unlike H.R. 3887, it did not include a provision eliminating the requirement of force, fraud, or coercion for the prosecution of traffickers or for the state model statute to include a similar provision.²²⁸ Furthermore, S. 3061 only lowered the standard for whether a trafficker of a minor knew the victim's age from knowledge to "reckless disregard," which would permit traffickers to defend the charges on the basis of not knowing the victim was a minor.²²⁹ Similarly, S. 3061 included a provision that would only allow prosecutions of sex tourism when the commercial sex act was illegal in the jurisdiction where it occurred.²³⁰ Lastly, the Senate bill did not require the DOJ to complete the studies mandated by the TVPRA of 2005.²³¹

87%20and%20s%203061.pdf [hereinafter POLARIS PROJECT, ANALYSIS OF H.R. 3887 AND S. 3061].

²²² H.R. 3887 110th Cong. § 221(g) (1st Sess. 2007).

²²³ POLARIS PROJECT, ANALYSIS OF H.R. 3887 AND S. 3061, *supra* note 221; *see* H.R. 3887 § 221(g).

²²⁴ H.R. 3887 § 232.

²²⁵ *See* Ben-Aime, *Still Time to do the Right Thing*, *supra* note 206 ("[H.R. 3887] targets pimping and traffickers, which in turn will help prevent sex trafficking and protect its victims, which in turn will help us become effective leaders in combating human trafficking. [S.3061] will not accomplish this goal.").

²²⁶ *See* 154 Cong. Rec. H10888-01 (Dec. 10, 2008) (statement of Rep. Berman).

²²⁷ *See* S. 3061 110th Cong. § 222 (2d Sess. 2008).

²²⁸ POLARIS PROJECT, ANALYSIS OF H.R. 3887 AND S. 3061, *supra* note 221.

²²⁹ *See* S. 3061 § 222(b); POLARIS PROJECT, ANALYSIS OF H.R. 3997 AND S. 3061, *supra* note 221.

²³⁰ S. 3061 § 222(g).

²³¹ POLARIS PROJECT, ANALYSIS OF H.R. 3997 AND S. 3061, *supra* note 221.

B. *TVPRA of 2008*

The TVPRA of 2008 represents a consensus between H.R. 3887 and S. 3061.²³² The TVPRA of 2008 drew from the similarities between these two bills and provides alternative provisions where the bills diverged.²³³ Its passage marked a new era in the federal government's campaign against human trafficking because of its emphasis on preventing domestic trafficking, in addition to international trafficking.

For instance, the TVPRA of 2008 includes the H.R. 3887 provision stating that a domestic or international trafficker of a minor cannot claim ignorance of the victim's age as a defense.²³⁴ The TVPRA of 2008 provides that this defense is not available to any defendant who had "reasonable opportunity to observe" the victim or disregarded that the victim was forced to engage in a commercial sex act.²³⁵ The TVPRA of 2008, however, incorporates the Senate's "reckless disregard" standard as to knowledge of a trafficking victim's age for other interested parties, such as brothel landlords, who did not have a reasonable opportunity to observe the victim.²³⁶ Notably, no proof of force, fraud, or coercion is necessary for convictions of traffickers of minors and their accomplices.²³⁷ Thus, prosecutions of sex traffickers of minors will be easier under the TVPRA of 2008 than under previous reauthorizations of the TVPA.²³⁸

Unfortunately, evidence of force, fraud, or coercion is still required for the prosecutions of adult domestic traffickers.²³⁹ The TVPRA of 2008, however, lowers the standard of proof from "knowing" to "reckless disregard" so that persons who are willfully blind to trafficking victims who are coerced or abused will not escape prosecution.²⁴⁰ The

²³² See 154 CONG. REC. S10886-01 (Dec. 10, 2008) (statement of Sen. Leahy).

²³³ 154 CONG. REC. H10888-01 (Dec. 10, 2008) (statement of Rep. Berman).

²³⁴ See TVPRA of 2008 § 222(b)(5), 18 U.S.C.A. § 1591(c) (West 2009).

²³⁵ *Id.*

²³⁶ See TVPRA of 2008 § 222(b)(5), 18 U.S.C.A. § 1591(a)(2).

²³⁷ See *id.*

²³⁸ This is because "nonviolent and psychological coercion," such as the exploitation of a drug addict or the use of drugs, will qualify as coercion. See POLARIS PROJECT, THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008: SUMMARY OF IMPORTANT PROVISIONS 6, <http://www.polarisproject.org/images/elements%20of%20tvptra%202008%20public%20final.pdf>.

²³⁹ See TVPRA of 2008 § 222(b)(3), 18 U.S.C.A. § 1589(a); Julie Marie Lopiccolo, *Where are the Victims? The New Trafficking Victims Protection Act's Triumphs and Failures in Identifying and Protecting Victims of Human Trafficking*, 30 WHITTIER L. REV. 851, 876-77 (2009); see also Margaret Maffai, *Accountability for Private Military and Security Company Employees that Engage in Sex Trafficking and Related Abuse While Under Contract With the United States Overseas*, 26 WIS. INT'L L.J. 1095, 1133 (2009).

²⁴⁰ TVPRA of 2008 § 222(b)(3), 18 U.S.C.A. § 1589(b) (West 2009).

TVPRA of 2008 also clarifies the definition of coercion.²⁴¹ It states that the use or threat of “serious harm” refers to both physical and nonphysical harms and is supposed to be subjectively construed when determining whether the coercion was sufficient to overcome a victim’s will.²⁴² Similarly, the TVPRA of 2008 clarifies that “abuse or threatened abuse of law or legal process” means the use or threatened use of law or a legal process (administrative, civil, or criminal) to pressure another person to do or not do something.²⁴³

Also, the TVPRA of 2008 followed S. 3061 by criminalizing the obstruction of trafficking investigations, conspiring to engage in trafficking, and benefiting financially or receiving anything of value from any federal trafficking crime.²⁴⁴ This last provision applies broadly to defendants who “recklessly disregarded” the fact that victims were forced, defrauded, or coerced.²⁴⁵ It applies to sex trafficking crimes, as well as forced labor crimes.²⁴⁶

Finally, the TVPRA of 2008 improves financial disgorgement provisions to ensure that traffickers do not benefit from their criminal activities and that their gains go directly to their victims.²⁴⁷ It also mandates a number of reports, including the TVPRA of 2005 report on illegal, commercial sex acts in the United States,²⁴⁸ and it increases the number of services available to United States citizens who are victims of human trafficking.²⁴⁹

²⁴¹ For the crimes of forced labor or commercial sexual activity, there is a requirement to show threat of “serious harm” or a scheme, plan, or pattern used to make a victim believe that such harm would occur. 154 CONG. REC. H10888-01 (Dec. 10, 2008) (statement of Rep. Berman); *see* TVPRA of 2008 § 222(b)(3), 18 U.S.C.A. § 1589(c)(2).

²⁴² *See* TVPRA of 2008 § 222(b)(3), 18 U.S.C.A. § 1589(c)(2). This coercion also includes the “various and subtle forms of coercion used by traffickers in light of the experiences of prosecutors and non-governmental organizations in combating trafficking and assisting victims.” 154 CONG. REC. H10888-01 (Dec. 10, 2008) (statement of Rep. Berman). The forms of coercion used by traffickers include: “isolation, denial of sleep and punishments, or preying on mental illness, infirmity, drug use or addictions (whether pre-existing or developed by the trafficker).” *Id.*

²⁴³ *See* TVPRA of 2008 § 222(b)(3), 18 U.S.C.A. § 1589(c)(1).

²⁴⁴ *See* TVPRA of 2008 § 222(b)(6), 18 U.S.C.A. §§ 1593A, 1594(a–c).

²⁴⁵ *See* TVPRA of 2008 § 222(b)(6), 18 U.S.C.A. § 1593A.

²⁴⁶ *See* TVPRA of 2008 § 222(b)(6), 18 U.S.C.A. § 1593A (West 2009).

²⁴⁷ *See* TVPRA of 2008 § 221, 18 U.S.C.A. § 1593(b)(4).

²⁴⁸ *See* TVPRA of 2008 §§ 213, 237, 22 U.S.C.A. § 7105, 28 U.S.C.A. § 534 (West 2009).

²⁴⁹ The TVPRA of 2008 authorizes HHS and DOJ to establish new programs to provide services for U.S. citizens who are victims of severe forms of trafficking, and it reauthorizes funding to establish residential programs for minor victims. *See id.* § 213, 22 U.S.C.A. § 7105(f). Also, in 2008 HHS led a U.S. Domestic Trafficking in Persons Notification Pilot Program. The Notification Pilot Program aimed to increase public awareness and victim assistance for U.S. citizen and legal permanent residents. The U.S. Domestic TIP Notification Pilot Program, however, did not confer benefits on victims or provide a determination of TIP victim

C. *TVPRA of 2008 Noticeably Leaves Adult Domestic Trafficking Victims Out of Its Reforms*

The TVPRA of 2008 is only a first step toward addressing domestic trafficking because it demonstrates that the federal government still does not view the domestic trafficking of adult victims as a serious federal issue.²⁵⁰ Although much of the TVPRA of 2008 is based on H.R. 3887, Congress' failure to include the criminal provisions of H.R. 3887 negating the force, fraud, or coercion requirement significantly hinders its effectiveness.²⁵¹ In order to receive federal social services, adult domestic victims must still cooperate with federal authorities in their attempt to successfully prosecute traffickers, but child domestic victims and foreign-born victims do not.²⁵²

The TVPRA of 2008 does not require proof of force, fraud, or coercion for minor victims and for some foreign trafficking victims.²⁵³ Since domestic and foreign minors are inherently incapable of consenting to their abuse, in order to successfully prosecute their traffickers, they do not have to overcome a high burden of proof or cooperate with law en-

status. See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT, *supra* note 72, at 67–68.

²⁵⁰ “The U.S. government has not yet taken full responsibility for eliminating human trafficking within its own borders.” Maffai, *supra* note 239, at 1133. Yet in 2008, the DOJ reported that, between January 2007 and September 2008, U.S. citizens made up sixty-three percent of all alleged sex trafficking victims and almost seventy-five percent of all sex trafficking suspects. In comparison, United States citizens made up only four percent of all labor trafficking victims and about thirty percent of all labor trafficking suspects for that same period. Also, the majority of reported human trafficking cases involved sex trafficking, and over ninety percent of all trafficking victims were female. See U.S. Dep't of Justice, Bureau of Justice Statistics, *More than 1,200 Alleged Incidents of Human Trafficking Reported in the U.S.*, Jan. 15, 2009, available at <http://bjs.ojp.usdoj.gov/content/pub/press/cshti08pr.cfm>. But this number may be larger. See U.S. DEP'T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. GOV'T DOMESTIC ANTI-TRAFFICKING IN PERSONS EFFORTS, TRAFFICKING IN PERSONS REPORT (2008), available at www.state.gov/g/tip/rls/tiprpt/2008/105385.htm (“An unknown number of American citizens and legal residents are trafficked within the country primarily for sexual servitude . . .”).

²⁵¹ Instead, most of the criminal provisions in the final bill came from S. 3061. See Charles Doyle, *The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457): Criminal Law Provisions*, CONGRESSIONAL RESEARCH SERVICE 3, Jan. 29, 2009, available at http://assets.opencrs.com/rpts/R40190_20090129.pdf.

²⁵² “To be confirmed in the HTRS [Human Trafficking Reporting System], the case must have led to an arrest and been subsequently confirmed by law enforcement, or the victim must have received a special non-immigrant Visa classification, as provided under the 2000 TVPA.” U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *supra* note 250. *But see* Haynes, *supra* note 104 (arguing that victim services should be provided even if the case against the trafficker is not strong enough to go to trial and regardless of whether the victim is certified).

²⁵³ See TVPRA of 2008 § 201, 8 U.S.C.A. § 1101 (West 2009); see Jones, *supra* note 2, at 332 (“The cooperation requirement underwent a legal transformation that currently makes victims participation a less rigid demand, and therefore, the remedies of the T-Visa are theoretically available to more victims.”).

forcement.²⁵⁴ Similarly, the TVPRA of 2008 does not make cooperation with law enforcement a requirement for foreign victims in order to receive a T-visa, which means that they have access to federal services, even if they are unable to cooperate with authorities.²⁵⁵ Accordingly, the receipt of housing, protection, and assistance for child domestic trafficking victims and some foreign victims is not contingent upon the successful prosecution of their traffickers.²⁵⁶ These individuals only need to be identified as trafficking victims. As minors, all children who are trafficked are deemed trafficking victims.²⁵⁷ Similarly, because foreign victims fit into the dominant definition of “trafficking victim,” it is easier for them to obtain unconditional protection and support.²⁵⁸

Although the force, fraud, and coercion standard has been diminished slightly under the TVPRA of 2008, the burden of proof still lies with adult domestic trafficking victims to prove force, fraud, or coercion.²⁵⁹ Since adult victims are often viewed by law enforcement as criminals, the prosecution of their pimps is difficult and rarely pursued, thus preventing them from receiving rehabilitative or protective services.²⁶⁰ Furthermore, traffickers often do not need to use force, fraud, or coercion because their victims are already traumatized and vulnerable to trafficking due to exigent circumstances such as sexual abuse, poverty, or drug addiction.²⁶¹ These victims are often “lured, enticed, or deceived

²⁵⁴ See Lopiccolo, *supra* note 239, at 880 (referring to the waiver of the force requirement for minors in the TVPRA of 2008 by stating, “[t]here is no equivalent provision for adults, which is unfortunate, since prosecutions are low regardless of the age of the victim”).

²⁵⁵ Foreign trafficking victims who are unable to cooperate due to psychological or physical trauma may be exempted from the cooperation requirement. See TVPRA of 2008 § 201, 8 U.S.C.A. § 1101.

²⁵⁶ See *id.*; Lopiccolo, *supra* note 239, at 880.

²⁵⁷ See Micah N. Bump, *Treat the Children Well: Shortcomings in the United States’ Effort to Protect Child Trafficking Victims*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 73 (2009).

²⁵⁸ See Jonathan Todres, *Law, Otherness, And Human Trafficking*, 49 SANTA CLARA L. REV. 605, 654 (2009).

²⁵⁹ See TVPRA of 2008 § 222, 18 U.S.C. § 1591; see Haynes, *supra* note 104, at 90–91 (noting the over-emphasis on prosecution while the TVPA claims to be primarily victim-centered).

²⁶⁰ See Adelson, *supra* note 72, at 122 (noting that U.S. citizens are not certified by HHS because they already have citizenship, but without certification, they cannot receive victim’s compensation). Most prostitution arrests in the United States are women and girls, not their pimps or johns. Kristof, *supra* note 77; see also Farley, *Unequal*, *supra* note 138 (commenting that the TVPA does not sufficiently protect domestic or international trafficking victims or target their predators, pimps, sex traffickers, and johns); Angela Bonavoglia, Op-Ed, *In Prostitution Raids, Let’s Remember Men Break the Law Too*, N.Y. DAILY NEWS, July 26, 2008, available at http://www.nydailynews.com/opinions/2008/07/26/2008-07-26_in_prostitution_raids_lets_remember_men_-2.html (explaining that in New York City, prostitutes are twice as likely to be arrested and ten times more likely to be convicted if charged).

²⁶¹ See *Successfully Prosecuting Sex Traffickers: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (Nov. 1, 2007) (statement of Dorchen A. Leidholdt, Founding Board Member, Coalition Against Trafficking in Women), available at <http://action.web.ca/home/>

into servitude” rather than overtly coerced by their pimps because they are likely to know or actually love their pimp.²⁶² Since the relationship with her pimp may make the woman appear complicit in her prostitution, it is difficult for prosecutors to prove force, fraud, or coercion in these situations.²⁶³ The pimp is, thus, generally not prosecuted, or he is charged only with a misdemeanor.²⁶⁴

Even when a victim has been subjected to force, fraud, or coercion, it may still be difficult for the victim to prove force, fraud, or coercion.²⁶⁵ Domestic trafficking victims often resist testifying against their trafficker because they fear for the safety of family members who may be targeted in retribution.²⁶⁶ They also often mistrust law enforcement or have bonded with their trafficker.²⁶⁷ Victims are offered few protections under the law so it is understandable that many refuse to testify. Yet, this refusal frustrates many domestic trafficking prosecutions since these rely heavily on victim testimony.²⁶⁸ Without a willing victim, these prosecu-

catw/readingroom.shtml?x=113289&AA_EX_Session=667e93e64846516b40e078c672a4b589.

²⁶² See Taina Bien-Aime, *Protecting Pimps and Traffickers*, HUFFINGTON POST, July 15, 2008, http://www.huffingtonpost.com/taina-bienaime/protecting-pimps-and-traf_b_112929.html; Kristof, *supra* note 77; see also Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 267 n.158 (2008) (noting that domestic underage prostitutes often resist helping the prosecution, seeing it as their choice; foreign trafficking victims, in contrast, are more likely to help out since they were forced into prostitution) (citation omitted).

²⁶³ Samir Goswami, director of policy and outreach for the Justice Project Against Sexual Harm, noted that because women often become romantically attached to their pimps in the beginning, they are perceived as complicit in their prostitution. Thus, “focusing prosecution on women’s willingness to participate is problematic and even detrimental to stopping traffickers.” Hillstrom, *supra* note 207.

²⁶⁴ See Jones, *supra* note 2, at 343–44; see also Hanna, *supra* note 8, at 23, 26; Louwagie, *supra* note 6.

²⁶⁵ See Letter from Coalition Against Trafficking in Women et al. to Senator Joseph Biden (Jan. 24, 2008), available at <http://www.equalitynow.org/english/campaigns/sextourism-trafficking/tvpa/biden.pdf> [hereinafter CATW, Biden Letter]; see also Nat’l Org. of Men Against Sexism, *NOMAS Supports Reauthorization of the Trafficking Victims Protection Act, H.R. 3887* (last accessed Jan. 3, 2009), available at <http://www.nomas.org/node/142> (noting that women are often too scared to testify or to try to prove what their trafficker did to them).

²⁶⁶ Equality Now, *Trafficking Victims Protection Reauthorization Act*, http://www.equalitynow.org/english/campaigns/sextourism-trafficking/tvpa/tvpa_en.html (last visited Jan. 3, 2010).

²⁶⁷ *Id.* Women are specifically taught not to cooperate with or to trust law enforcement. Berger, *supra* note 62. Moreover, a prostitute is more likely to give sexual favors to a police officer than to get arrested. Steven D. Levitt & Sudhir Alladi Venkatesh, *An Empirical Analysis of Street-Level Prostitution* 5, Sept. 2007 (Working Paper), available at <http://economics.uchicago.edu/pdf/Prostitution%205.pdf>.

²⁶⁸ See CATW, Biden Letter, *supra* note 265.

tions cannot go forward,²⁶⁹ and victims cannot receive the rehabilitative services they need.²⁷⁰

The difficulty of the force, fraud, or coercion standard is demonstrated by the fact that only a limited number of trafficking cases have been successfully prosecuted since the enactment of the TVPA in 2000.²⁷¹ Given that thousands of persons are trafficked into the United States each year and thousands more are trafficked within the United States, the overall number of prosecutions is exceptionally small.²⁷² Furthermore, most of these cases were brought under the Mann Act, which requires a lower burden of proof than the TVPA.²⁷³ The House of Representatives recognized this fact and incorporated the Mann Act into its criminal provisions.²⁷⁴ The House and numerous advocates for the bill

²⁶⁹ See *Successfully Prosecuting Sex Traffickers*, *supra* note 261.

²⁷⁰ “TVPA [funds] . . . are dedicated to assist non-U.S. citizen victims While U.S. citizen victims are statutorily eligible for other federal crime victim benefits, there is currently little data to assess the extent to which U.S. citizen trafficking victims are accessing the benefits for which they are eligible.” U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT, *supra* note 72, at 12. A recent report explains:

Trafficked persons should not be compelled to cooperate with law enforcement in order to access services and legal immigration status. Many trafficked persons are willing to cooperate in investigations and prosecutions. However, they should not be expected to do so until they are emotionally and financially stable, physically well, and safe. Even those trafficked persons who never feel able to cooperate with law enforcement deserve necessary services and legal protections.

SEX WORKERS PROJECT, *supra* note 73, at 9 (providing recommendations for the treatment of trafficked sex workers).

²⁷¹ There is some dispute over the exact number of prosecutions under the TVPA. See Bien-Aime, *Protecting Pimps and Traffickers*, *supra* note 262 (stating that there have only been 100 successful prosecutions since 2000). *But see* Berger, *supra* note 62 (stating that the TVPA has led to 196 cases with convictions against 419 people). From 2000 to 2008, DOJ and United States Attorneys’ Offices had prosecuted 531 defendants, attained 419 convictions and guilty pleas, and opened 998 new investigations. See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT, *supra* note 72, at 42; see Bump, *supra* note 257, at 90 (“[T]he absolute number of overall prosecutions remains relatively low, especially given the estimates of the total number of international trafficking victims entering the country each year.”).

²⁷² See Bien-Aime, *Protecting Pimps and Traffickers*, *supra* note 262; Norma Ramos, Esq., *Keynote Address: Addressing Domestic Human Trafficking*, 6 U. ST. THOMAS L.J. 21, 23–24 (2008) (explaining that the “requirement of force, fraud or coercion . . . rendered the TVPA an ineffective prosecutorial instrument,” and forced law enforcement to rely on the Mann Act).

²⁷³ Statement of Jessica Neuwirth, President, Equality Now, to the New York City Council (June 11, 2008), available at http://www.equalitynow.org/english/pressroom/press_releases/presidentstatement_20080613_en.html [hereinafter Statement of Jessica Neuwirth].

²⁷⁴ See Equality Now, *supra* note 66 (noting that the burden of proof requires a trafficker to merely have “persuaded, induced, or enticed” a victim into prostitution, which was “in or affecting interstate commerce”); see also Bien-Aime, *Protecting Pimps and Traffickers*, *supra* note 262 (incorporating the Mann Act language into the TVPA creates “a cohesive and strong anti-trafficking legislation and a good model for states”).

believed that lowering the burden of proof would lead to more successful prosecutions of sex traffickers, especially of domestic traffickers.²⁷⁵

D. *The Federal Government Must Realize that Adult Domestic Trafficking Victims are Entitled to the Same Services and Protection as Child Domestic Victims and Foreign Victims*

The force, fraud, or coercion requirement must be removed for *all* trafficking prosecutions because this would help federal, state, and local authorities prosecute traffickers and lead them to view adult prostitutes as domestic trafficking victims.²⁷⁶ Pimps would be more likely to be convicted, and their victims would be more likely to get the services they need.²⁷⁷ Furthermore, the addition of this provision would be consistent with a number of feminist perspectives because it would not “federalize prostitution,” harm sex workers, or diminish federal resources.²⁷⁸

The burden of proof should be placed on traffickers to prove that they are innocent, and the burden should not be placed on victims to prove that they resisted their traffickers’ actions.²⁷⁹ If victims are not required to prove force, fraud, or coercion, but only sex trafficking itself, then evidence used against them to show that they are “willing prostitutes,” such as marriage to their traffickers or signing a prostitution contract, would be irrelevant.²⁸⁰ Thus, since the testimony of these women is often considered “inadequate and unreliable” even where there is clear evidence of coercion,²⁸¹ removing this high burden of proof would likely

²⁷⁵ See Bien-Aime, *Still Time to do the Right Thing*, *supra* note 206; Press Release, Congresswoman Carolyn Maloney, N.Y. Gov’t Leaders, Activists Urge Strong Senate Bill to Curb Human Trafficking (Dec. 10, 2007), available at <http://maloney.house.gov/index.php?option=content&task=view&id=1519&Itemid=61>.

²⁷⁶ See Marisa Silenzi Cianciarulo, *What is Choice? Examining Sex Trafficking Legislation through the Lenses of Rape Law and Prostitution*, 6 U. ST. THOMAS L.J. 54, 75 (2009) (noting that the federal government says prostitution cannot be a freely chosen profession, but still requires proof of force, fraud, or coercion be present for an adult to be a victim of human trafficking).

²⁷⁷ “Legal scholars have noted that incongruities between state legislation and the TVPA may negatively impact a victim’s opportunity to receive federal benefits and protections.” Valerie S. Payne, Note, *On the Road to Victory in America’s War on Human Trafficking: Landmarks, Landmines, and the Need for Centralized Strategy*, 21 REGENT U. L. REV. 435, 445 (2009). If they pursue state remedies, they may miss out on federal benefits.

²⁷⁸ See Bien-Aime, *Protecting Pimps and Traffickers*, *supra* note 262 (noting that the DOJ had yet to present “coherent supporting arguments”). *But see* Jennifer Podkul, *The Danger in Defining: An Activist Speaks Out on Trafficking*, FEMINISTING, <http://www.feministing.com/archives/009338.html> (last visited Jan. 3, 2010) (arguing that forcing the federal government to investigate prostitution cases will harm law enforcement’s ability to investigate trafficking cases because of its already limited resources). *See also* Haynes, *supra* note 104, at 93–94.

²⁷⁹ *See Successfully Prosecuting Sex Traffickers*, *supra* note 261.

²⁸⁰ *See id.*

²⁸¹ Matt Richtel, *Sex Trade Monitors A Key Figure’s Woes*, N.Y. TIMES, June 17, 2008, at A12; *see* Jones, *supra* note 2, at 348–49 (noting that these women face severe social prejudice,

lead to more successful prosecutions of traffickers.²⁸² The traumatic horrors these women endure should alter how the government approaches the prosecution of traffickers, as well as how it assists these women with aid and support.²⁸³

Congress needs to realize that many pimps are actually traffickers and that the crime of pimping must be incorporated into the human trafficking legislative framework.²⁸⁴ By incorporating the Mann Act, the connection between pimps, covered by the Mann Act, and human traffickers, covered by the TVPA, would be clearer.²⁸⁵ Law enforcement would be trained, accordingly, to recognize and address sex trafficking networks at all levels.²⁸⁶ Federal, as well as state and local governments would recognize that women and children are being trafficked within the United States and would provide them with the support they need.²⁸⁷

and juries and prosecutors often view them as assuming the risk, as liars, or as unequal before the law).

²⁸² See CATW Letter, *supra* note 1, at 2 (arguing that the force, fraud, or coercion standard actually makes traffickers increase their violence and abuse towards their victims to prevent them from testifying against them); Richtel, *supra* note 281.

²⁸³ See *Successfully Prosecuting Sex Traffickers*, *supra* note 261 (“Given that the average age of entry into prostitution in the United States is 12–14 years old, this high burden of proof disproportionately falls on adult victims who are traumatized or intimidated by their pimps to not testify against their pimps or traffickers.”); Janice Shaw Crouse, *Polarizing Viewpoints on Sex Trafficking*, Concerned Women for America, July 30, 2008, available at <http://www.cultureandfamily.org/articledisplay.asp?id=15572&department=BLI&categoryid=>; see also Brief for the Coalition Against Trafficking in Women, *supra* note 141, at 9 (“[I]t must also be kept in mind that prostituted children grow up to be prostituted adults.”); Hanna, *supra* note 8, at 12 (“Thus, even arguments about the autonomy of adult prostitutes are questionable given the age at which most enter the industry.”).

²⁸⁴ See Donna M. Hughes, *Combating Sex Trafficking: A Perpetrator-Focused Approach*, 6 U. ST. THOMAS L.J. 28, 48 (2008) (noting that “[t]he broader discussion of trafficking-related offenses should acknowledge that pimping is sex trafficking” because the definition of pimping at the state and federal level is almost the same as the federal definition of sex trafficking. Also, anti-pimping laws are in all 50 states and most have a lower burden of proof than the TVPA.”); Statement of Jessica Neuwirth, *supra* note 273. A federal policy against all forms of human trafficking must be formulated so that no one state can become a safe harbor for pimps by continuing to have laws that local law enforcement fails to enforce or laws that do not sufficiently address adult domestic trafficking. See Adelson, *supra* note 72, at 125.

²⁸⁵ See CATW, Biden Letter, *supra* note 265; see also Donna M. Hughes, *Wilberforce Can Free Again: Protecting Trafficking Victims*, Mar. 12, 2008, NAT’L REV. ONLINE, <http://www.article.nationalreview.com/351239/wilberforce-can-free-again/donna-m-hughes> (“By defining prostitute recruitment as sex trafficking . . . [the federal government] will send a message that all pimping-related activities are illegal.”).

²⁸⁶ Hughes, *supra* note 285.

²⁸⁷ See Joe Markman, *Rescued But Still in Peril; Child Prostitution Victims Free in October Crackdown Aren’t Getting the Help They Need, Experts Say*, L.A. TIMES, Dec. 8, 2009, at A26 (“[D]omestic victims are shortchanged by the attention authorities and advocacy groups give to the illegal importation of foreign prostitutes.”). To expand trafficking to include adult domestic victims would draw attention to the breadth of commercial sexual exploitation in the United States and apparent hypocrisy as it gains acclaim as a leader in the anti-trafficking movement. See Kari Lydersen, *Satisfied Sex Worker or Domestic Trafficking Victim?*, ALTERNET, May 8, 2008, <http://www.alternet.org/reproductivejustice/84748/>.

This provision would also strike a compromise between the different feminist responses to prostitution. If the TVPA would use the criminal provision from H.R. 3887, the federal government would demonstrate that it agrees with radical feminists that prostitution is modern day slavery²⁸⁸ and that the majority of women working as prostitutes in the United States do so against their will.²⁸⁹ Thus, this provision would decriminalize the prostitute's actions while prosecuting the pimps and johns.²⁹⁰ This would also ensure that our government treats its own citizens with the same respect it treats foreign trafficking victims.²⁹¹

By making sex trafficking a separate offense, which incorporates the crime of domestic and international trafficking, the federal government would not impermissibly conflate prostitution with sex trafficking. Removing the requirement of proof of force, fraud, or coercion is not at odds with the pro-sex feminist approach to prostitution because it would not make prostitution a federal offense.²⁹² It would not target all women in prostitution, but would focus only on the parties who profit or benefit from sex trafficking—pimps, traffickers, and johns.²⁹³ Thus, while persons who induce or entice prostitutes will be prosecuted, the women themselves would not be.²⁹⁴ This provision also would not represent a

²⁸⁸ See MacKinnon, *Prostitution and Civil Rights*, *supra* note 12, at 16 (stating that prostitution is a violation of these women's rights under the Thirteenth Amendment).

²⁸⁹ See Statement of Jessica Neuwirth, *supra* note 273 (noting the overlap between prostitution and sex trafficking: "While it is true that not all women in prostitution have been trafficked, it is also true that all sex trafficking victims are trafficked into prostitution."); see also ESTES & WEINER, *supra* note 22, at 7 ("55% of street girls engaged in formal prostitution about 75% of which are pimp controlled."); SEX WORKERS PROJECT, *supra* note 73, at 7.

²⁹⁰ See H.R. 3887 110th Cong. §§ 221(a)(1), (f) (1st Sess. 2007); see also Kaigh, *supra* note 111, at 151 (agreeing that decriminalizing prostitution might be a better means to end sex trafficking). The House's provisions do not legalize prostitution outright because legalization creates a façade of legality that permits traffickers to prosper by acting undetected by law enforcement. The demand for women and children for commercial sexual exploitation also increases. Conversely, when brothel owners and clients are prosecuted aggressively, like in Sweden, the number of prostitutes and johns decreases. See FARLEY, *supra* note 10, at 207–08.

²⁹¹ McClain, *supra* note 142, at 598; see Clinton, *supra* note 7 ("Trafficking weakens legitimate economies, breaks up families, fuels violence, threatens public health and safety, and shreds the social fabric that is necessary for progress. It undermines our long-term efforts to promote peace and prosperity worldwide. And it is an affront to our values and our commitment to human rights.").

²⁹² See Statement of Jessica Neuwirth, *supra* note 273 (noting that there is no crime of prostitution in the criminal provisions of H.R. 3887).

²⁹³ Therefore, their actions are not criminalized, but their pimps and customers actions are criminalized. See Schwartz, *supra* note 262, at 242–43 (explaining that the Mann Act deals specifically with traffickers in . . . prostitutes (pimps, madams, etc.)).

²⁹⁴ See *id.*; see also Hillstrom, *supra* note 207 (erasing the requirement of proving force, fraud, or coercion penalizes third parties who benefit from prostituting the women, in other words, pimps).

moral judgment against the women who enter prostitution voluntarily, as previous federal policies have in the past.²⁹⁵

In addition, because only the largest domestic trafficking cases would be pursued, removing this high burden of proof would not divert funds from international trafficking victims.²⁹⁶ Carolyn B. Maloney, a Congresswoman from New York, supported H.R. 3887's criminal provisions because "[w]e want to crack down on sex trafficking, and DOJ can allocate its resources to go after the most serious cases."²⁹⁷ The House, thus, was merely reacting to the questionable legitimacy of the Mann Act and leaving open the possibility of federal domestic trafficking prosecutions.²⁹⁸ Although domestic trafficking was not the initial impetus for the TVPA, it is as important as international trafficking, and the federal government must address it.²⁹⁹

Lastly, by easing prosecutions of domestic traffickers and identifying more domestic trafficking victims, these victims would be better able to access federal social services. This is consistent with the critical theorist approach that non-legal means should be used to combat domestic trafficking.³⁰⁰ By addressing the socio-economic reasons behind many women's decision to enter prostitution, and providing them with the appropriate social services, more women would be able to leave the sex industry if they so choose.³⁰¹ Both radical and pro-sex feminists con-

²⁹⁵ See Ditmore, *supra* note 69 (referring to the misuse of the Mann Act in the past to target promiscuous women). Only those women who need help, i.e., are coerced prostitutes, will get help. H.R. 3887's criminal provisions do not "equate each instance of adult prostitution to a form of modern-day slavery" or ignore "whether the individual in question is free to leave or not." *But see* Podkul, *supra* note 278 (arguing that the House "equates each instance of adult prostitution to a form of modern-day slavery . . .").

²⁹⁶ John R. Miller, a public policy scholar at the Woodrow Wilson Center and former State Department ambassador at large on modern slavery, believes that the Justice Department that opposed H.R. 3887 knew that only the largest pimps would be prosecuted and not every case of prostitution as it feared. Miller, *supra* note 10. Though expensive to carry out, prosecutors have strong incentives to bring trafficking cases—good publicity and strong support from the President. Bump, *supra* note 257, at 79–80.

²⁹⁷ Jerry Markon, *Anti-Human Trafficking Bill Would Send FBI Agents on Trail of Pimps*, WASH. POST, Nov. 29, 2007, at A5.

²⁹⁸ See Hanna, *supra* note 8, at 24; *see also* Ditmore, *supra* note 69 (noting that the Mann Act was used for politically motivated prosecutions, like those involving interracial couples or Communist sympathizers); Ramos, *supra* note 272, at 24 (explaining that federal prosecutors still have prosecutorial discretion to decide which cases should be tried, but this would just open that number of possible cases since the burden of proof would be lowered).

²⁹⁹ There is no line between prostitution and trafficking because prostitution creates the demand for trafficking—the whole system must be confronted. Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 141–42 (2006).

³⁰⁰ Because the Mann Act alone does not provide social services to victims, integrating it with the TVPA will enable adult domestic victims to have access to more services. *Compare* 18 U.S.C. § 2421 (2006) with TVPRA of 2005 (codified in part at 22 U.S.C. §§ 7101–13).

³⁰¹ See Carline & Pearson, *supra* note 191, at 114. The 2009 TIP Report recognized, for the first time, the direct link between gender-based violence, domestic abuse, and human traf-

sider this an important first step that the government must take in its effort to eliminate coerced prostitution in the United States. By recognizing that, in reality, many women want to leave prostitution but cannot due to a lack of supportive and protective services, the federal government would help those women who chose to leave prostitution while still allowing other women to continue to work as sex workers.

CONCLUSION

As long as the federal government fails to treat adult domestic trafficking victims as human trafficking victims, their plight will not change. Although it is admirable that states are providing services and protection to domestic trafficking victims, these efforts are not enough. The problem of human trafficking is increasing, and only through swift federal action can it be dealt with effectively. The TVPRA of 2008 is a first step toward addressing the issue of domestic trafficking. Perhaps with future reauthorizations of the TVPA, the federal government will finally send a clear message to pimps that they can no longer act with impunity and that they will be treated as felons. By removing the force, fraud, or coercion requirement for all trafficking prosecutions, the prosecution of traffickers will be easier and more common. Furthermore, the women that pimps force into prostitution will be treated as victims, not as criminals, and they will receive the services they need to leave prostitution, if they so desire. Domestic trafficking is a form of human trafficking and must be addressed as such in order to protect the human rights of the women involved. Only by addressing the needs of both child and adult victims of domestic trafficking will the federal government achieve its goal of fighting all human trafficking while still respecting the autonomy and self-determination of women.

ficking. It also recognized “push factors,” like economic need and gender discrimination, that make women vulnerable to trafficking. See U.S. DEP’T OF JUSTICE, TIP REPORT, *supra* note 28, at 41; U.S. Dep’t of Justice, Confronting Human Trafficking at Home and Abroad, <http://www.ovv.usdoj.gov/internationalissues.htm> (last visited Jan. 3, 2010).