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# FEMINIST LEGAL THEORY AND HUMAN TRAFFICKING IN THE UNITED STATES: TOWARDS A NEW FRAMEWORK

CYNTHIA L. WOLKEN\*

## I. INTRODUCTION

Human trafficking is modern day slavery. Over the past decade, policy makers in the United States have begun to recognize human trafficking as a distinct act, rather than lumping trafficking into one of its associated acts such as immigration violations, labor law violations, prostitution or other peripheral crimes. In 2000, Congress passed the Trafficking Victims Protection Act (TVPA), one of the purported goals of which was to protect victims by creating a special “T-Visa” that would permit them to leave their oppressors without being deported.<sup>1</sup> This legislation, by the government’s own admission, was a colossal failure in providing meaningful assistance to those who had been actually or virtually enslaved and exploited for their sex or labor.<sup>2</sup> Two crippling yet inevitable problems emerged when compassion, which demands inclusion, collided with the exclusionary barriers that comprise United States immigration policy: we<sup>3</sup> failed to reach a

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1. See Trafficking Victim’s Protection Act, Pub. L. No. 106-386, §§ 1-2004, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 18, 22, 27, and 42 U.S.C.). It is interesting to note that the goal of assisting victims is listed *last* in the TVPA’s statement of purpose, which states, “the purposes of this division are to combat trafficking in persons . . . to ensure just and effective punishment of traffickers, and to protect their victims.” Trafficking Victim’s Protection Act § 102.

2. See U.S. DEP’T OF JUSTICE, ASSESSMENT OF U.S. GOV’T ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 4 (2004), available at [http://www.usdoj.gov/crt/crim/wetf/us\\_assessment\\_2004.pdf](http://www.usdoj.gov/crt/crim/wetf/us_assessment_2004.pdf) [hereinafter DEP’T OF JUSTICE 2004 ASSESSMENT]. I use the distinction between “sex” and “labor” only because this language has been foisted on the human trafficking framework to subordinate “labor” to “sex” trafficking and present them as distinct categories. As I discuss later, they are anything but and the distinction blurs to the point of near irrelevance.

3. I use the pronoun “we” to acknowledge the widespread responsibility — and collective relative failure — of *all* of the above professions to adequately identify victims. Human trafficking victims are for the most part hidden, transient, and invisible to society. Therefore, the ability to identify and help victims must exist across institutions. First points of

significant number of victims and made it almost impossible for those we did reach to meet the criteria for obtaining help.<sup>4</sup>

While government agencies report inconsistent statistics on the number of T-Visas granted to trafficking victims, it is clear that between the passage of the TVPA in 2000 and March 2005, less than 500 T-Visas were granted.<sup>5</sup> This number is in stark contrast to the estimated 14,500 to 17,500 people trafficked into the United States each year.<sup>6</sup> This means that, at best, less than 3.5% of victims are able to gain access to the system and receive meaningful assistance. In this paper, I explore how we know the current framework is failing, why it is failing and what can be done to improve it.

In Section II, I outline and summarize our current social and political attitude toward global human trafficking, which almost completely fixates on sex trafficking to the exclusion of other forms of exploitation. In Section III, I examine the dangerous effects this framework has on identifying and assisting trafficking survivors in this country. While the work of some scholars in the human trafficking arena has made the connection that over-emphasizing sex trafficking de-emphasizes agricultural and domestic trafficking, I go further and analyze the ways in which feminist legal theory has contributed to — and helped create — this problem and explore ways in which it can help us move past this narrow emphasis. It should be noted that, similar to legislation addressing prostitution, pornography, violence against women and almost any instance “sex” and “women” have been mentioned together in any law, human trafficking has also mobilized and created strange bedfellows. Alliances between conservative male Christian traditionalist legislators and both pro-sex and anti-sex

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contact for victims can include law enforcement officers, health care providers, social service providers, legal aid attorneys, religious leaders, and many others.

4. This tension is not unique to the TVPA and the T-Visa. The inclusion/exclusion dynamic most significantly emerged in the provisions for self-petitioning in the Violence Against Women Act. *See* 8 U.S.C. § 1154(a) (2004). That law still ties a woman’s right to be free from violence to her batterer’s immigration status. Perhaps the anti-immigrant Congressmen who demanded this provision were concerned about “rewarding” an undocumented domestic violence survivor simply for her capacity to be beaten, or did they feel women would flock here from all parts of the world with the most sadistic men they knew with the hope that they might survive torture and then petition for lawful residence? The effect of this policy of exclusion winning out over one of compassion is that the most vulnerable victims — undocumented women with almost no legal or enforceable rights to begin with — remain invisible.

5. *See* Hussein Sadruddin, Natalia Walter & Hose Hidalgo, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 392-93 (2005).

6. *See* DEP’T OF JUSTICE 2004 ASSESSMENT, *supra* note 2, at 9.

feminists are the norm; unfortunately, the current feminist frameworks currently winning in the lobby are contributing to ineffective policies for protecting trafficking victims. The dangerous consequence of these policies is that most victims are left unable to access relief.

Human trafficking does not occur in social and political isolation. When the circumstances that allow for and support the forceful theft of human labor are deconstructed, human trafficking is squarely located within the larger context of workers' rights, immigrant rights and *human rights*. The extreme exploitation that is human trafficking would not be possible without the less recognized, more insidious exploitation of women and racial minorities that takes place in our communities everyday without challenge or consequence. If those who make and carry out policy are purposefully failing to make this connection, it is largely because we have allowed it. No longer should the largest vulnerable population of victims in the United States, migrant farm workers, be ignored simply because including them in the dialogue would inevitably require a larger discussion on race, nationality and our failed immigration policy. It is certainly our obligation — and well past time — to begin this discussion.

Feminist legal theory has historically struggled to incorporate the marginalized, and in many cases further pushes them to the fringe. I chose to write this article as a voice for those who are being left out of the discourse and to explore the adequacy of a feminist legal theory framework to bring them back into focus. I am writing this article in response to all those who, upon learning of my anti-trafficking program for rural agricultural states, ask only about the Russian women in seedy brothels that they are sure must be in their town or city, rather than the person who might be mowing their lawn, building their house, or harvesting their food. But most of all, I am writing this article for all of the Latino migrant workers to whom I have provided outreach who could not even begin to identify a trafficking situation because they understand an employer's use of force, fraud or coercion — the elements of a typical trafficking situation — as simply an occasional occupational hazard they must endure for the privilege of working.

## II. YOU CAN'T FIND WHAT YOU AREN'T LOOKING FOR

It is general knowledge among experts and practitioners dealing with trafficking that women trafficked for sex account for a small percentage of the total victims of trafficking in the United States, and that young Caucasian women account for an even smaller portion of this number. Nevertheless, legal scholars, lawmakers, advocacy groups and the media have consistently used an eroticized version of the female “sex slave” to justify and garner public support for anti-trafficking legislation. In this often-played out scenario, a beautiful, young and helpless eastern-European woman is made to embody not only *sex* trafficking, but *human* trafficking as a whole.<sup>7</sup> This disproportionate focus on trafficking for sex work is evident in every step of the federal TVPA, from the Congressional testimony supporting the bill<sup>8</sup> to the statutory construction<sup>9</sup> and implementation

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7. See *Lured from Latvia, Sex Slave Tells Story*, CHI SUN-TIMES, Aug. 18, 2002, at 20 (chronicling the experience of a twenty-three year old “attractive” woman with a “pretty face” trafficked from Latvia for sex work in a downtown Chicago brothel). This article inspired widespread national outrage and led to federal involvement in the form of the largest Department of Justice grant to any city in the country to combat trafficking. See Press Release, Dep’t of Justice, Justice Department Announces Grant to Assist Victims of Trafficking (Feb. 25, 2003) (awarding a total of \$1,164,397.00 to the Heartland Alliance for Human Needs and Human Rights to provide outreach, education, and services in the Chicago area). See also Press Release, The White House, Office of the Press Sec’y, President Announces Initiatives to Combat Human Trafficking (July 16, 2004) (in which President Bush references the “documented cases of Latvian girls trafficked into sexual slavery in Chicago”).

8. *Trafficking of Women and Children in the International Sex Trade: Hearing on Pub. L. No. 106-386 Before the Subcomm. on Int’l Operations and Human Rights, H. Int’l Relations Comm.*, 106th Cong. (Sept. 14, 1999). This fixation on sex trafficking is not unique to Congress and has emerged in state legislatures across the country considering anti-trafficking legislation. For example, in my testimony before the Montana Senate and House Judiciary Committees in support of Senate Bill 385, Criminalizing Involuntary Servitude and Trafficking in Persons, I focused almost exclusively on the plight of my female clients brought to the United States by their abusive spouses and purposely excluded mention of exploited migrant farmworkers. *An Act Criminalizing Involuntary Servitude and Trafficking in Persons, Hearing on S.B. 385 Before the H. Comm. on Judiciary*, 2007 Leg., 60th Sess. (Mont. 2007) (statements of Cynthia Wolken, Attorney, Mont. Legal Services), available at <http://data.opi.mt.gov/legbills/2007/Minutes/House/Exhibits/juh56a02.pdf>. *An Act Criminalizing Involuntary Servitude and Trafficking in Persons, Hearing on S.B. 385 Before the S. Comm. on Judiciary*, 2007 Leg., 60th Sess. (Mont. 2007) (statements of Cynthia Wolken, Attorney, Mont. Legal Services). Audio recordings of my testimony before both the Montana Senate and Montana House Judiciary Committees are also available through the Montana State Legislature website. See 2007 Regular Session Committee Minutes, Senate Standing Committees, Judiciary, February 22, 2007, <http://legtalk.state.mt.us/Archives/minutes/2007/Senate/JUS/070222JUS.rm> (last visited May 14, 2007); 2007 Regular Session Committee Minutes, House Standing Committees, Judiciary, March 16, 2007, <http://legtalk.state.mt.us/Archives/minutes/2007/House/JUH/070316JUH.rm> (last visited May 14, 2007). This unfortunately necessary strategy was reaffirmed by the Senate Judiciary’s vote to table (kill) the bill upon the concern of one Senator that the prohibition from “causing

<sup>10</sup> of the subsequent law. For example, under the text of the TVPA, someone convicted of *sex* trafficking faces life imprisonment, while the crimes of forced labor, involuntary servitude, trafficking into servitude and debt bondage carry a significantly lesser punishment of up to twenty years.<sup>11</sup>

Sex trafficking victims are to the anti-trafficking lobby what white, middle-class women are to the domestic violence lobby — they “displace the ‘other’ as the presumed victim . . . primarily as a political appeal to rally white elites.”<sup>12</sup> Thus, this focus on sex work “permits white women victims to come into focus, but does little to disrupt the patterns of neglect that permitted the problem to continue as long as it was imagined to be a minority problem.”<sup>13</sup> In the case of trafficking, the “other” are those trafficked for non-sexual forms of exploitation, mainly agricultural and domestic work. That these victims are most likely people of color renders them not only more vulnerable, but both figuratively and *literally* invisible. While the Department of Justice has no problem compiling statistics on almost every aspect of trafficking, including country of origin, sex and age, it does not compile — or at least does not publish<sup>14</sup> — statistics on victims by race or type of

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financial harm to a person or using financial control over any person” in the definition of ‘involuntary servitude’ could attach to virtually any employer-employee relationship. The bill was later revived and ultimately signed into law on April 5, 2007, after I vigorously and ultimately successfully lobbied the Senate Judiciary Committee to reconsider the vote tabling the bill by placing the focus back on exploited and abused immigrant women. For a detailed history of this bill, refer to the Montana State Legislature website. Montana Legislature, Detailed Bill Information, SB 385, [http://laws.leg.mt.gov/pls/LAWS07/law0210W\\$BSIV.ActionQuery?P\\_BILL\\_DFT\\_NO5=LC1700&Z\\_ACTION=Find](http://laws.leg.mt.gov/pls/LAWS07/law0210W$BSIV.ActionQuery?P_BILL_DFT_NO5=LC1700&Z_ACTION=Find) (last visited May 14, 2007).

9. In both the findings and substantive provisions of the TVPA, sex trafficking is given primacy over all other forms of trafficking. *See* Trafficking Victim’s Protection Act, Pub. L. No. 106-386, §2, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 18, 22, 27, and 42 U.S.C.); 22 U.S.C. § 7101(b) (2004). Despite what Congressional testimony might lead one to believe, it is necessary for the Act to state that “[t]rafficking in persons is not limited to the sex industry.” *See* 22 U.S.C. § 7101(b)(3).

10. According to the Department of Justice, in 2003, twenty out of the twenty-four prosecutions made under the TVPA were for sex trafficking. *See* DEP’T OF JUSTICE 2004 ASSESSMENT, *supra* note 2, at 28.

11. In addition, those convicted of forced labor and trafficking into servitude may be given a life sentence if the crime resulted in kidnapping, death or “*aggravated sexual abuse*.” *See* 18 U.S.C. § 1589 (2003) (emphasis added).

12. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1260 (1991).

13. *Id.*

14. I say not publish simply because collecting data on race and type of exploitation requires no further steps. I assume the data exist because statistical exclusion would be irrational. Unfortunately, because the Department of Justice’s methodology is unavailable, further analysis and critique is impossible.

exploitation.<sup>15</sup> The statistical compilation is therefore significant for both the information included as well as the information purposefully left out.

This phenomenon mirrors Kimberle Crenshaw's work addressing the purposeful refusal of the domestic violence lobby to give shape and voice to women of color experiencing domestic violence.<sup>16</sup> Those trafficked for exploitation not explicitly involving sex are likewise given no voice. In this paper, I apply theories of sexual subordination feminism and cultural feminism to the trafficking problem in this country. I explore the ways in which the sexual subordination framework's focus on sex marginalizes those trafficking victims who are not sexually abused and trivializes and obscures the experience of women who *are* trafficked into the sex trade. I identify the ways in which cultural feminism's theory of gender difference also fails victims of trafficking — in particular, by stigmatizing women trafficked for “bad” sex and silencing the large percentage of women trafficked for domestic labor and men trafficked for agricultural labor in the United States. Through application and deconstruction, I hope to begin to conceptualize an alternate framework within feminism with which to adequately confront all types of trafficking in the United States.<sup>17</sup>

*A. The Price of Living in a Glass House: If you Can't Make the Numbers, Make them Up*

While the Bush Administration has prioritized combating global trafficking in persons, several challenges have emerged to prevent a comprehensive and adequate policy. These obstacles include the Administration's disregard for the human rights of citizens in other countries as well as our own and the lack of good data collected on the

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15. However, the Department of Justice's estimate of women trafficked for sex globally, a percentage that is admittedly much higher than in the United States, comprises only thirty-three percent of total human trafficking. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2006), available at <http://www.state.gov/documents/organization/66086.pdf> (noting that “of the estimated 600,000 to 800,000 men, women, and children trafficked across international borders each year, approximately 80 percent are women and girls”).

16. See Crenshaw, *supra* note 12.

17. This paper will not address the abolitionist versus non-abolitionist view of the legalization of prostitution and the exploitation of women. While this ongoing debate within the feminist movement is certainly interesting, both camps clearly unite on the trafficking issue, if for varying reasons.

problem in the United States.<sup>18</sup> The TVPA requires the State Department to monitor human trafficking in foreign countries and rank countries in order of their commitment and efforts to eradicate trafficking — tier one countries being the best and tier three the worst.<sup>19</sup> The responses of the United States to countries with poor rankings fall along a wide spectrum — ranging from public admonishment to substantial reduction in aid money.<sup>20</sup> However, by putting itself in a position of global leadership — and global judgment — the United States government has opened itself up to heightened scrutiny of its own trafficking problem. Foreign governments and non-governmental organizations have argued that United States citizens are among the most voracious consumers of trafficking — either directly as sex tourists or indirectly as corporations profiting from a complicated and insulated corporate structure built on exploited labor in developing countries.<sup>21</sup>

To maintain its position of global leadership on the issue of trafficking, the United States government has quietly reduced its estimate of the number of people trafficked in the United States each year — without any explanation of the disparity in its numbers. The TVPA of 2000 was passed after a comprehensive government assessment of the trafficking problem in the United States. Congress found that at least 700,000 people were trafficked globally and 50,000 women and children were trafficked into the United States each year.<sup>22</sup> However, according to the Department of Justice's 2004 report on government efforts to combat trafficking, between 600,000 and 800,000 people are trafficked across international borders each year, including between 14,500 and 17,500 people who are trafficked into

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18. Human trafficking victims are virtually invisible because they are rarely allowed contact with social or government institutions or members of the community. However, like any black market activity such as drug or arms smuggling, demographic and other information on the buying and selling of people and their labor *can* be better tracked and studied by the government with the proper funding and methodology.

19. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT (2005), available at <http://www.state.gov/g/tip/rls/tiprpt/2005/>. For perspective, tier one countries include Sweden, New Zealand and Canada, while tier three countries include Sudan, Saudi Arabia and North Korea. See *id.* at 42.

20. Most of these countries have no political clout in the international community, and those that do receive more deference from the Administration in both rankings and sanctions.

21. See *Examining U.S. Efforts to Combat Human Trafficking and Slavery: Hearing Before the S. Comm on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Property Rights*, 108th Cong. (2004) (statement of Wendy Patten, U.S. Advocacy Director, Human Rights Watch) (noting "it is imperative that the United States demonstrate its leadership on this critical human rights issue by doing all it can to provide protection and redress for trafficking victims here in the United States").

22. See Trafficking Victims Protection Act, 22 U.S.C. § 7102 (b)(1) (2000).

the United States.<sup>23</sup> In the span of just four years, even using the 2000 estimate that excluded male victims entirely, over 32,500 victims in the United States *simply disappeared* while global trafficking numbers remained steady. The Department of Justice, the Department of State and the Central Intelligence Agency all remain silent on the factors or methodology that led to this disparity in numbers. But one effect *is* clear: the re-estimation of the trafficking problem has allowed the United States to remain *the* self-proclaimed legitimate anti-trafficking police in the global arena, insulated from criticism. While the Department of Health and Human Services has initiated a well-funded Rescue and Restore Campaign aimed at finding and assisting victims, the federal law enforcement agencies' and State Department's convenient denial of the magnitude of the United States trafficking problem has frustrated this effort.

### *B. Voyeurism and Sex Entertainment in the Media*

Current portrayals of human trafficking in the media have completely marginalized victims who do not conform to the Hollywood-created mold of a victim's color, gender and country of origin. The media's portrayal of sex trafficking perfectly satiates the public demand for sexual violence using *education* as the perfect cover, and these portrayals only bolster the public's skewed image of sex trafficking as the primary form of trafficking.

A more nuanced and sensitive approach to the trafficking issue is apparently not to be found in the mass media, which thrives on salaciousness and oversimplification. The cable television Lifetime Network's recent made-for-T.V. mini-series is entitled *Human Trafficking*, but its content suggests a more apt title of *Sex Trafficking*.<sup>24</sup> The series follows the story of three girls sold into prostitution. Annie Gray is a perky, blond twelve-year-old on vacation with her family in Manila when she is kidnapped off the street and forced to participate in the sex tourism industry. Helena is a pretty twenty-something woman from Prague who is repeatedly raped and ultimately murdered by her captor. And then there is Nadya, the beautiful teenager from the Ukraine who believes she is coming to the

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23. See ATTORNEY GENERAL ALBERTO R. GONZALES, REPORT ON U.S. GOV'T EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2004 5 (2005).

24. *Human Trafficking* (Lifetime television broadcast Sep. 28, 2005). See generally *Human Trafficking*, <http://www.lifetimetv.com/movies/originals/humantrafficking.html> (last visited Feb. 7, 2007).

United States to model. Upon arrival, she is drugged, raped, and forced to participate in pornography. The film's focus throughout is entirely on young, beautiful, white females,<sup>25</sup> yet it purports to be a socially responsible documentary addressing not only all sex trafficking, but all *human* trafficking as well.

This approach can be reconciled with what we know about the customer — in this case Lifetime's viewers, who are typically white, middle-class women.<sup>26</sup> After all, while Lifetime had the laudable goal of raising awareness about trafficking, the Nielsons require an appropriate amount of sex and violence in order to appeal to the viewer. Numerous studies have confirmed what is obvious to the average media consumer: the portrayal of violence and sex in the media has been steadily increasing.<sup>27</sup> Almost two-thirds of television shows contain some sexual content.<sup>28</sup> In shows that talk about sex, sixteen percent include mention or description of sexual violence, including rape, incest, or prostitution.<sup>29</sup> As the Media Education Foundation notes:

Overwhelmingly, the stories mass media tell about men and about women are narrow and stereotypical. Men are primarily portrayed as aggressive, strong, independent and violent. And although feminism has succeeded in attaining diverse roles for women on television shows and in movies, female characters are still mainly valued for their appearance (*with extremely narrow definitions of beauty*), their (*hetero*)sexuality, and their passivity.<sup>30</sup>

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25. Some Asian child trafficking victims were shown briefly as a back-drop to Annie Gray's captivity, but the primary focus was at all times upon the three white female protagonists. *Human Trafficking*, *supra* note 24.

26. Sixty-eight percent of Lifetime's viewers are women. The network's major advertisers include Pier 1 Imports, Jenny Craig, Barnes and Noble, Slimfast and Lowe's. *See* About Lifetime, Advertise, <http://www.lifetimetv.com/about/advertise> (last visited Feb. 7, 2007).

27. *See* Kimberly M. Thompson & Fumie Yokota, *Violence, Sex, and Profanity in Films: Correlation of Movie Ratings with Content*, MEDSCAPE GEN. MED., Jul. 12, 2004, available at <http://www.medscape.com/viewarticle/480900>; *see also* DALE KUNKEL, ET. AL., KAISER FAM. FOUND., SEX ON TV 4 (2005), available at <http://www.kff.org/entmedia/upload/Sex-on-TV-4-Full-Report.pdf> [hereinafter SEX ON TV 4].

28. *See* DALE KUNKEL ET. AL., KAISER FAM. FOUND., SEX ON TV 3: TV SEX IS GETTING SAFER 14 (2003), available at <http://www.kff.org/entmedia/upload/Sex-on-TV-3.pdf>.

29. SEX ON TV 4, *supra* note 27, at 25-26.

30. *See* Kendra Olson, *Media Education & Preventing Sexual Violence*, MEDIA EDU. FOUND., 2003, available at <http://www.mediaed.org/news/articles/pdf/SVP>.

The mass media, through product packaging and marketing, has successfully blurred the line between legitimate public education that responsibly informs and sex entertainment that misleads. It is under this false cover of “education” that a middle-aged suburban couple, Lifetime’s typical viewers, can justify watching *Human Trafficking* even though the series most closely resembled a bondage pornography.<sup>31</sup> The “customers” in this dynamic are not the men on the screen but middle-class Americans coming home after soccer practice and grocery shopping to tune into countless shows depicting brutal sexual violence.

How many people would have tuned in for a mini-series called *Agricultural Trafficking*? Sex trafficking has everything — beautiful helpless girls, drugs, violence, sex and money — it is the voyeur’s dream come true. It is no wonder that the media both creates and perpetuates public focus and fixation on sex trafficking. The danger in this practice is that the ordinary members of society who are taking in these skewed images — ministers, social workers, postal carriers, etc. — are the ones who could be of most help in identifying possible victims of trafficking if they received the right analytical tools. If their only concept of human trafficking is derived from what they see on the television, they will be primed only to ask questions when encountering the stereotypical — and less common — sex trafficking situation while failing to identify the presently invisible male victims or victims of color who might be working or living within blocks of them. That media portrayals are sensationalist and misleading is not surprising, but the real question is where can one go to find a more nuanced approach?

### C. Recycling Sex-Sationalism through Academia

Academics have likewise failed to address the full spectrum of trafficking victims, focusing almost exclusively on sex trafficking victims. Most legal articles addressing human trafficking substitute sex trafficking for human trafficking or speak in generalizations by considering the state of the law generally and advocating for a more “victims-centered” perspective. New scholarship should address the

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31. For example, one scene from *Human Trafficking* involves a seventeen year old girl who is dressed in leather, tied down on a bed, being raped brutally and repeatedly by a menacing older man (Nadya’s graphic pornography scene) and a sadistic gang-rape scene in the montage from the series. *Human Trafficking*, *supra* note 24.

many facets of human trafficking, especially labor trafficking, and this work should be included in flagship in addition to topical journals.

Unfortunately, nuance will not be found in academia, which also appears to be riding the wave of voyeuristic fixation on eastern European sex-trafficking victims. Consider, for example, *The Saga of Susannah*:

Susannah is pretty. She is a twenty-two year old unemployed factory worker desperately seeking work and barely surviving in Sarajevo. . . . Quite unexpectedly, a friendly old woman named Angel comes up to Susannah one day and speaks to her in a gentle tone. . . . Angel showers Susannah with compliments, tempts her with gifts, a drink, dinner in her home; and like a guardian angel, offers Susannah the opportunity of employment, prosperity, a visa, and a passport out of this life of misery. . . . Hungry and naive, Susannah agrees to come to Angel's apartment for dinner. . . . Halfway through the meal, Angel drugs Susannah and hands her over to another agent who appears out of nowhere and drives Susannah, unconscious, across the border.

When Susannah awakens the next day, she finds herself in unfriendly surroundings, in a brothel located in a foreign land where she is unable to speak the language. Worst of all, Susannah is now owned by a brutal man who forces her to work off a \$40,000 debt which he claims Susannah owes to his agency. . . . Once Susannah crosses the border, the trafficker confiscates Susannah's passport and visa, indicating that he will return her documents only when she finally works off the debt by sexually servicing up to twenty men a day in the brothel. . . . [T]he trafficker flings her into a room, orders ten of his thugs to gang rape Susannah in the course of an entire morning, and leaves Susannah there to lick her wounds without food or water for two more days.<sup>32</sup>

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32. Susan Tiefenbrun, *The Saga of Susannah – A U.S. Remedy for Sex Trafficking in Women: the Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV 107 (2002) [hereinafter *Saga of Susannah*].

The plot to a primetime crime drama? No, this is narrative from an article written by Susan Tiefenbrun, an Associate Professor at the Thomas Jefferson School of Law and one of the most prolific academics in the field of trafficking.<sup>33</sup> In her comprehensive analysis of the TVPA, Tiefenbrun acknowledges that its scope reaches other forms of trafficking,<sup>34</sup> yet her scholarship's focus throughout is unapologetically — and uncritically — focused on the horrors of sex trafficking.

To her credit, Tiefenbrun attempts to apply critical gender theory to sex trafficking, but only in noting the age-old controversy over the effects of the legalization of prostitution on the overall status of women. In a one-paragraph section entitled “Feminists Debate Sex Trafficking”, she writes:

Feminist legal scholars writing about sex trafficking typically fall into two distinct categories that reflect two different types of non-consensual prostitution. One group of feminist scholars, called neo-abolitionists, condemns both voluntary and involuntary prostitution on the theory that prostitution is never really entirely consensual and reduces all women to nothing more than pure sex objects. The other group of feminist scholars accepts the right of women to choose prostitution as a career and condemns sex trafficking only when the career choice is non-consensual or when the conditions imposed on a consensual sex worker are inhumane and unanticipated. These feminists argue that to condemn the right of consensual prostitutes to engage in their career of choice is to buy into a myth of the purity and innocence of women as dependent victims.<sup>35</sup>

Because human trafficking is *defined* by lack of true consent, the debate over agency and sexual ownership — although an interesting if

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33. Since 2001, Tiefenbrun has published four articles on the subject. See Susan W. Tiefenbrun, *Sex Sells But Drugs Don't Talk: Trafficking of Women Sex Workers*, 23 T. JEFFERSON L. REV. 199 (2001); *Saga of Susannah*; Susan Tiefenbrun, *Copyright Infringement, Sex Trafficking, and Defamation in the Fictional Life of a Geisha*, 10 MICH. J. GENDER & L. 327 (2004); Susan W. Tiefenbrun, *Sex Slavery in the U.S. and the Law Enacted to Stop it Here and Abroad*, 11 WM. MARY J. WOMEN & L. 317 (2005) [hereinafter *Sex Slavery*].

34. See *Sex Slavery*, *supra* note 33, at 327-30.

35. See *Saga of Susannah*, *supra* note 32, at 123-24.

well-worn theoretical tool for conceptualizing women's sexual ownership — is ultimately unhelpful as applied to sex trafficking.<sup>36</sup>

Most of the dozen or more articles make the common mistake of collapsing sex trafficking and human trafficking or speak in generalizations — giving an overview of the current state of the law or calling for a more “victims-centered” perspective.<sup>37</sup> However, a few articles have recently emerged that attempt to carve out space for a more critical and nuanced approach. In *Triply Exploited: Female Victims of Trafficking Networks — Strategies for Pursuing Protection and Legal Status in Countries of Destination*, Anne Marie Gallagher acknowledges the racial components that create push factors in countries of origin like Columbia and Nigeria, but then suggests that female sex trafficking victims should seek and be granted more rights than other victims under international law for “gender-related persecution.”<sup>38</sup> No one disputes that victims' existing legal rights should be located and enforced. Nevertheless, feminist legal theory must also recognize and explore the role of gender and race in trafficking situations without subordinating one to the other, as Gallagher encourages. If this approach requires a different domestic and international legal framework, then this is perhaps where the discussion should begin.

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36. It is, however, a great tool for understanding the *political* motivations behind the focus on sex-trafficking. The Christian Conservative (abolitionist) influence over the Bush Administration has been a major factor pushing its strong stance against sex trafficking both here and abroad. Examples include the restrictions on federal funding for contraception and AIDS prevention both domestically and abroad, as well the Department of Defense's new initiative to crack down on service members' patronization of prostitutes while stationed abroad. See John R. Crook, *General International and U.S. Foreign Relations Law: United States Lifts Some Sanctions on Libya*, 99 AM. J. INT'L 253, 264 (2005); see also Rick Maze, *The Pentagon to Tighten Penalties for Prostitution-Related Offenses*, NAVY TIMES, Oct. 4, 2004, at 30. In this context, the TVPA and the subsequent increase in support and funding for it are best understood as a large stick in a bundle of anti-sex, anti-sex work policies. For more on the Administration's twisted moral logic, see Edi C. M. Kinney, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS*, 21 Berkeley J. Gender L. & Just. 158 (2006).

37. See, e.g., Ivy C. Lee, *Mie Lewis, Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts*, 10 U.C. DAVIS J. INT'L L. & POL'Y 169 (2003); Anna Marie Gallagher, *Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination*, 19 GEO. IMMIGR. L.J. 99 (2004) (primary emphasis on female victims of sex trafficking); *The Trafficking Victims Protection Act*, 118 HARV. L. REV. 2180 (2005); *Sex Slavery*, *supra* note 33; Aiko Joshi, *Symposium on Sexual Slavery: The Trafficking of Women and Girls into the United States for Sexual Exploitation*, 13 HASTINGS WOMEN'S L.J. 31 (2002); Wendy M. Gonzalez, *Human Trafficking: Criminalization of Victims in the Sex Industry*, 11 BUFF. WOMEN'S L.J. 19 (2002-2003); Sadruddin, Walter, & Hidalgo, *supra* note 5.

38. Gallagher, *supra* note 37.

A more nuanced approach can also be found in some regional analyses of trafficking. In *Human Rights in the Sunshine State: A Proposed Florida Law on Human Trafficking*, the author acknowledges Florida's large population of *male* trafficking victims, explaining, "Florida has proven to be a mecca for this new industry in the trafficking of human beings. A state with a strong immigrant presence whose economy is largely dependent upon agricultural production, Florida represents an environment naturally conducive to labor exploitation."<sup>39</sup> Similarly, as practitioners in northern California, Mae and Lewis write about their experience with both men and female pacific-islanders exploited for their labor.<sup>40</sup> These accounts provide a richer and fuller understanding of the "who", "where" and "why" of human trafficking in the United States. Specifically, while large urban areas with a significant organized crime presence are the breeding grounds for international sex trafficking rings, these articles help identify the conditions that make people vulnerable to trafficking across other geographic areas and industries.

*Models Wanted: The Search for an Effective Response to Human Trafficking* is among the best critical articles written on human trafficking thus far<sup>41</sup> — rather than a survey of the current state of the law, it attempts to push practitioners and the legal community to do better.<sup>42</sup> Author Elizabeth Bruch, Professor and Director of the International Human Rights Law Clinic at American University, observes that "[t]he early emphasis on protecting white women now seems obviously racist and sexist" and calls for "a more nuanced understanding of the complexities of human trafficking and . . . expanded notions of individual agency to counter the current fixation on victimization and sexual exploitation" through "existing norms of

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39. Terry S. Coonan, *Human Rights in the Sunshine State: A Proposed Florida Law on Human Trafficking*, 31 FLA. ST. U. L. REV. 289, 290 (2004).

40. Ivy C. Lee & Mie Lewis, *Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts*, 10 U.C. DAVIS J. INT'L L. & POL'Y 169 (2003). Both authors work at Asian Pacific Islander Legal Outreach. Of three case stories, "Ana" was trafficking from Guatemala for housework in a boarding house, while "Mai" was trafficked from Vietnam to work at a factory in American Samoa. *See id.*

41. *See, also*, Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2980-81 (2006) (the author makes the connection between failed U.S. immigration policy and abysmal protections for migrant workers and the current epidemic of human trafficking in the U.S. She correctly observes that the "current anti-trafficking efforts are characterized by the presumptive criminality of prosecutions; a conflation of trafficking and prostitution; [and] a racially biased conception of trafficking . . .").

42. Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L L. 1 (2004).

nondiscrimination.”<sup>43</sup> While the field of scholarly writing has quickly filled for sex trafficking, I am calling for scholars to apply the same attention and passion to labor trafficking. Additionally, this work should be considered for publication in flagship journals rather than continue to be largely relegated to topical journals on immigration, international law, gender, etc.<sup>44</sup>

### III. SEXUAL SUBORDINATION FEMINISM AND HUMAN TRAFFICKING: “WELL, WERE YOU RAPED?”

Sexual subordination feminism, as articulated by Catharine A. MacKinnon, is particularly damaging to victims of human trafficking for several reasons. First, like the media and legal scholarship, subordination feminism focuses almost exclusively on sexual acts and presumes a male oppressor over a female victim. Second, subordination feminism marginalizes the “other”, including men and female trafficking victims who are not sexual slaves.

In subordination feminism, the sexual act is the primary transfer point of power and dominance. While critical of the essentialization of women as vessels of their sexual organs, this theory also simultaneously reinforces this essentialization in trafficking situations by focusing primarily and almost exclusively on lurid sex in seedy brothels. In addition, subordination feminism marginalizes the “other.”<sup>45</sup> With this focus on heterosexual “fucking”,<sup>46</sup> trafficked men are wholly excluded from this framework, as are women who are not forced into a sexual act by their traffickers. As Katherine M. Franke

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43. *Id.* at 3-4.

44. Only one flagship law journal has published an article on trafficking. In 2005, The Harvard Law Review included a general piece on the TVPA in its *Developments in the Law: Jobs and Borders* section. 118 HARV. L. REV. 2171, 2180 (2005). Due to the nature and complexity of human trafficking, scholarship on the issue could foreseeably fall within a number of topical legal categories, including race, gender, intersectionality, immigration, state and national legal reform, etc. While the benefits and limitations of publishing in a journal addressing these specific topics versus a flagship journal may be debated, there is no doubt that flagships allow authors to “reach a broader audience for their views.” See Laura A. Rosenbury, *Feminist Legal Scholarship: Chartering Topics and Authors, 1978-2002*, 12 COLUM. J. GENDER. & L. 446, 459 (2003).

45. Crenshaw, *supra* note 12, at 1241-42 (noting this process affects African Americans, other people of color, and gays and lesbians, among others).

46. What Janet Halley calls “sex2.” See Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE 80, 83 (Wendy Brown & Janet Halley eds., 2002).

summarizes, “For MacKinnon, all gender is always already about sexuality, and all sexuality is always already about gender.”<sup>47</sup>

In this way, subordination feminists ignore entirely common trafficking situations in which the trafficking victim and oppressor are of the same sex. For example, hundreds of African women are trafficked by World Bank and United Nations employees and enslaved in the Washington, D.C. area for domestic work,<sup>48</sup> and *thousands* of men are trafficked and enslaved to pick oranges and tomatoes in Florida. In the former situation, female heads of household often hold the dominant power positions over female domestic workers and inflict the most sadistic forms of coercion and torture. Similarly, growers’ *male* supervisors often isolate, threaten and beat the undocumented men trafficked for agricultural labor. Clearly, these power dynamics lie well outside the dominance-only-through-female-penetration-by-penis theory of subordination feminism.

In addition, MacKinnon’s dominance approach, in which *all* women lack agency, albeit to varying degrees, often trivializes the experience of women who have been trafficked and enslaved.<sup>49</sup> The TVPA defines “coercion” as: “threats of serious harm to or physical restraint against any person;” “any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;” or “the abuse or threatened abuse of the legal process.”<sup>50</sup> MacKinnon posits that all sex is rape because it is always a coercive act in which a man

47. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 198 (2001).

48. Under United States immigration law, diplomats and employees of certain international organizations such as the United Nations, the World Bank, and the International Monetary Fund may bring people from their country of origin to work in their household in the United States with a G-5, A-1, or B-1 visa. See 8 U.S.C. § 1184(b) (2006). Most of the 4,000 of these visas given annually go to employees in developing countries who are brought here to work as maids, chauffeurs, groundskeepers and nannies. With little or no oversight of the labor conditions these employees encounter in the United States, trafficking and slavery have become rampant. The Break the Chain Campaign in Maryland formed to assist these victims. See About the Break the Chain Campaign, <http://www.ipsdc.org/campaign/history.htm> (last visited Feb. 7, 2007). However, to date, the above organizations have rejected all proposals to provide better oversight of these domestic workers. The Campaign also correctly calls attention to the racism and classism evident in United States immigration law whereby au-pairs, who are largely young white nannies from European states, come to the United States under a J-1 visa, which provides much stronger worker protections and oversight mechanisms than those provided by the visas above. *Id.*

49. See CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-45 (1987).

50. Trafficking Victims Protection Act, 22 U.S.C. § 7102(2) (2003).

dominates a woman.<sup>51</sup> She creates a short continuum of male dominance through rape along which *all* women's sexual experiences must be located. In this way, she rejects any substantive definition of coercion that distinguishes between prostitution and sex trafficking, and thus allows for at least *some* agency for women.<sup>52</sup> The law is not meant to — or even able to — correct or redress amorphous cultural oppression taking into account the different ways in which women might be affected by patriarchal dominance-through-sex. By denying women agency over their bodies even in instances of prostitution or relationship sex where there is little or no coercion that the law even *can* identify, MacKinnon dis-empowers women who engage in sex work. Like her stance on sexual harassment and pornography, she rejects any requirement of actual harm and supports “[t]he idea that the legal claim of one woman flawlessly reveals the injury that male subordination and female subordination inflict on all women.”<sup>53</sup>

Subordination feminists would obviously see a difference between a married woman who has sex with her husband to please him although she is tired and would rather go to sleep, and a woman who is beaten, starved and locked in the basement of a brothel, forced to have sex with multiple partners without a condom and allowed no access to the outside world. However, the line is so blurred by MacKinnon as to be totally ineffectual in practical application — MacKinnon's definition of trafficking for sex would sound a lot like Justice Potter Stewart's infamous definition of pornography: “I know it when I see it.”<sup>54</sup> This is so dangerous precisely because people *don't* know other forms of trafficking when they see it because of the almost exclusive emphasis on sex.<sup>55</sup> Further, taking the above scenario, MacKinnon would place

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51. CATHARINE A. MACKINNON, *A Rally against Rape*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, *supra* note 49, at 81, 82 (asserting “I call it rape whenever a woman has sex and feels violated”); see also CATHARINE A. MACKINNON, *Sex and Violence*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, *supra* note 49, at 88 (stating that there is much violence in intercourse).

52. See Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13 (1993).

53. See Halley, *supra* note 46, at 86.

54. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

55. This is best evidenced by data on actual trafficking prosecutions. According to the U.S. Attorney General, 76.5% of all federal TVPA prosecutions brought in 2005 were for sex trafficking. U.S. Dep't of Justice, Attorney General's Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons FY 2006 16 (2006). TVPA prosecutions for sex trafficking are actually increasing on average over time — from 2001 through 2004, sex trafficking prosecutions represented 40%, 70%, 72.7%, and 88.5% of all TCPA prosecutions. *Id.* Logic tells us that, as with any crime, an increase in awareness of the existence of (the much more common) crime of trafficking and servitude for labor among law

the focus on what many sex trafficking victims have considered the *least* miserable part of their day — sex with a trafficker or “customer” as a reprieve from the other physical and mental tortures endured.<sup>56</sup> By denying any substantial degree of freedom and choice for sex for all women, MacKinnon denies agency in situations where a trafficked woman uses sex to negotiate for something of value to her and assumes that sex is the worst part of a victim’s oppression and pain. This approach is entirely inadequate and dangerously trivializes the experience of those women who are trafficked for sex work, while ignoring other trafficking victims.<sup>57</sup>

#### IV. IF SEXUAL SUBORDINATION FEMINISM IS PROBLEMATIC, IS CULTURAL FEMINISM THE ANSWER?

Cultural feminists believe that the female gender is distinct from its male counterpart, either by biology or social design. As applied to human trafficking, this framework leads to an overvaluation of the “female” that necessarily subordinates the experience of male trafficking victims. For the purposes of this paper, I will adopt Janet Halley’s definition of cultural feminism:

Cultural feminism holds that women have a distinct consciousness and/or culture. In some versions, this distinctiveness derives from their biological situations; in others, it emerges from their historical oppression by men. Some versions emphasize women’s reproductive experience; others focus on their situation in sexuality. What makes a feminism *cultural* feminist is not its position on the essentialist/social constructivist

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enforcement and the public would inevitable ‘trickle up’ to an increase in prosecutions for the ‘other’ *non-sex trafficking* cases.

56. Many of my clients who have endured physical, sexual, emotional and verbal abuse put a primary emphasis on the emotional abuse and controlling behavior to which they were subjected. While admittedly there is a shame and stigma associated with sexual abuse and thus often a reluctance to discuss it, it is telling that these women expressed feeling most violated by incidents that included severe name-calling and belittling, being kicked out of the home, prevented from any contact with family or being forced to work against their will.

57. It is interesting to note that in MacKinnon’s speech *Pornography and Trafficking* (of course, having nothing to do with *non-sex* trafficking), she expounds on the trafficking framework as merely another weapon in her anti-pornography arsenal and predictably blurs the degree of agency in trafficking victims’ participation in pornography and voluntary (has MacKinnon ever used this word outside quotations?) participants to non-existence. 26 MICH. J. INT’L L. 993 (2005).

divide, but its dedication to the propositions that women's feminine attributes amount to a consciousness or culture, that their consciousness or culture is improperly devalued, and that the reform goal is to revalue it upwards, until it has cultural status equal to or perhaps superior to the culture of men and maleness.<sup>58</sup>

Whether biologically determined or socially constructed, both essentialist and social constructionist theories of cultural feminism lead to the overvaluation of female gendered traits.<sup>59</sup> Thus, while I acknowledge real differences between the two theories, for purposes of this analysis, the theoretical and practical differences between essentialists and cultural constructionists are negligible.

Like sexual subordination feminism, cultural feminism locates moral superiority within the female gender, which has dangerous implications for trafficking victims, especially those who suffer at the hands of female enslavers, because it minimizes and ignores the often brutal exploitation of women by women. Essentialists believe women to be inherently more "moral" than men, as illustrated by the well-known sentiment, "If only women ran the world, there would be no war." Similarly, Halley points out how the attempts of social constructionists to revalue constructed female attributes upwards until they are valued equally with maleness creates a moral superiority similar to that held by essentialists. Because "[w]omen's subordination is a moral error . . . it has produced women's moral superiority to men" among both sexual subordination feminists and cultural feminists.<sup>60</sup> In fact, the view that women are morally superior to men is especially strong in subordination feminism.<sup>61</sup> The supposition is that men are not inherently "bad", but they have done something very bad — historically, constructing and maintaining a system of patriarchal dominance — for which they must be held morally responsible. This moral superiority is dangerous when, combined with a reluctance to intrude on a woman's private domestic sphere, it creates a society much less willing to identify and condemn *female* traffickers/enslavers of domestic workers.

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58. Halley, *supra* note 46, at 87-88.

59. As discussed below, the essentialist overvaluation is derived from the belief that women have inherently "good" characteristics that make the female gender superior, while social constructionists believe that the female gender must continue to be valued more than the male gender until the two are equal.

60. Halley, *supra* note 46, at 88.

61. *See id.*

In addition, cultural feminism's valuation of *the way women are or are constructed to be* creates constrictive binaries for gender performance that fail to acknowledge both women — and especially men — who are not trafficked for sex. Under this binary system, women are good, sensitive, care-giving and mothers, while men are aggressive, competitive, emotionally stunted and sexually insatiable. Women are relational. Men are autonomous. Women like foreplay and making love. Men like fucking. The labor women do as wives, mothers and daughters is spiritual and spiritually fulfilling.<sup>62</sup> The work in which men engage to financially support their wives so that they may engage in this spiritual work is cold, hard, rat-race wage-labor. As I explore later in the paper, these binaries created by cultural feminism ignore the thousands of trafficking victims whose experiences fall outside their narrow constructs.

One seeming benefit of applying cultural feminist theory to human trafficking is recognition of the female gender's special vulnerability to being trafficked, including women's tendencies to internalize rather than externalize abuse — especially emotional abuse — and their relational rather than autonomous nature that makes them more likely to stay and negotiate better conditions with their captor rather than risk flight.<sup>63</sup> These traits are thought to stem from “the emotional and psychological bond between mother and infant” and the fact that “[w]omen, more than men, depend upon relationships with others, because the weakest of human being — infants — depend on [women].”<sup>64</sup> However, when these assumed gendered vulnerabilities are deconstructed and applied to men trafficked into agricultural work, we find that these vulnerabilities are in fact *not* entirely gendered, but more a function of oppression and lack of power, shared by victims across gender and type of exploitation. Rather, the greatest determinates of vulnerability to trafficking are cultural and language barriers, undocumented status in the United States, and the socioeconomic situation of the victim in his/her country of origin.

In addition, like subordination feminists' focus on sex, cultural feminists and their maternalization of women fail victims in trafficking because in most trafficking situations reproduction is not even *possible*.

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62. See generally Dorothy E. Roberts, *Spiritual and Menial Housework*, in *FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER* 110-21 (Nancy E. Dowd & Michelle S. Jacobs eds., 2003) (characterizing and analyzing women's domestic labor as either spiritual or menial).

63. See Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN'S L.J.* 81, 139-45 (1987).

64. *Id.* at 140.

Men are obviously biologically incapable of giving birth and individuals trafficked for agricultural purposes are usually forced to live in isolated trailers or other block housing with other male victims. Furthermore, women trafficked into sex often have abortions and contraceptives forced upon them,<sup>65</sup> and women trafficked into domestic servitude are usually either past the age of conception or not allowed even incidental contact with anyone outside the home, much less sexual encounters.<sup>66</sup> Thus, although relationship and obligation to one's children motivate some to remain in trafficking situations in the hopes of earning money for their families abroad, these factors are not present in all situations, and are certainly not limited to the female gender. In the following sections, I will further expand my analysis of the failings of cultural feminism to further a nuanced understanding of trafficking for sex, domestic work and agricultural labor.

#### A. *Sex Trafficking: Worse Crime but Guiltier Victim?*

Cultural feminism's focus on the good sex/bad sex binary renders trafficking for sex more morally and criminally reprehensible than trafficking for domestic or agricultural work, which in turn perpetuates the maternalization and terrorization of women's bodies. This focus on good sex/bad sex affects law enforcement officers, who have been trained that prostitution is a serious moral and criminal act, and already have a heavily ingrained presumption of guilt against the sex trafficking victim. In fact, law enforcement agents *literally* "interrogate women with the question of whether they are for or against prostitution (and) whether a woman is for illegal sex or whether she is for legal, maternalized sex."<sup>67</sup> Our legal system also terrorizes victims of trafficking through our immigration enforcement and deportation processes. Finally, the moral inferiority of men in cultural feminism implicitly supports an emphasis on prosecution and punishment of the male perpetrator, subordinating the *woman's* suffering to his crime.

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65. Women are often given contraceptives to prevent pregnancy but not the contraction of sexually transmitted diseases. In many cases, they are forced to have sex without a condom at the request of the "customer."

66. Unless, of course, there is sexual abuse by the male head of household. As with the victims of sex trafficking, however, if pregnancy were to result in this situation, it would be in the best interest of the captor to prevent the pregnancy from reaching full term.

67. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1054 (1992).

Mary Joe Frug's scholarship explores the categorization of legal/illegal sex.<sup>68</sup> Legal sex "establish[es] marriage as the legal site of sex and that link[s] marital sex to reproduction by, for example, legitimating children born in marriage."<sup>69</sup> The flip side of this binary is that sex outside the framework of marriage is "bad" sex. While many women come to the United States believing they have been brought here to work in restaurants, bars, or other "legitimate" businesses, some women also believe that they are coming here to perform some type of sex work, from stripping to giving massages to having sex with many men. What distinguishes this sex work from a trafficking situation is that the women will control not only the time, place and type of act, but they will receive a fair share of the profit and will be free to leave at any time. Thus, this concept of "bad" sex works not only to prioritize this type of trafficking in relation to other forms of trafficking, but also to make these victims dirtier and more responsible for their enslavement once they engage in this illegal sex, despite their lack of control or consent to the enslavement itself.

In addition, much like the prostitute who is denied the presumption of innocence when she "dares complain of sexual violence," women trafficked for sex work are often arrested and charged with prostitution or immigration violations resulting from their own enslavement.<sup>70</sup> Here, cultural feminism is perhaps more dangerous than sexual subordination feminism because its rhetoric has permeated society and has often dictated to well-meaning people the "best" way to deal with a "women's issue." Local law enforcement officers are often the first points of contact for women trafficked into sex or immigrant women abused by their domestic partners, yet too often trafficking victims are themselves charged with criminal or immigration violations. Deputizing law enforcement officers to enforce immigration law in addition to prostitution law, without proper education on the signs and indications of human trafficking, only further victimizes trafficked women.<sup>71</sup>

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68. I do not necessarily agree with Frug's conclusion that legalizing prostitution will significantly break down the good sex/bad sex binary. It will no longer be legal sex/illegal sex, but the sex for money/sex for love/children distinction will continue to sexually terrorize women.

69. Frug, *supra* note 67, at 1055.

70. *See id.* at 1056.

71. I recently had a client, whom I will call "Mai", who was brought to the United States from the Philippines by her husband, who was stationed there in the military. Mai spoke almost no English. After she arrived in the United States, her husband began a brutal campaign of physical, emotional, and sexual abuse of her. When police were called, Mai could not describe her ordeal and it was her husband who "translated" for her. They simply inquired

In sex trafficking situations, victims, because of language and cultural barriers, literally cannot answer law enforcement questions, and officers will often rely on the host of explanations that traffickers provide in perfect English to justify “the bleeding mouth.”<sup>72</sup> While law enforcement is becoming more educated on identifying potential trafficking situations, it is hard to swim up the stream of cultural and legal presumptions that further victimize trafficking victims who need law enforcement’s assistance the most.

Complex and intimidating immigration and deportation laws and processes are perhaps the greatest tools available to traffickers seeking to gain and maintain power and control. Deportation is not an empty threat, and has helped perpetrators enslave their victims. Perpetrators will often confiscate the women’s passports and threaten them with deportation to coerce them to stay. While the TVPA created a T-Visa,<sup>73</sup> a temporary visa of up to three years<sup>74</sup> for which trafficking victims can apply, the requirements and lengthy application process effectively make it unattainable for most victims. The woman must comply with requests for assistance in the investigation or prosecution of her trafficker, well aware that those who trafficked her are most often members of a highly sophisticated organized crime operation threatening her safety here<sup>75</sup> as well as that of her family in her country of origin. Rather than protecting the trafficking victim, cultural feminism creates an emphasis on *punishment* of the male “wrong” before all else. This focus on the *man’s* immoral behavior while subordinating the *woman’s* suffering as a result of his crime helps explain why only twenty-three T-Visas were granted in 2003 out of the 5,000 available.<sup>76</sup>

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to her legal status. Of course, Mai’s husband prevented her from getting help and the officers did not further investigate or attempt to obtain a translator, despite the obvious signs of abuse. Later, when Mai suffered a nervous breakdown due to the abuse, Mai’s husband was able to have her involuntarily committed to a mental hospital — of course serving as her “translator” with medical personnel. Because Mai did not speak English, both the officers as well as the hospital staff failed her and chose to see her as an imbalanced foreign woman rather than a victim in desperate need of help.

72. Frug, *supra* note 67, at 1054.

73. See 8 U.S.C. § 1101(a)(15)(T) (2000).

74. While the T-Visa is renewable and victims may technically apply for permanent residence, this process is extremely complicated, protracted, and requires extensive documentation by both the victim and federal law enforcement and social service employees.

75. Victims only qualify for witness protection programs if they are needed to testify against their trafficker. In cases where a plea bargain is made, based on information the perpetrators know was provided by the victim, she is not eligible for witness protection.

76. See Press Release, Dep’t of Justice, Factsheet: Accomplishments in the Fight Against Trafficking in Persons (Feb. 25, 2003), available at [http://www.usdoj.gov/opa/pr/2003/February/03\\_crt\\_110.htm](http://www.usdoj.gov/opa/pr/2003/February/03_crt_110.htm).

*B. Enslaved Female Domestic Workers: The Bottom of the Pyramid*

Cultural feminism also works to marginalize those trafficked into domestic servitude. Almost all of these victims are women and service providers have identified the overwhelming majority of victims as women of color. This intersectionality of race and gender is a result of the historic devaluation of race — and disempowerment of women of color — in the white male construction of “desire.” This construction is best articulated through images in the mass media, including mainstream or soft-core pornography, in which the object/victim of this desire is a white, often blond, thin and, most importantly, *available* woman — meaning that the woman is present in the man’s everyday life, perhaps as his fictional nurse, masseuse or neighbor.<sup>77</sup> Women of color are considered *perversions* of this desire, as they are not white or blond, and because of the pervasive institutionalization of racism in our country, they are much less likely to encounter white men in everyday interactions. As Evelyn Hammonds states, “the black female became the antithesis of European sexual mores and beauty and was relegated to the lowest position on the scale of human development.”<sup>78</sup> Unless they are trafficked to provide sex to what our culture deems a more “perverse” clientele, it is no surprise that women of color are much more likely to be trafficked into domestic servitude than into the sex business.

In addition, the zone of privacy that isolates a household from public scrutiny, and the level of violence against women in the home which society has found to be acceptable, serve to obscure not only violence against women as wives or girlfriends, but against other women in the household. Martha R. Mahoney observes that “the daily reality of [marriage] . . . defines most [women’s] memories and retrospective sense of the relationship: these were ‘bad’ marriages, not ordeals of physical torture. [Women] resisted defining the entire experience of marriage by the episodes of violence that had marked the relationship’s lowest points.”<sup>79</sup> Like the battered wife, the enslaved

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77. See CATHARINE A. MACKINNON, *Linda’s Life and Andrea’s Work*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, *supra* note 49, 127-33 (chronicling Linda Marchiano’s experience in making the pornographic *Deep Throat* film).

78. Evelyn M. Hammonds, *Towards a Genealogy of Black Female Sexuality: The Problematic of Silence*, in FEMINIST THEORY AND THE BODY 93, 95 (Janet Price & Margrit Schildrick eds., 1999).

79. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 16 (1991).

domestic worker will define her relationship with her captor primarily as that of a “bad” employment situation. This contributes to the resistance enslaved domestic female workers have against self-identification as victims of crime. Compounded by the complete physical isolation of the woman and the primacy placed on physical rather than psychological abuse, service providers have observed the average length of enslavement for domestic work is many times higher than that of other types of exploitation.

While cultural feminists seek to value upwards women’s work in the home, they do not value the work of *all* women or *all* work performed by women, but only that work which is considered “spiritual” care work.<sup>80</sup> However, as Dorothy Roberts notes, “household labor . . . is not all spiritual. It involves nasty, tedious physical tasks — standing over a hot stove, cleaning toilets, scrubbing stains off of floors and out of shirts, changing diapers and bedpans.”<sup>81</sup> While the work is substantively the same, spiritual housework is driven by a woman’s love and affection for her family, while menial housework is dismissed as raw wage labor. Cultural feminism marginalizes women trafficked to perform devalued “menial” housework and implicitly — and no doubt unconsciously — supports their exploitation by the female head of household seeking to “delegate housework’s menial tasks to others while retaining their more valuable spiritual duties.”<sup>82</sup>

It is clear that the racial component of dominance is necessary to support this labor hierarchy. Roberts notes, “It is true that housework has always been women’s work, but polishing floors scrubbing clothes, and tending to children for pay has been Black and other minority women’s work.”<sup>83</sup> It is interesting to note that in cases where both victim and trafficker are women of color — as in the recent scandals involving World Bank, United Nations, and diplomatic employees — victims are often racial and/or ethnic minorities in their countries of origin or recruited from groups with lower socio-economic status than the trafficker.<sup>84</sup>

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80. See Roberts, *supra* note 62, at 110-21.

81. *Id.* at 111.

82. *Id.*

83. *Id.* at 113.

84. In recent years, it has been revealed that many diplomats were using their virtually unregulated ability to bring predominantly female domestic workers into the United States under an A-3 or G-5 visa and were then confiscating these workers’ legal documents, holding them captive with no pay and subjecting them to horrific physical, verbal, and oftentimes sexual abuse. See, e.g., Complaint, *Swarna v. Al-Awadi*, 06cv4880 (S.D.N.Y. filed June 2006) (forced labor case brought by an Indian domestic worker against a minister at the Kuwaiti

Evelyn Nakano Glenn further explores this stratification of labor by race and gender as it exists in the health care industry. Race and gender structure a hierarchy in which the doctors are men, the registered nurses are white women, and “at the bottom of the pyramid are the nurse’s aides, predominantly women of color; housekeepers and kitchen workers, overwhelmingly women of color; and orderlies and cleaners, primarily men of color. They constitute the ‘hands’ that perform routine work directed by others.”<sup>85</sup> This model is seamlessly applied to domestic work within a nuclear family. At the top of the pyramid is the white male head of household, or in homes of people of color the male member of the more dominant race, who leaves the house everyday to perform public-sphere work and thus comprises “the group most insulated from dirty work and contact with those who do it.”<sup>86</sup> Like the registered nurses in Nakano Glenn’s hierarchy, the wife/mother constitutes the middle strata — they directly supervise the “exploitation of racial-ethnic women’s physical, emotional, and mental work.”<sup>87</sup>

Because this structure of dominance removes men from direct contact with the cheap domestic female worker, the legal system holds men less culpable than their wives for forced domestic labor. For example, in *US v. Blackwell & Blackwell*, a husband and wife were convicted of conspiring to smuggle a woman from Ghana into the United States to work as an unpaid domestic servant and nanny.<sup>88</sup> The

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Mission to the U.N.); Somini Sengupta, *Settlement reached in Maid’s Suit Against Diplomat*, N.Y. TIMES, July 15, 2000, at B2 (case brought by Bangladeshi woman subjected to forced domestic labor by Bahraini diplomat to the U.N., settled for an undisclosed amount); Complaint, *Sabbithi v. Al Saleh*, Civil Action No. 0-70115EGS (D.D.C. filed Jan. 18, 2007) (claim brought by three Indian domestic workers trafficked to the U.S. by a Kuwaiti diplomat and his wife); Complaint, *Parades v. Nielsen*, 06CV00089 (D.D.C. filed Jan. 18, 2006) (forced labor claim brought by Paraguayan woman against a high-ranking Argentinean diplomat and his wife). See also U.N. Econ. and Soc. Council, Comm’n on Human Rights, *Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, Submitted Pursuant to Comm’n on Human Rights Resolution 2003/46*, ¶ 26, U.N. Doc. E/CN.4/2004/76 (12 Jan. 2004) (finding “migrant domestic workers are frequently the victims of racism and xenophobia and of verbal abuse by members of the family.”). For further background and examples, see HUMAN RIGHTS WATCH, *HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES* (2001), available at <http://www.hrw.org/reports/2001/usadom/usadom001.pdf>.

85. Evelyn Nakano Glenn, *Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, in *THE SECOND SIGNS READER: FEMINIST SCHOLARSHIP* (Joeres & Laslett eds., 1996) as reprinted in JUDITH G. GREENBERG, MARTHA L. MINOW, & DOROTY E. ROBERTS, *MARY JOE FRUG’S WOMEN AND THE LAW* 287, 289 (3d ed. 2004).

86. *Id.* at 292.

87. *Id.* at 291.

88. DEP’T OF JUSTICE 2004 ASSESSMENT, *supra* note 2, at 31.

defendants hid the victim's passport and forced her to perform household chores with no pay.<sup>89</sup> They also threatened to have her deported and imprisoned if she disobeyed their demands.<sup>90</sup> Mrs. Blackwell was sentenced to sixty-three months in prison while Mr. Blackwell received six months of home detention and three years of probation.<sup>91</sup>

Neither menial nor spiritual housework is adequately compensated. However, cultural feminism greatly *values* the work of a wife and a mother, but only in her own home, for her own husband and children. This valuation takes the form of societal privilege and status for a female who either embraces what Robin West considers the essential nature of women as nurturing caregivers for their own families<sup>92</sup> or, as Debouviour prefers, "becomes a woman."<sup>93</sup> The woman who does the housework but not the "care work" is not only not valued, but *devalued* because she is seen as neglecting her own family. This theory of domestic labor implicitly approves of lower compensation for individuals working in others' homes. But how much less is all right? If this number is low enough that we consider room and board adequate compensation for this type of labor, then do we really consider involuntary servitude for domestic work a crime? As trafficking penalties suggest, the answer is yes, *but not a really bad crime*.

While arriving separately, both cultural feminist and subordination feminist theories lead to a focus on abuse that is "sexual" in nature — an elusive concept at best. A woman trafficked into sex work for a few days before she escapes or is properly identified by law enforcement (the odds of which are shockingly low) can see her perpetrator jailed for the rest of his or her life, while someone can virtually lock a woman in a house for years, force her to do grueling manual labor fourteen hours a day, seven days a week, and receive only twenty years in jail.<sup>94</sup> That is, unless the woman is unlucky enough to be murdered (but then who would uncover the crime?), kidnapped (there is often a middle-man involved), or sexually abused (this ignores the fact that in domestic servitude situations, it is

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89. *Id.*

90. *Id.*

91. *Id.*

92. West, *supra* note 63.

93. SIMONE DEBEAUVOIR, *THE SECOND SEX* 267 (H.M. Parshely ed., Vintage Books 1989) (1952).

94. See *supra* note 11 and accompanying text.

often women who inflict the force, torture and control, which is primarily non-sexual in nature but equally as brutal).

Women trafficked into household labor are perhaps the most vulnerable of all those trafficked because they are often women of color, racial minorities in their country of origin, have little to no English language proficiency and, in many instances, are older. They are often geographically isolated in suburban areas and allowed no contact outside the house. Most likely their captor(s) has told them many lies about the dangers they will face if they try to leave, and therefore these women are terrified of neighbors, mail carriers, law enforcement agents, or anyone else in the community with whom they might come into contact.

Both cultural feminism and sexual subordination feminism overlook these women and compound this vulnerability by glorifying domestic work in the former framework and focusing almost exclusively on sex in the latter. With cultural feminists, compulsory heterosexuality, repronormativity and the maternalization of domestic labor make trafficking for domestic labor more palatable and trafficking for sex more objectionable. In short, women are *supposed* to be wives and mothers, therefore *someone* has to do the domestic work involved in supporting these relationships.<sup>95</sup> Since *no woman* should be having “bad” sex, the emphasis is on eradicating trafficking for sex at the expense of the “other” woman who is trafficked for domestic work.

### C. *Agricultural Laborers and the Myth of the Invulnerable Man*

Both subordination feminism and cultural feminism similarly ignore those trafficked for agricultural labor. These victims are overwhelmingly male and are driven into trafficking situations as a result of the dire economic poverty in many Latin American countries. Due to agricultural and climactic conditions, most of these men are trafficked in groups into the southeastern United States, with a large population in rural and suburban Florida.

In theories of subordination feminism, men have almost total agency and control of situations around them, while women have almost none. Therefore, men have control over their labor and their personal and commercial relationships with others. Subordination feminism supports and perpetuates the notion that it is almost

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95. *Id.* at 139-45.

impossible for men to be truly enslaved. Thus, rather than recognizing the situation as forced labor, it is viewed as more akin to a contract that just inevitably happens to benefit one party more than the other.

For cultural feminists, male-female gender binaries dictate that men either are (or are conditioned to be) autonomous, independent, aggressive, or emotionally and physically strong. Men have full agency and can choose from a wide array of options in pursuing their goals. In other words, men can take care of themselves. And they can — and *should* — take care of others. Where it would be abominable for a woman to be enslaved for the hope of sending money back to her destitute family, men are not only encouraged but *required* to financially support their families by any means possible. When employment in one's country of origin is scarce, it is their *duty* to place themselves at the mercy of coyotes or traffickers, travel thousands of miles away from their home and endure physical and emotional abuse and horrible work conditions for little or no pay.

In addition, cultural feminism attempts to essentialize certain pain only to the female gender — “the violence, the danger . . . the poverty, the fear, the numbness . . . the isolation, the low self-esteem.”<sup>96</sup> However, while the physical or emotional pain of rape or sexual assault is not *identical* to that experienced by men who have been trafficked or enslaved, the pain is no less severe. The pain these men experience is marginalized by cultural feminism and is ironically compounded by patriarchal messages that by experiencing this pain they are somehow less “male.” As Halley points out in her critique of the United States Supreme Court's decision in *Oncale v. Sundowner Offshore Services*,<sup>97</sup> in which the Court held that same-sex harassment need not be motivated by sexual desire to be actionable, cultural feminism's concept of masculinity creates a higher bar for identifying pain that men are subject to and must endure.<sup>98</sup> In sexual harassment

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96. *Id.* at 143.

97. 523 U.S. 75 (1998).

98. See Halley, *supra* note 46, at 80. Halley uses “the purportedly clarifying example [of] the (presumptively heterosexual) coach of a professional football team. The person is not engaging in actionable harassment if he ‘smacks’ a player on the butt out on the field. . . but he may come within the reach of Title VII if he commits the same act upon a secretary (male or female) back in the office.” *Id.* Halley sarcastically notes,

If this strikes you as a bit mysterious, do not be concerned. Justice Scalia ends the opinion with a reassurance that courts and juries will use *common sense* to distinguish ‘simple teasing and roughhousing among members of the same sex’ from actionable sex discrimination. *Common sense* is precisely what I am afraid judges and juries *will* use.

*Id.*

law, we do not inquire into whether a female is sexually attracted to the gender of her harasser, but a male harassment victim is interrogated about his sexuality to determine whether or not he can “handle” the harassment.<sup>99</sup> According to this model, men are almost insusceptible to psychological coercion or domination — these agricultural “slaves” stay because they want to, just as a male employee must not mind a “heterosexual” slap on the ass now and then. For cultural feminists, this is what it means to perform the male gender — to “be a man.”

This disparity in treatment based on gender has devastating effects for men enslaved in agricultural work. Because it is often hard to hide large groups of illegal workers within small rural communities, there are often many points of contact — and opportunities for intervention — for these men with priests, landlords, police officers, etc., not to mention the vendors who buy the produce at prices they know are impossible without forced labor. However, the most oft-given response by those who neglected to identify a trafficking situation was that they thought the men *were only getting bad wages*. How many of these same people would neglect to help a woman kept in a brothel for sex as long as she was getting paid *something*? Cultural feminism has contributed to the current climate surrounding trafficking whereby: If you see sexual slavery, you call the police; if you see domestic slavery, you call the “wife” and take her word as to what is occurring; if you see agricultural slavery, you call the Department of Labor and have the men deported.

## V. TOWARD A NEW FRAMEWORK

While subordination and cultural feminism theories have proven inadequate as applied to human trafficking in the United States, their deconstruction and application will be useful in formulating a better feminist theory on the relationship between gender and dominance in the trafficking industry. However, a human rights framework might be the best — or even the only — successful framework to address and incorporate the experience of *all* trafficking victims into the discourse, regardless of their status. It will more effectively marry theory and political strategy and place human trafficking where it belongs, in the larger context of globalization and

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99. *Id.*

the exploitation of groups of people based on their race, class, religion, country of origin *and* (rather than *only*) gender. While remaining silent on this controversial and apparently subversive truth<sup>100</sup> has proven to be a successful political strategy to gain initial support and momentum for anti-trafficking legislation and funding, it is time to start speaking the real truth.

In order to begin to accomplish this, we need to let go of the fear that through this inclusion, and by moving away from an exclusive focus on pretty white sex slaves, we will diminish or dilute financial and political support for combating trafficking as a whole. While this might happen, we must nevertheless fight harder. Just as feminists should not be “afraid of being overwhelmed,”<sup>101</sup> so should we not be afraid of overwhelming others with the truth. This means demanding that funding for education, outreach, and service provisions be distributed effectively and logically — filtered through local immigrants’ rights and workers’ rights organizations as well as domestic violence and other social justice organizations. We must continue to abdicate the government of oversight of labor and industry and acquiescence to the exploitation of immigrant labor and push for comprehensive immigration reform. This requires fighting against the subordination of women without discounting male pain. Most importantly, it demands encouraging others to speak the truth about the experience of marginalized victims of human trafficking in the United States today. This is the challenge we face and we can afford to remain silent no more.

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100. Perhaps subversive only in the current political climate.

101. See Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988).

