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SEX AND SLAVERY: AN ANALYSIS OF THREE MODELS OF STATE HUMAN TRAFFICKING LEGISLATION

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INTRODUCTION

The headline could have read "Dirty Little Secret: Hidden Slavery in the Suburbs." A quiet home in a prominent city suburb was recently uncovered as a site of shocking violence and abuse. After a daring escape, two immigrant women told their harrowing tale of relentless abuse and exploitation over multiple years of exploitation. The women had been pinched, scalded with boiling water, forced to eat their own vomit, and beaten with hands and objects until they bled. One had been forced to strip her clothes off, had her hair cut and pubic hair shaved off, had been wrapped in cellophane, and was dressed in rags that exposed parts of her body because she was not allowed to wear undergarments.[1] Alongside the physical abuse, they had been psychologically tortured and blackmailed with compromising photographs. Regularly deprived of food and sleep, they were forced to eat from the garbage. The women were not let out of the house and were forced to

1. United States v. Sabhnani, 539 F. Supp. 2d 617, 620-21 (E.D.N.Y. 2008).

perform all manner of services day and night for years. Their passports and immigration documents were held in a locked cabinet, preventing them from fleeing.[2] Federal prosecutors alleged that the defendants lured these inexperienced and uneducated women from their homes overseas with promises of good jobs and decent salaries and ruthlessly exploited them once they arrived.[3] Isolated linguistically and culturally in the United States, with nowhere to go for help, the women had no choice but to submit to their abusers' demands. On the witness stand, the victims bravely told their story, sharing the intimate and often shameful details of their abuse with the jury, punctuated with sobs.[4] The jury found both defendants guilty on all twelve counts, including human trafficking, and sentenced them to eleven and three and a half years in prison, respectively.[5]

Stereotypically, the punch line to this story would be that these women were sex slaves, part of a multi-billion dollar criminal industry of exploitation. Many films, made-for-TV movies, television crime dramas, and newspaper exposés use this plotline regularly, retelling a story that dates back to the Victorian era's tales of white slavery.[6] In fact, the women in this real-life story were trafficked to be household domestic workers by a wealthy Long Island businessman and his wife, who was the primary abuser.[7]

Human trafficking, or modern day slavery, has become a prominent political issue in the United States in the last decade.[8] Quantification of the overall problem is notoriously difficult,[9] but it is clear

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2. *Id.* at 620.

3. *Id.* at 619-20.

4. Paul Vitello, *From Stand in Long Island Slavery Case, a Snapshot of a Hidden U.S. Problem*, N.Y. TIMES, Dec. 3, 2007, at B1.

5. United States v. Sabhnani, 566 F. Supp. 2d 148, 150 (E.D.N.Y. 2008). The traffickers were a married couple — the wife received the longer sentence as the primary abuser. *Id.* at 150, 156.

6. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 343 (2007) ("Symbolically, 'trafficking' has regressed to stereotyped images of poor, uneducated, and helpless young women and girls, forced into prostitution, reminiscent of historical conceptions of 'white sexual slavery' at the turn of the twentieth century."); Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 POL. & SOC'Y 447, 467 (2007) (noting the connections between the "white slavery" problem and the current depictions of sex trafficking victims in popular culture); *see also* Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 217 (2007) (noting that white slavery existed more in public perception than reality, but served as the basis for a number of international conventions, as well as the White Slave Traffic Act, also known as the Mann Act).

7. Vitello, *supra* note 4.

8. *Id.*

9. Free the Slaves, Washington, D.C., & the Human Rights Ctr. of the Univ. of Cal., Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47, 47 (2005) [hereinafter *Hidden Slaves*]. Between 1998 and 2003, the press "reported 131

from studies of identified cases what trafficking primarily looks like on the ground.[10] Forced prostitution accounts for just under half of all known U.S. trafficking cases (46%), and domestic servitude accounts for half of the remaining cases (27%).[11] These figures illustrate that almost three quarters of trafficking victims in the United States are exploited in traditionally female labor sectors: cleaning homes, caring for children, and sexually servicing men[12] — what feminists describe as the "sexual division of labor."[13] As it is primarily expressed in the United States, human trafficking fits into overall patterns commodifying stereotypically gendered roles, which reaffirm women's subordinated status within the context of women's objectification and exploitation.[14] Human trafficking is at least partially a gendered phenomenon in the United States.[15]

The development of state-level human trafficking laws is an important step towards actually uncovering trafficking cases.[16] Although

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cases of forced labor in the United States involving 19,254 men, women, and children from a wide range of ethnic and racial groups," including U.S. citizens. *Id.* at 52, 53. The *Hidden Slaves* researchers extrapolated this data to indicate that "at any given time 10,000 or more people are working as forced laborers in the United States," which is lower than U.S. government estimates from the same time period. *Id.* at 57, 58. Numerous commentators note that there are really no reliable statistics on human trafficking, as the trade is clandestine, and most figures are only guesswork. *See, e.g.*, Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence: U.S. Estimates Thousands of Victims, But Efforts to Find Them Fall Short*, WASH. POST, Sept. 23, 2007, at A1; *see also* Chang & Kim, *supra* note 6, at 321 (referencing a 2006 report of the U.S. General Accounting Office (G.A.O.), highly critical of the U.S. government's estimates on trafficking, which concluded that the government had not established an effective mechanism for estimating the numbers of trafficking victims); Weitzer, *supra* note 6, at 456 (citing the same G.A.O. criticism of the government's unreliable statistics).

10. *Hidden Slaves*, *supra* note 9, at 48-49. Note that because this study focused on known cases from 1998-2003, as found through interviews with service providers and media reports, the numbers are likely to be skewed towards trafficking cases involving women in forced prostitution, as well as reflect media bias towards reporting sensational stories about sex slaves.

11. *Id.* at 48. Other prominent labor sectors were "agriculture (10%), sweatshop/factory (5%), and restaurant and hotel work (4%)." *Id.* Anecdotally confirming these earlier numbers in 2007, a prominent anti-trafficking attorney and service provider in New York City stated that about a third of trafficking cases involved domestic servants. Vitello, *supra* note 4.

12. *Hidden Slaves*, *supra* note 9, at 48.

13. Vicki Schultz, *Sex and Work*, 18 YALE J.L. & FEMINISM 223, 227 (2006) (quoting RUTH ROSEN, THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA 122 (2000)).

14. Berta E. Hernández-Truyol & Jane E. Larson, *Sexual Labor and Human Rights*, 37 COLUM. HUM. RTS. L. REV. 391, 440-41 (2006).

15. This article does not assert that men are not greatly affected by human trafficking and recognizes that they represent a substantial number of victims, particularly of labor trafficking. At the risk of obscuring the plight of male victims of trafficking, this article focuses on the female victims that are at the heart of both legislative efforts and feminist theories debating human trafficking and sex work.

16. *See* Terry S. Coonan, *Human Rights in the Sunshine State: A Proposed Florida Law on Human Trafficking*, 31 FLA. ST. U. L. REV. 289, 294-95 (2004) (suggesting that,

the federal law appears to be rather comprehensive, criminal enforcement is much easier at the state and local level, where most criminal enforcement occurs.[17] On the practical side, state laws engage all levels of law enforcement officers in the investigation and apprehension of traffickers.[18] Federal law enforcement simply does not have the number of officers needed to be everywhere in the country.[19] Local and state law enforcement are everywhere. Beat officers regularly handle solicitation, pandering, prostitution and assault cases.[20] This is the typical way that law enforcement comes into contact with trafficking victims.[21] Many states do not have laws criminalizing slavery or forced labor, so although the Thirteenth Amendment exists, there is often no method or incentive for state law enforcement to directly enforce the constitutional prohibition against slavery.[22]

The fight against human trafficking is one that has animated feminist and women's rights organizations globally and domestically, and has sparked a remarkable wave of state-level statutes criminalizing human trafficking in the United States.[23] As of August, 2009, forty-three states have enacted criminal and other legislation attempting to end the phenomenon of human trafficking.[24] Critics have already begun challenging the current U.S. focus on criminalization and anti-prostitution efforts as "detrimentally impact[ing] the rights of trafficked persons."[25] As a feminist phenomenon, these anti-trafficking

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since the September 11 attacks, "federal resources are necessarily committed to countering terrorism to the detriment of many other law enforcement activities . . . the commitment of state law enforcement resources could do much to bridge this gap" between outlawing trafficking and enforcing the law); Shashi Irani Kara, Note, *Decentralizing the Fight Against Human Trafficking in the United States: The Need for Greater Involvement in Fighting Human Trafficking by State Agencies and Local Non-Governmental Organizations*, 13 CARDOZO J.L. & GENDER 657, 667-70 (2007) (outlining several reasons for increased state-level involvement in anti-trafficking efforts).

17. One of the findings of the *Hidden Slaves* report was that the almost exclusive federal "mandate has hindered coordination between federal and state law enforcement agencies," which in turn has allowed "perpetrators of forced labor to go undetected." *Hidden Slaves*, *supra* note 9, at 49.

18. Kara, *supra* note 16, at 672-76.

19. *Id.* at 669.

20. *Id.* at 667; Danny Hakim & Nicholas Confessore, *Albany Agrees on Law Against Sexual and Labor Trafficking*, N.Y. TIMES, May 17, 2007, at B1.

21. Kara, *supra* note 16, at 667.

22. *See id.* at 670-71 (arguing that the U.S. "anti-trafficking regime needs to catch up with its normative aspirations of eradicating trafficking and slavery worldwide" and that "the federal government's anti-trafficking efforts have not put due emphasis and pressure upon the states and local anti-trafficking initiatives").

23. Although it is not clear that criminalization is the best method of implementing human rights law, this article will focus solely on the forms that criminalization of trafficking has taken under state law.

24. POLARIS PROJECT, U.S. POLICY ALERT ON HUMAN TRAFFICKING 1 (2009), http://www.polarisproject.org/images/8-24-09policyalert.pdf.

25. Chang & Kim, *supra* note 6, at 318; *see also* MELISSA DITMORE, SEX WORKERS PROJECT, KICKING DOWN THE DOOR: THE USE OF RAIDS TO FIGHT TRAFFICKING IN PERSONS

laws are strong evidence of the influence of "governance feminism," or the installation of "feminist ideas into actual legal-institutional power structures," as defined by Janet Halley, Prabha Kotiswaran, Hila Shamir and Chantal Thomas.[26] Their primary observation is that feminist groups are no longer sitting on the sidelines, but are directly participating in the creation and implementation of laws.[27] This is certainly clear in the development of anti-trafficking state legislation. Three primary models of state legislation have emerged from this process: the federal model, inspired by federal statutes and the Department of Justice's Model State Legislation; California's model, primarily reflecting a human rights and individualist feminism framework; and New York's legislation, highly influenced by structural feminists.

At the heart of any discussion of human trafficking, two strikingly different theories come into play: individualism and structuralism. Individualist theories focus on the need for women to be free to make basic choices for their lives, even if those choices turn out to be bad ones.[28] Individualists call for a framework of individual rights to protect women's autonomy and anticipate that this liberal framework will provide trafficked women with the ability to escape slavery and seek restitution.[29] Many individualists also view sex work as a form of labor that should be legally recognized and regulated alongside other forms of wage labor.[30] Thus, individualists tend not to distinguish between sex trafficking and labor trafficking because all trafficking involves labor. Structuralist theory about human trafficking primarily springs from the works of Catharine A. MacKinnon and Kathleen Barry.[31] This theory holds that women's exploitation by men

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11 (2009), http://www.sexworkersproject.org/downloads/KickingDownTheDoor.pdf (asserting that a "rights-based and 'victim-centered' approach would prioritize the rights, needs, healing, and agency of survivors of trafficking over criminal proceedings").

26. Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses To Rape, Prostitution / Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 340 (2006) [hereinafter Halley et al.].

27. *Id.* at 336.

28. *Id.* at 350.

29. *Id.*

30. The overall concept that sexual labor should fall under general labor protections has been recognized by several scholars. *See* Hernández-Truyol & Larson, *supra* note 14, at 440; *see also* Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 90-92 (2006) (applying Title VII sexual harassment principles to legal sex work in Nevada brothels); Oliver J. McKinstry, Comment, *We'd Better Treat Them Right: A Proposal for Occupational Cooperative Bargaining Associations of Sex Workers*, 9 U. PA. J. LAB. & EMP. L. 679, 701-02 (2007) (suggesting that a labor union model would alleviate workplace problems for sex workers).

31. Seminal works on the topic include KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1979) (discussing the forms, practices, and politics of sexual slavery); ANDREA DWORKIN,

is centered on the sexual act, and that prostitution is the locus and perfect embodiment of women's oppression.[32] All prostitution is inherently sex trafficking because prostitution involves the buying and selling of women's sexual services as commodities. Both prostitution and sex trafficking must be eradicated in order to free women from male dominance. The clear focus of structuralist theory regarding human trafficking is on prostitution and sexual exploitation, exclusive of other forms of labor.[33] When individualists and structuralists are both advocating for anti-trafficking legislation, they use the same term "human trafficking" to mean two very distinct groupings of exploitative crimes. It is thus easy for legislators, media, and bystanders to misunderstand what each group is truly advocating and to assume that both groups use terms the same way.[34] A middle path between both theories is necessary to encompass all forms of modern-day slavery and can be found by focusing on the root cause of trafficking: exploitation, and more specifically, women's exploitation.

The focus on sex trafficking by both structuralist feminists and popular media obscures the similar exploitation involved in all forms of human trafficking. The actions taken by traffickers in sex and labor cases are almost always the same. Trafficking cases all involve some combination of isolation of the victim, emotional or physical abuse,

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PORNOGRAPHY: MEN POSSESSING WOMEN (1979) (discussing pornography, the system in which it exists, and the power of men as regards pornography); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987) (discussing the relation between the sexes, critiquing the notion of gender differences and the impact of pornography). More modern reiterations of structuralist theory appear in varied media such as symposium presentations. *See* Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993, 995 (2005) ("They usually 'consent' to the acts only in the degraded and demented sense of the word (common also to the law of rape) in which a person who despairs at stopping what is happening, sees no escape, has no real alternative, was often sexually abused before as a child, may be addicted to drugs, is homeless, hopeless, is often trying to avoid being beaten or killed, is almost always economically desperate, acquiesces in being sexually abused for payment, even if, in most instances, it is payment to someone else."); 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, 111 (2006) ("Prostitution/trafficking/pornography thus systematically discriminate against women . . . ."). Advocacy materials of prominent organizations such as the Coalition Against Trafficking in Women address "the links between prostitution and trafficking; challenging the demand for prostitution that promotes sex trafficking . . . ." Coalition Against Trafficking in Women, About — Coalition Against Trafficking in Women, http://www.catwinternational.org/about/index.php (last visited Aug. 22, 2009). "All prostitution exploits women, regardless of women's consent. . . . Prostitution affects all women, justifies the sale of any woman, and reduces all women to sex." *Id.*

32. *See* Farley, *supra* note 31, at 109-10 (arguing that "[p]rostitution is sexual violence that results in massive economic profit for some of its perpetrators" and, "[l]ike slavery, prostitution is a lucrative form of oppression").

33. Halley, et al., *supra* note 26, at 347, 349-50.

34. *Id.* at 347.

and threats to ensnare the victim into acquiescing to the trafficker's demands.[35] Legal division of human trafficking into two forms, sex and labor, separates trafficking cases on the basis of the type of labor or services forced from the victim. This division ignores the reality that all trafficking victims face the same types of exploitation at the hands of traffickers. Responses by the legal system to those exploitative actions will be limited by this artificial legal division.

This article first addresses this issue from a practical perspective, considering whether sex and labor trafficking can be readily distinguished from each other on the basis of actual injury to victims. The second section focuses on the federal Department of Justice model as the primary form of state legislation criminalizing human trafficking. The third section analyzes the California and New York laws as examples of competing ideals for human trafficking laws. Practical recommendations for the implementation and revision of state human trafficking laws follow this analysis. Throughout this article, I use "sex work" to refer to all forms of commercial sexual activity, following the most common international definition. I use the term "prostitution" as it relates to specific crimes defined as prostitution or to terms used by particular theorists.

I. IS SEX TRAFFICKING INHERENTLY WORSE THAN LABOR?

The separation of labor and sex trafficking into distinct crimes is normatively obvious at first blush. Sex trafficking involves forced sex, i.e., rape, and thus constitutes one of the most egregious crimes that humans can inflict upon one another. Labor trafficking involves forced labor, i.e., someone being forced to perform work that thousands of other people legally and voluntarily perform on a daily basis.[36] Thus sex trafficking appears far worse for victims than labor trafficking, and legal distinctions between them appear to reflect common sense. These distinctions track expectations regarding harms to the victims involved. "Good" women forced into sex work are far more deserving of governmental assistance and rescue than "bad" undocumented low-wage immigrant workers whose labor is expected to be exploited. Performing tasks that one would not otherwise consider performing in exchange for a paycheck, which is usually smaller than one wants, is par for the course in regular employment, and only a lucky few are able to describe their work as a labor of love rather than wage slavery.

35. Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 7 (2004).

36. *Id.*

However, upon examination of cases in context, sex and labor trafficking are not actually so far apart.

A. There Are No Practical Distinctions Between Sex and Labor Trafficking from the Victimization Perspective

1. Labor Trafficking Often Involves Sexual Abuse

Distinctions between sex and labor exploitation are generally difficult to draw in actual cases because the actions of the traffickers are so similar. Many trafficking cases, technically considered labor trafficking, involve egregious sexual violations as a part of the physical and psychological coercion the victims endure.[37] Cases are often difficult to classify as purely sex or labor, because when women are trafficking victims, they are often "sexually abused and forced to work."[38] For example, in the *Lakireddy Bali Reddy* case from California, the trafficker blurred the line between labor exploitation and sexual exploitation by using "whatever means [were] necessary to ensure the confinement and cooperation of [his] victims, including sexual assault."[39] Victims in many high profile federal labor trafficking cases were also sexually exploited by their abusers. In the *Soto* case, the women were raped almost nightly by captors who forced them to cook and clean smuggling safe houses during the day.[40] The victim in the *Tecum* case was forced to perform sexual acts at night after days of backbreaking farm labor.[41] The Department of Justice Office for Victims of Crime recognizes this common problem by collecting data on sex and labor trafficking victims in three categories: sex, labor, and sex and labor.[42] Traffickers use whatever coercive tools they have at their disposal, and sexual abuse is common.

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37. *Id.* at 6-7.

38. *Hidden Slaves*, *supra* note 9, at 71. The Department of Justice Office for Victims of Crime tracks statistics on trafficking victims aided with OVC funding in three categories: sex, labor, and sex and labor. *Id.*

39. Kim & Hreshchyshyn, *supra* note 35, at 23 (referencing the *Lakireddy Bali Reddy* case).

40. CTR. FOR WOMEN POLICY STUDIES, FACT SHEET ON STATE ANTI-TRAFFICKING LAWS 3 (2008), http://www.centerwomenpolicy.org/programs/trafficking/facts/documents/FactSheetonStateAntiTraffickingLawsDecember2008.pdf; Press Release, Dep't of Justice, Justice Department Announces Sentencing in South Texas Human Trafficking and Sex Slavery Prosecution (Jan. 29, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/January/04_crt_054.htm.

41. CTR. FOR WOMEN POLICY STUDIES, *supra* note 40, at 4; Ronnie Greene, *A Crop of Abuse*, MIAMI HERALD, Sept. 1, 2003, *available at* http://www.miamiherald.com/news/florida/v-print/story/56983.html.

42. *See* Office for Victims of Crimes, U.S. Dep't of Justice, http://www.ojp.usdoj.gov/ovc/welcome.html (last visited Oct. 12, 2009) (for access to statistical resources regarding sex and labor trafficking).

When sex trafficking and labor trafficking are distinguished at law, traffickers are charged, convicted, and sentenced not based on their exploitative actions, but on the end result of their coercion. This leads to unpredictable results. Without "prostitution" or a commercial sexual act to define the crime as sex trafficking, the abuse becomes labor trafficking whether or not sexual abuse was involved.[43] Cases are often categorized criminally as labor trafficking, even those encompassing clear sexual exploitation in the sex industry, if the case does not involve an exchange of sex for money. Several federal cases involving women trafficked for work in strip clubs have been prosecuted as labor trafficking crimes,[44] although the underlying exploitation was certainly sexual in nature.[45] In practice, the theoretical designation of labor trafficking as inherently less sexually exploitative than sex trafficking is false.

2. Labor Trafficking Causes Significant Trauma to Victims

Sex trafficking can be seen normatively as more inherently harmful, because it violates a woman's bodily integrity in a manner that labor trafficking apparently does not. Sexual abuse and exploitation may be assumed to cause higher levels of trauma to victims. Thus, higher penalties for sex trafficking seem a common sense response to different harms. However, this distinction does not hold true. Victims of labor trafficking often present forms of psychological trauma similar to those of sex trafficking victims, largely because

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43. *See* Farley, *supra* note 31, at 141-42 (arguing that "prostitution" and "sex trafficking" are inexorably linked, and that attempting to distinguish them hinders efforts to create effective legislation against trafficking).

44. *See, e.g.*, *Case Updates,* ANTI-TRAFFICKING NEWS BULL. (U.S. Dep't of Justice, Civil Rights Division, Washington, D.C.), Winter 2006-2007, at 10, 10-11, *available at* http://www.usdoj.gov/crt/crim/trafficking_newsletter/antitraffnews_dec06.pdf (discussing the *United States v. Jado* case); *see also Case Updates,* ANTI-TRAFFICKING NEWS BULL. (U.S. Dep't of Justice, Civil Rights Division, Washington, D.C.), Summer/Fall 2007, *available at* http:// www.usdoj.gov/crt/crim/trafficking_newsletter/antitraffnnews_aug07.pdf at 7, 7-8 (overview of the *Maksimenko* and *Aronov* cases, in which defendants were accused of holding exotic dancers in involuntary servitude).

45. State laws often divide sex and labor trafficking differently than the federal division. For example, under judicial interpretation of "sexual contact" in the definition of prostitution in New York State, most trafficking into strip clubs would be considered prostitution. *See* People v. Gray, 607 N.Y.S.2d 828, 829 (App. Div. 1994) (sexual contact includes touching of upper leg); People v. Aronsen, 611 N.Y.S.2d 901, 903 (App. Div. 1994) (sexual contact includes touching of breasts); People v. Felton, 536 N.Y.S.2d 340, 342 (App. Div. 1988) (sexual contact includes touching of buttocks); People v. Belfrom, 475 N.Y.S.2d 978, 980 (Sup. Ct. 1984) (sexual contact includes touching of navel). *See also* People v. Hinzmann, 677 N.Y.S.2d 440, 442 (Crim. Ct. 1998) (noting that stripper sitting on a lap and gyrating while having her naked breasts and buttocks fondled is sufficient to allege prostitution charge).

both are subjected to performing demeaning and often degrading tasks against their will by similarly coercive abusers.[46] Losing the ability to control what happens to one's body leaves similar psychological damage, whether one is forced to clean toilets or to provide sexual services. Victims also tend to emotionally react to their experiences individually. Such factors as the length of time in the trafficking situation, the relationship of the victim to the trafficker, and the expectations the victim held prior to the trafficking situation all affect the level of harm the individual victim experiences. A sex trafficking victim who knew she would be performing sexual labor but did not expect to be in debt bondage may weather her abuse fairly well. A labor trafficking victim in a purportedly romantic relationship with a trafficker who forces her to clean houses may be completely devastated. Further, offenses against the right to bodily integrity should surely include any services a person is forced to perform for another, even if those services are not of a sexual nature. Since victims show differing levels of trauma based on their individual circumstances, and not based on the type of exploitation they experience, violation of bodily integrity cannot serve as the marker of difference between sex and labor trafficking.

3. Labor Trafficking Targets Women Because of Their Gender

The distinctively gendered nature of most sex work, i.e., women paid to provide services to male clients, is an oft-cited reason for why sex trafficking is worthy of greater prosecution and punishment.[47] There is no question that abuse and exploitation of women occurs in all areas of the sex industry, whether that abuse rises to the level of sex trafficking or not.[48] However, trafficking in the sex industry is not the exclusive way that women as women are targeted for exploitation. Most trafficking victims in the United States are victims of labor trafficking, and most victims of trafficking are women.[49] The

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46. *Health Care and Human Trafficking*, COMMUNITY HEALTH PLAN. AND POL'Y DEV. SEC. NEWSL. (Am. Pub. Health Ass'n, Washington, D.C.), Spring 2008, *available at* http://www.apha.org/membergroups/newsletters/sectionnewsletters/comm/spring08/.

47. Although male-male sex trafficking certainly occurs, as does trafficking of transgendered sex workers, legal academics and theorists have generally only been concerned with the dynamic of differently gendered prostitution encounters. Marc Spindelman, Panel Discussion, *Sex Work Explored: Rethinking the Laws Regulating Prostitution*, 8 GEO. J. GENDER & L. 995, 1013 (2007).

48. Trafficking Victims Protection Act, 22 U.S.C.S. §§ 7101-12 (LexisNexis 2009).

49. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, LABOR TRAFFICKING FACT SHEET 1-2 (2009), *available at* http://www.acf.hhs.gov/trafficking/about/fact_labor.pdf [hereinafter LABOR TRAFFICKING FACT SHEET]; *see Hidden Slaves*, *supra* note 9, at 58, 60 (dissecting statistics on human trafficking).

second largest percentage of human trafficking cases are domestic servitude cases, an almost exclusively female occupation.[50] While these numbers could reflect a law enforcement bias towards prosecuting cases that involve a traditionally female victim of male aggression,[51] there may simply be more women targeted for trafficking. Trafficking in the United States is clearly a gendered crime, as the majority of victims in both sex and labor trafficking are women.

B. Distinctions Between Labor and Sex Trafficking Are Likely to Rest on Moral Condemnation Rather than Differences in Harm

Once the usual distinctions between sex and labor trafficking based on sexual and gendered exploitation are proven false by practical experience, what remains of this distinction lies in the field of moral disapproval. Sex trafficking is simply considered more morally repugnant than labor trafficking. Anti-trafficking statutes strongly distinguishing sex and labor trafficking reflect this moral disapproval of the sex industry and give labor exploitation a free pass. Dividing sex and labor trafficking along moral lines underplays the actual harms of labor trafficking, "marginalizes persons trafficked in non-sex related industries,"[52] and erases the gendered nature of labor trafficking.

1. Sex Work Is Seen as Morally Reprehensible and Harmful While Exploitation of Labor Is Not

The underlying exploitation involved in sex trafficking, prostitution, pimping, or patronizing a prostitute, is already criminalized as morally repugnant.[53] Without any type of force or coercion, pimping or patronizing a prostitute are also illegal activities in most jurisdictions. In contrast, most states and the federal government leave regulation of the labor sector to civil regulation rather than criminal. Very few, if any, jurisdictions criminalize the hiring of undocumented workers or the underpayment of workers. Prostitution is almost

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50. *See* LABOR TRAFFICKING FACT SHEET, *supra* note 49 ("Women and children are overwhelmingly trafficked in labor arenas because of their relative lack of power, social marginalization, and their overall status as compared to men."); *Hidden Slaves*, *supra* note 9, at 60-61 ("[P]rostitution is the sector for which the largest amount of forced labor occurs. . . .[T]he second highest incidence of forced labor takes place in domestic service in U.S. homes.").

51. *See* Dina Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 348 (2007) ("The type of cases prosecuted . . . have been heavy on trafficking involving sex exploitation, where the most visible victims can be found . . . .").

52. Chang & Kim, *supra* note 6, at 319.

53. 8 U.S.C. § 1328 (2006).

universally illegal, while working without legal authorization is barely a civil violation. Thus, it seems to be common sense that sex trafficking should be punished at a higher level than labor trafficking, because the underlying exploitation in sex trafficking is already subject to criminal penalties.

Yet, this only makes sense if we assume that labor exploitation is not morally reprehensible. Labor exploitation could be considered criminal if society chooses to recognize it as such. Not paying workers for their work or underpaying them may be considered just as morally wrong in some circles as paying someone for sexual services. Even if labor regulation remains civil, lax enforcement gives a free pass to those who choose to exploit vulnerable labor.[54] The lack of enforcement leads to the perception that labor exploitation is acceptable. This acceptance of the status quo makes labor trafficking seem to be the lesser moral harm.

2. Social Panic Over Sexuality Leads to Moral Distinctions Based on Condemned Sexual Activity

Although they are hardly alone in this, structuralist theorists support a popular moral division between sex and labor trafficking largely based on sex panic.[55] In the moral scheme of structuralist feminism, commercial sex as the embodiment of women's oppression is clearly more immoral than slavery. The critique of structuralist feminism's conflation of prostitution and sex trafficking as constituting a moral panic is not new. Multiple critics, feminist and otherwise, have attacked the conflation of sex trafficking and prostitution in the sex work context as reflective of an underlying moral view that ignores the daily realities of sex workers' lives and businesses.[56] This conflation is reminiscent of the viewpoint of nineteenth century white slave trade abolitionists and undermines women's ability to control their sexuality.[57]

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54. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks at Release of Ninth Annual Trafficking and Persons Report Alongside Leaders in Congress (June 16, 2009), http://www.state.gov/secretary/rm/2009a/06/124872.htm.

55. Jacqueline Berman, *The Left, the Right and the Prostitute: the Making of U.S. Anti-trafficking in Persons Policy*, 14 TUL. J. INT'L & COMP. L. 269, 281 (2006).

56. Cynthia L. Wolken, *Feminist Legal Theory and Human Trafficking in the United States: Towards a New Framework*, 6 U.MD. L.J. RACE RELIGION GENDER & CLASS 407, 423 (2006).

57. *See* Berman, *supra* note 55, at 274 (discussing anti-trafficking groups' perspective that "women and girls 'working' in a foreign sex sector" are unable to consent to such exploitation); Hernández-Truyol & Larson, *supra* note 14, at 400-01 (arguing that the abolitionist position "translates into a refusal to distinguish voluntary prostitution and immigration for sex work from forced prostitution and trafficking"); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking*

In the trafficking context, this conflation allows the harms of labor trafficking to go unrecognized and unpunished. Labor exploitation is not always a form of gender oppression, because it happens between men as often as between men and women.[58] While feminists are naturally only concerned with women's oppression by men, individualism gives greater space to liberal ideals that apply more easily to all forms of oppression. Thus, a moral viewpoint concerned with multiple forms of oppression, or a more general human rights focus, gives labor trafficking a similar weight to sex trafficking. However, such an approach runs the risk of erasing the gender-specific nature of trafficking.

Social panic over sex trafficking also dovetails neatly with increased criminal enforcement generally. Fighting sex trafficking and prostitution fit comfortably within a rubric of greater criminal control over immigrants and the greater society, and thus is a much easier perspective for legislators and law enforcement to assimilate.[59] Law enforcement officers are used to dealing with vice crimes and prostitution, while labor is not usually within their purview. Victimization in the sex industry at the hands of ruthless criminals is stereotypic, while victimization at the hands of criminals in the labor context is almost unheard of. The translation of labor exploitation into the criminal context is a much more difficult leap, but one that must be taken if trafficking is going to be handled criminally. In order to strip away moralizing about sex, full and equal recognition of labor trafficking is essential to get to the root of women's oppressive exploitation through trafficking.

II. ISN'T FEDERAL ENFORCEMENT ENOUGH TO FIGHT TRAFFICKING?

Although the federal Victims of Trafficking and Violence Prevention Act (TVPA)[60] reflects a remarkable compromise between

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Law, 87 B.U. L. REV. 157, 194 (2007) (discussing the abolitionist perspective, "which recalls the heated debate about the 'white slave trade'"); Weitzer, *supra* note 6, at 450-51 (outlining claims made by moral crusaders regarding prostitution). Chantal Thomas also recognizes that human rights activists form a central pillar in the individualist camp, shifting the focus of trafficking debates to the human rights of all trafficked persons. Halley et al., *supra* note 26, at 350; *see also* Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 83-87 (1998) (highlighting the individualist concerns, and suggesting that "[b]ecoming mired in debates over whether or not women should be able to consent to prostitution could overlook the different kinds of coercive forces that could potentially influence her consent").

58. Susan Carroll, *More Men Victims of Human Trafficking*, HOUS. CHRON., July 6, 2009, at A1 (highlighting an increase in male victims from six percent of victims in 2006 to forty-five percent of victims in 2008).

59. *See* James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking,"* 49 VA. J. INT'L L. 1 (2008) (regarding this phenomenon in the international arena).

60. Trafficking Victims Protection Act, 22 U.S.C.S. §§ 7101-12 (LexisNexis 2009).

feminist positions, labor trafficking is dramatically under-enforced according to the federal government's own statistics. In the first eight years of enforcement of the TVPA, the majority of trafficking cases prosecuted by the Department of Justice were sex trafficking cases.[61] Fewer than thirty percent of all trafficking cases brought under the TVPA were labor trafficking cases.[62] Even with a change of administration, there is no reason to expect the priorities of the Department's Civil Rights Division to change dramatically in this respect. Labor cases are usually considered civil cases, and are not considered important cases for criminal enforcement in the way that organized crime and prostitution are. Federal enforcement will likely remain skewed towards prosecuting sex trafficking.

It is also unrealistic to expect primary enforcement of trafficking cases from the federal government, since state and local governments are the primary locus of criminal enforcement. Although the federal government has occasionally been involved in enforcement of prostitution and labor laws, such as the vice raids conducted under J. Edgar Hoover, the federal government has actively indicated its intention to primarily abdicate the field to the states by pressuring them to pass state level legislation and by funding local task forces to handle trafficking cases (albeit with involvement of federal officials).[63] If trafficking is to become institutionalized as a recognized and regularly prosecuted crime, state and local authorities will have to prosecute most of these cases.

As the first anti-trafficking criminal statute passed in the United States, the federal law has been a model for state level legislation in this area, and provides a prime example of political compromise between feminist activist positions on trafficking. State level legislation and future prosecution should be the primary method for integrating anti-trafficking into criminal justice institutions.

A. Federal Victims of Trafficking and Violence Protection Act

1. Overview of the Federal Act

Congress was the first legislative body in the United States to tackle the issue of human trafficking. The federal Victims of

61. U.S. GOV'T ACCOUNTABILITY OFFICE, HUMAN TRAFFICKING: A STRATEGIC FRAMEWORK COULD HELP ENHANCE THE INTERAGENCY COLLABORATION NEEDED TO EFFECTIVELY COMBAT TRAFFICKING CRIMES 49 (2007), *available at* http://www.gao.gov/new.items/d07915.pdf.

62. *Id.*

63. CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001-2005 56 (2006), *available at* http://www.usdoj.gov/crt/crim/trafficking_report_2006.pdf [hereinafter DOJ REPORT].

Trafficking and Violence Protection Act (TVPA),[64] passed in October 2000 and amended in 2008, criminalizes human trafficking in two sections: "Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor,"[65] and "Sex trafficking of children or by force, fraud, or coercion."[66] This bifurcated structure separating labor and sex trafficking is the product of a grand compromise between structuralist and individualist advocacy efforts during the drafting of the TVPA.[67] As the first law criminalizing trafficking as such, the federal compromise provides an important starting point for analyzing state legislation on trafficking.

The twin trafficking definitions of the TVPA largely mirror each other in structure. There are three primary sections within each definition: the methods of gaining control over the victim, the means used to exploit the victim, and the underlying labor or services that the victim is forced to perform.[68] A person can be convicted of trafficking only if there is evidence in each one of those three categories.[69] For example, if a trafficker uses one of the proscribed methods of gaining control, such as recruiting, in conjunction with one of the proscribed means of exploitation, such as threats of physical force, in order to

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64. 18 U.S.C.S. § 1590 (LexisNexis 2009). The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 amended 18 U.S.C.S. §§ 1581(a), 1583, 1584, 1589-94 to include criminal sanctions in alignment with the TVPA. PUB. L. 110-457, 122 STAT. 5044.

65. *Id.* § 1590(a). "Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor" states, in relevant part:

> Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

66. *Id.* § 1591(a). "Sex trafficking of children or by force, fraud, or coercion" states, in relevant part:

> Whoever knowingly — (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains or maintains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

67. Srikantiah, *supra* note 57, at 169.

68. This article will use the term "methods" to cover the various ways the law defines the gaining of control over another, and "means" to describe the sets of actions required for the labor or services to be considered exploited.

69. §§ 1590(a), 1591.

keep his victims working in a factory against their will, trafficking has occurred. Almost all trafficking definitions have the same combination of methods, means, and underlying labor or services.

The TVPA also includes additional provisions dealing with foreign policy and victim services. Victims of "severe forms of trafficking," defined separately and encompassing victimization under both the sex and labor trafficking provisions, are eligible for immigration relief, and also receive federal benefits to the same extent as incoming refugees and asylees.[70] As state legislatures have no power to extend immigration benefits, and usually little or no funding for service provisions, these federal provisions for victim witnesses ensure that even state-prosecuted trafficking cases will have some federal governmental involvement.

2. Defining the Crime

While labor and sex trafficking are separately defined, both definitions include the three elements of method, means, and underlying service. In the labor trafficking provision, entitled "Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor," the listed methods include recruitment and transportation, amongst other common methods.[71] The means are not specifically listed in this statute, which only lists "by any means."[72] The definition is similarly simple in its reference to the underlying "labor or services."[73] The phrase "labor or services" encompasses all of the provisions within the "Peonage, Slavery and Trafficking in Persons" chapter of the federal criminal code.[74] Most of the crimes in this chapter were first codified in the late 1940s, but the Trafficking Victims Protection Act added the crime of "forced labor."[75] The forced labor section was passed in

70. 22 U.S.C.S. § 7105(b)(1)(B) (LexisNexis 2009).

71. § 1590.

72. *Id.* § 1590(a).

73. *Id.*

74. Chapter 77 of Title 18 of the U.S. Code separately contains the crimes of peonage, slavery, forced labor, and trafficking with respect to those crimes. 18 U.S.C.S. §§ 1581-95 (LexisNexis 2009).

75. *Id.* § 1589(a) provides, in relevant part:

> Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means — (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection (d).

2000 as a part of the TVPA,[76] and is essentially a complicated list of various means of exploitation, such as force, threats, or abuse of the legal system.[77] The labor trafficking definition itself is broad, because the underlying crimes are so specific.

"Sex trafficking of children or by force, fraud, or coercion" combines both broadness and specificity in one definition.[78] Essentially, the sex trafficking provision combines the methods listed in the labor trafficking provision with the detailed means provision of the forced labor definition. The methods of gaining control over the victim are specified first, and are identical to the labor provision, with the addition of "maintains."[79] Section (a) of the sex trafficking provision starts with the broad "by any means" language of the labor trafficking provision, but the mens rea portion of the statute limits it to specific means of force, threats, fraud, or coercion as separately defined in section (e)(2).[80] Means need not be proven if the victim is under eighteen, provided that the trafficker knew or recklessly disregarded the victim's age.[81] The underlying services for sex trafficking are limited to "commercial sexual acts."[82]

3. Punishing the Crime

Labor trafficking convictions carry a sentence of a fine, punishment for not more than twenty years, or both.[83] If death or other serious violations, such as kidnapping or aggravated sexual abuse are involved, the term of punishment is any term of years to life.[84] Sex trafficking effected by the listed means is subject to imprisonment of not less than fifteen years, or life.[85] Means need not be proven if the victim is under eighteen.[86] If the victim is under the age of fourteen,

76. *See* 22 U.S.C.S. § 7112 (LexisNexis 2009) (TVPA of 2000, amending 18 U.S.C.S. § 1589, among other sections, to include anti-trafficking criminal prosecution language).

77. *Id.*

78. § 1591.

79. *Id.*

80. *Id.* § 1591(a), (e)(2). Section (e)(2) provides, in relevant part:

> (2) The term "coercion" means —
>
> (A) threats of serious harm to or physical restraint against any person;
>
> (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm or physical restraint against any person; or
>
> (C) the abuse or threatened abuse of law or the legal process.

81. *Id.* § 1591(a).

82. *Id.* § 1591(a),(e)(3) (defining 'commercial sex act' "as any sex act, on account of which anything of value is given to or received by an person").

83. *Id.* § 1590(a).

84. *Id.*

85. *Id.* § 1591(b)(1).

86. *Id.* § 1591(a)(2).

the sentence range is fifteen years to life.[87] If the victim was between the ages of fourteen and eighteen, imprisonment for not less than ten years or for life is imposed.[88] Obstruction of the enforcement of either the sex or labor trafficking provisions is punishable by imprisonment up to twenty years.[89] Although the basic crime of labor trafficking is initially punished at a lower maximum level than sex trafficking, the inclusion of aggravating factors at sentencing gives some measure of parity between the sentencing levels.

B. Department of Justice Model Legislation

Most of the forty-three state anti-trafficking laws follow the basic format of the federal law,[90] in large part because states were encouraged to adopt a model law on human trafficking drafted by the Department of Justice (DOJ) after the passage of the TVPA.[91] State laws primarily create criminal sanctions,[92] whereas a handful of states such as California, Illinois, and Missouri also provided schemes for victim benefits or victim compensation funds.[93] While a few states adopted the Model Law wholesale, most states borrowed pieces from the Model Law and pieces from the federal law. The Model Law, with its unitary definition of trafficking, fully integrates labor and sex trafficking into one crime.[94]

1. Overview of the Model Law

The most common form of enacted state-level human trafficking laws[95] borrowed language directly from the model state law drafted by the DOJ.[96] Not surprisingly, the Model Law largely mimics the

87. *Id.* § 1591(b)(1).

88. *Id.* § 1591(b)(2).

89. *Id.* §§ 1590(b), 1591(d).

90. POLARIS PROJECT, *supra* note 24, at 1.

91. Former Attorney General Gonzales was also reported to have personally sent letters to all fifty state governors, encouraging them to pass anti-trafficking laws. Markon, *supra* note 9.

92. The criminalization response in large part may be reflective of the fact that criminal statutes rarely come with an actual price tag, allowing legislators to claim that they are taking action to address a serious problem.

93. RENEWAL FORUM, AN EXAMINATION OF STATE LAWS ON HUMAN TRAFFICKING 3 (2007), http://renewalforum.org/theblog/wp-content/uploads/2007/11/statelawanalysis2.pdf.

94. MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE (Dep't of Justice 2004), *available at* http://www.usdoj.gov/crt/crim/model_state_law.pdf.

95. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-1306 to -09 (2009) ("unlawfully obtaining labor or service"); 720 ILL. COMP. STAT. ANN. 5/10A-5 to 5/10A-20 (West 2008) ("Trafficking of Persons and Involuntary Servitude"); TEX. PENAL CODE ANN. § 20A.01-02 (Vernon 2008) ("Trafficking of Persons").

96. MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE § XXX.01 (Dep't of Justice 2004), *available at* http://www.usdoj.gov/crt/crim/model_state_law.pdf.

federal law. However, the Model Law integrates sex and labor to a much greater degree than the federal law.[97] Twenty-five[98] adopted most or all of the language of the Model Law, including means of trafficking elements similar to the former federal formulation of force, fraud and coercion.[99] Many of these statutes bifurcate the definition of trafficking into sex and labor, similar to the federal law.[100] All state laws considered Model Law statutes in this analysis follow the Model Law's sentencing parity between sex and labor trafficking.[101] Aside from criminal provisions, the Model Law also provides for mandatory restitution for victims,[102] as well as a nudge in the direction of providing social services by mandating a state-level assessment of trafficking victims' needs.[103] The Model Law combines a unified definition of trafficking with sentencing enhancements on the basis of specified crimes, including gendered sex crimes, such as rape, thus carving a politically feasible middle path between structuralist and individualist camps.

2. Governance Feminist Model: Intersectional

Before diving into the details of the Model Law, I will first discuss some of the apparent theoretical implications of this solution.

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97. RENEWAL FORUM, *supra* note 93, at 7.

98. *E.g.*, ARIZ. REV. STAT. ANN. §§ 13-1306 to -09 (2009); DEL. CODE ANN. tit. 11 § 787 (2009); FLA. STAT. ANN. §§ 787.06, 796.045 (West 2008); 720 ILL. COMP. STAT. ANN. 5/10A-5 to 5/10A-20 (West 2008); IOWA CODE § 710A.2 (2008); KY. REV. STAT. ANN. § 529.100 (LexisNexis 2009); MICH. COMP. LAWS ANN. §§ 750.462b-I (West 2009); MINN. STAT. § 609.282 (2008); MO. REV. STAT. §§ 566.206, 209 (2009); MONT. CODE ANN. §§ 45-5-305 to -306 (2007); NEB. REV. STAT. § 28-831 (2009); NEV. REV. STAT. ANN. §§ 200.467-.468 (LexisNexis 2009); N.H. REV. STAT. ANN. §§ 633:6-:7 (2009); N.J. STAT. ANN. § 2C:13-8 (West 2009); N.C. GEN. STAT. §§ 14-43.11 to .13 (2009); N.D. CENT. CODE § 12.1-40-01 (2009); OKLA. STAT. ANN. tit. 21, § 748 (West 2009); 18 PA. CONS. STAT. ANN. §§ 3002-3003 (West 2007); R.I. GEN. LAWS § 11-67-3 (2009); S.C. CODE ANN. § 16-3-930 (2008); TENN. CODE ANN. §§ 39-13-308 to -309 (2009); TEX. PENAL CODE ANN. § 20A.01-02 (Vernon 2008); UTAH CODE ANN. § 76-5-308 (2009); WASH. REV. CODE ANN. § 9A.40.100 (West 2009); WIS. STAT. ANN. § 940.302 (West 2009).

99. RENEWAL FORUM, *supra* note 93, at 2.

100. *See* Arizona (ARIZ. REV. STAT. ANN. §§ 1307-1308 (2009)), Florida (FLA. STAT. ANN. § 787.06 (West 2008)), Indiana (IND. CODE ANN. § 35-42-3.5-1 (West 2009)), Kentucky (KY. REV. STAT. ANN. § 529.010 (2)-(3) (LexisNexis 2009)), Minnesota (MINN. STAT. § 609.281(4)-(6) (2009)), New Jersey (N.J. STAT. ANN. § 2C:13-8(a)(1) (West 2009)), North Carolina (N.C. GEN. STAT. §§ 14-43.12a, 14-43.13 (2009)), Oklahoma (OKLA. STAT. ANN. tit. 21, § 748(A) (West 2009)), Rhode Island (R.I. GEN. LAWS § 11-67-1 (2009)), Tennessee (TENN. CODE ANN. §§ 39-13-308 to -309 (2009)), Texas (TEX. PENAL CODE ANN. §§ 20A.01, 43.02 (Vernon 2008)), and Wisconsin (WIS. STAT. ANN. § 940.302 (West 2009)) (states with bifurcated definitions of sex and labor).

101. MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE §§ XXX.01(8), XXX.02 (Dep't of Justice 2004), *available at* http://www.usdoj.gov/crt/crim/model_state_law.pdf.

102. *Id.* § XXX.02(5).

103. *Id.* § B.

To a far greater extent than New York or California, Model Law jurisdictions recognize the intersecting strands of oppression affecting trafficked people.[104] Primarily articulated as a critique of both structuralist and individualist theory, an intersectional response to trafficking recognizes the multitudinous ways in which different forms of oppression affect women.[105] This response draws heavily on feminist criticism of more mainstream feminist theorists for failing to account for the variety of women's experiences, based not just on their gender but also on their race, class, and sexual orientation, among others.[106] Joan Williams critiques the underlying assumption of many feminists that essentializes women's gender as a force that binds women together under similar oppression.[107] This criticism finds its weight in the race and class conflicts surrounding discussions of women's work in domestic and market spheres.[108] This critique is particularly relevant to trafficking victims who largely provide labor and services in domestic and underground market spheres. Kimberle Crenshaw's intersectional critique of this same tendency within both feminism and racial politics posits that the intersecting and overlapping oppressions experienced by people facing multiple types of discrimination (i.e., race, gender, age, disability, sexual orientation, etc.) should be explicitly recognized in anti-discrimination law.[109] The erasure of the rich, varied experiences of all women into a unified theory of how women are oppressed and how they should seek liberation is most similar to the structuralist focus on sex trafficking to the exclusion of other forms of trafficking and labor exploitation of women.[110] Singular focus on gender rather than class and racial oppression similarly privileges the experience of iconic white victims of sexual exploitation[111] over the poor immigrants of color commonly involved in domestic servitude[112] and other labor trafficking.

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104. *Id.* Explanatory Notes.

105. *See, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (advancing an intersectional approach instead of a structuralist or individualist approach to feminism); Joan Williams, *Implementing Antiessentialism: How Gender Wars Turn into Race and Class Conflict*, 15 HARV. BLACKLETTER L.J. 41, 41-42 (1999).

106. Williams, *supra* note 105, at 77-79.

107. *Id.* at 41.

108. *Id.* at 41-43.

109. Crenshaw, *supra* note 105, at 151.

110. Halley et al., *supra* note 26, at 349.

111. *See* Srikantiah, *supra* note 57, at 201-03 (incorporating class and race into the analysis of victims of sexual exploitations).

112. The private household industry is comprised of 21% unauthorized workers, and "22%, or 342,000, of the 1.5 million 'maids and housekeeping cleaners' in the United States are unauthorized workers," the highest percentage in any industry. Kevin Shawn

Recognition of the varied and intersectional experiences of human trafficking victims is crucial to an effective legal response to trafficking. In the trafficking context, Jayashri Srikantiah recounts how the passage of the federal anti-trafficking law[113] was largely predicated on lawmakers repeatedly referring to trafficking victims as passive objects of sexual exploitation. Furthermore, lawmakers focus on the iconic white female victim, while regularly demonizing "illegal aliens" who willfully entered the United States to work.[114] Srikantiah asserts that this rhetoric influenced the implementation of the federal law, and thus prosecutors and investigators tend only to identify trafficking victims as the former rather than the latter, no matter how much a trafficking victim's labor was exploited.[115] Grace Chang and Kathleen Kim show how trafficking victims who do not fit traditional concepts of involuntary or non-consenting victims may face deportation rather than assistance.[116] It is crucial that state laws recognize the multiple forms of oppression that affect trafficking victims so these victims can be discovered and assisted.

Williams's and Crenshaw's critiques are also important considering that structuralist theory in particular focuses on sex work and ignores domestic labor that encompasses a significant portion of gendered trafficking crimes.[117] In her discussions of the race and class divides amongst feminists, Williams noted that "[m]iddle-class American women aim to 'liberate' themselves by exploiting women of color — particularly immigrants — in the underground economy, for long hours at relatively low wages, with no benefits," which might explain the reticence of some feminist law scholars to embrace this critique.[118] Chang and Kim offer another angle on this reticence, citing that the focus on ending demand for prostitution diverts attention from the demands of the global north for cheap migrant labor.[119] Dividing women workers based on what jobs they chose or on what jobs they were trafficked into "ignores the reality that virtually all women workers experience [sexualization and] commodification [at

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Hsu, Note, *Masters and Servants in America: The Ineffectiveness of Current United States Anti-Trafficking Policy in Protecting Victims of Trafficking for the Purposes of Domestic Servitude*, 14 GEO. J. ON POVERTY L. & POL'Y 489, 500 (2007).

113. Srikantiah, *supra* note 57, at 176.

114. *Id.* at 160.

115. *Id.*

116. Chang & Kim, *supra* note 6, at 333.

117. Halley et al., *supra* note 26, at 349.

118. Williams, *supra* note 105, at 64 (quoting MARY ROMERO, MAID IN THE U.S.A. 40 (1992)). She also notes that "as late as 1940, sixty percent of all African American women workers were domestic servants," falling to eight percent by 1980, although Latinas (likely immigrants) were now also heavily represented in domestic work. *Id.* at 63.

119. Chang & Kim, *supra* note 6, at 332.

work because] of their sexuality and gender."[120] Anti-essentialist and intersectional theory demands that anti-trafficking laws must fully encompass the range of women's experiences of exploitation and be drafted broadly enough to encompass all forms of exploitation.

While feminist organizations do not appear to have been actively involved in the drafting of the Model Law, a variety of feminist, labor and human rights organizations encouraged state legislatures to adopt these hybrid provisions.[121] Although the impact of these laws will only be seen as they are implemented, from a structural point of view the Model Law offers greater possibilities for law enforcement to focus on multiple forms of oppression in trafficking.

3. Defining the Crime

The Model Law starts, as many such bills do, with a lengthy series of definitions of the terms it uses, such as "commercial sexual acts," "forced labor and forced services," and "trafficking victim."[122] The means of trafficking are first defined in the "Forced labor or services" definition,[123] which incorporates the definitions of the end exploitation of "Labor"[124] and "Services."[125] Signaling an intent to walk the line between various feminist camps, the "Services" section specifies that commercial sexual acts are considered services and that

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120. McGinley, *supra* note 30, at 91.

121. Halley et al., *supra* note 26, at 356-57, 360.

122. MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE § XXX.01 (Dep't of Justice 2004), *available at* http://www.usdoj.gov/crt/crim/model_state_law.pdf.

123. *Id.* § XXX.01(4) states:

> "Forced labor or services" means labor, as defined in paragraph (5), *infra*, or services, as defined in paragraph (8), *infra*, that are performed or provided by another person and are obtained or maintained through an actor's:
>
> (A) causing or threatening to cause serious harm to any person;
>
> (B) physically restraining or threatening to physically restrain another person;
>
> (C) abusing or threatening to abuse the law or legal process;
>
> (D) knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person;
>
> (E) blackmail; or
>
> (F) causing or threatening to cause financial harm to [using financial control over] any person.

124. *Id.* § XXX.01(5) ("Labor means work of economic or financial value.").

125. *Id.* § XXX.01(8) states:

> "Services" means an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor. Commercial sexual activity and sexually-explicit performances are forms of "services" under this Section. Nothing in this provision should be construed to legitimize or legalize prostitution.

the section should not be construed to legitimize prostitution.[126] This definition of services would also encompass domestic servitude and servile marriages, thus placing all of "women's work" under the services category rather than labor.[127] Because the criminal provisions refer to both labor and services together, this distinction at the definitional level does not create a separation between the underlying forms of exploitation in the definitions of the crimes themselves.

The Model Law sets out three separate criminal provisions: involuntary servitude,[128] sexual servitude of a minor,[129] and trafficking for forced labor or services.[130] As under the federal TVPA, each

126. *Id.*

127. *See id.* §§ XXX.01(2), (8) (defining commercial sexual activity in such a way that it encompasses both domestic servitude and servile marriages, and later including commercial sexual activity in the Services definition).

128. *Id.* § XXX.02(1) states:

> (1) INVOLUNTARY SERVITUDE. Whoever knowingly subjects, or attempts to subject, another person to forced labor or services shall be punished by imprisonment as follows, subject to Section (4) *infra*:
>
> (A) by causing or threatening to cause physical harm to any person, not more than 20 years;
>
> (B) by physically restraining or threatening to physically restrain another person, not more than 15 years;
>
> (C) by abusing or threatening to abuse the law or legal process, not more than 10 years;
>
> (D) by knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person, not more than 5 years,
>
> (E) by using blackmail, or using or threatening to cause financial harm to [using financial control over] any person, not more than 3 years.

129. *Id.* § XXX.02(2) states:

> (2) SEXUAL SERVITUDE OF A MINOR. Whoever knowingly recruits, entices, harbors, transports, provides, or obtains by any means, . . . another person under 18 years of age, knowing that the minor will engage in commercial sexual activity, sexually-explicit performance, or the production of pornography (see [relevant state statute] (defining pornography)), or causes or attempts to cause a minor to engage in commercial sexual activity, sexually-explicit performance, or the production of pornography, shall be punished by imprisonment as follows, subject to the provisions of Section (4) *infra*:
>
> (A) in cases involving a minor between the ages of [age of consent] and 18 years, not involving overt force or threat, for not more than 15 years;
>
> (B) in cases in which the minor had not attained the age of [age of consent] years, not involving overt force or threat, for not more than 20 years;
>
> (C) in cases in which the violation involved overt force or threat, for not more than 25 years.

130. *Id.* § XXX.02(3) states:

> TRAFFICKING OF PERSONS FOR FORCED LABOR OR SERVICES. Whoever knowingly (a) recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, intending or knowing that the person will be subjected to forced labor or services; or (b) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an

section sets out the methods of gaining control over the victim, the means by which the exploitation was achieved, and the form of the underlying labor and services.[131] The two labor trafficking provisions essentially parallel the federal crimes of forced labor and labor trafficking. The involuntary servitude section sets out the detailed means by which the exploitation is carried out, and the trafficking section sets forth the methods by which traffickers gain control over their victims.[132] The third crime created by the Model Law, sexual servitude of a minor, pulls out the section of the federal sex trafficking crime relating to minors and makes it a stand-alone crime.[133]

The crucial difference between the federal TVPA and the Model Law is the inclusion of commercial sexual acts in the definition of forced labor or services.[134] Thus, all forms of trafficking fall under the same unitary definition. The single unitary definition ensures similar treatment at sentencing for both sex and labor traffickers, as the provisions are the same.[135] By defining labor and sex trafficking as one crime, the focus shifts to the means of exploitation, rather than the underlying form of the exploitation. This shift forces law enforcement to place their efforts behind ending exploitative practices of traffickers, rather than allowing them to focus their efforts on the more familiar territory of sex trafficking.

The Model Law is clearly advantageous from the intersectional and anti-essentialist perspectives. The unitary definition requires compromises from both structuralists and individualists. While structuralist feminists would likely disfavor the subsuming of commercial sexual acts under the "services" definition, individualist feminists would be equally unhappy about the separate definition of sexual servitude of a minor.[136] However, neither side loses much in the Model Law definition. Individualist feminists can still rely on the definitions and sentencing parity of involuntary servitude and trafficking to protect women in domestic servitude and traditional labor sectors just as much as women in forced prostitution. Structuralist feminists can take comfort in the broad definition of commercial sexual acts and the

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act described in violation of Sections XXX.02(1) or (2) of this Title, shall, subject to the provisions of Section (4) *infra*, be imprisoned for not more than 15 years.

131. *Id.* § XXX.02(1)-(3); *see also* 22 U.S.C.S. § 7101 (LexisNexis 2009) (further explaining human traffickers' operations and methods of control).

132. § XXX.02(1), (3).

133. *Id.* § XXX.02(2). Many states have codified this provision in the section of the criminal code encompassing crimes against minors.

134. *Id.* § XXX.01(8).

135. *See id.* § XXX.02(1) (outlining the sentencing structure to be applied to someone convicted of subjecting another to "forced labor or services").

136. Halley et al., *supra* note 26, at 351.

strong condemnation of minors in the sex industry, as well as the strong language in the services definition that prostitution cannot be legitimized nor legalized under these provisions.[137] In all, the Model Law definition is more focused on the exploitative means by which trafficking is carried out, which appears to bridge the gap between the two perspectives. The Model Law represents a strong middle path.

In practice, however, the slight minority of Model Law states follow the federal TVPA rather than the Model Law and bifurcate the trafficking definitions into sex and labor trafficking.[138] As with the federal law, these bifurcated definitions represent a compromise between feminist positions, combining sentencing parity desired by individualists with some recognition of sex trafficking and prostitution as separate and distinct as desired by structuralists. However, only the Model Law provides a viable third solution that bridges the gap between the feminist positions.

4. Punishing the Crime

The Model Law recommends different sentences based on different exploitative means for each of the three designated crimes.[139] The focus of punishment is clearly placed on the form of exploitation used by the trafficker.[140] "Trafficking of Persons for Forced Labor or Services" contains a single sentence of not more than fifteen years.[141] Sentences for "Involuntary Servitude" range from fifteen years to three years based on the decreasing intensity of a set of means.[142] "Sexual Servitude of a Minor" also carries a sentencing range dependent upon the age of the victim, from up to fifteen years to not more than twenty-five years.[143] These flexible sentencing ranges allow judges or juries to take the specific actions of the trafficker directly into account at sentencing. In this manner, the focus of the Model Law is clearly on the exploitation used by the trafficker. However, almost all federal/Model Law states vary from this sentencing scheme by setting fixed sentences for involuntary servitude and sexual servitude of a minor.[144] This is likely due to the need to integrate

137. § XXX.01(8).
138. *See supra* note 100.
139. § XXX.02(1)-(3).
140. *Id.*
141. *Id.* § XXX.02(3).
142. *Id.* § XXX.02(1).
143. *Id.* § XXX.02(2).
144. For some examples, see Arizona (ARIZ. REV. STAT. ANN. § 13-705 (2009)), Florida (FLA. STAT. ANN. § 787.06 (West 2008)), New Jersey (N.J. STAT. ANN. § 2C:13-8(b), (d) (West 2009)) and Texas (TEX. PENAL CODE ANN. § 20A.02(b) (Vernon 2008)).

sentencing for trafficking crimes within an existing state-specific sentencing rubric.

Punishment under the Model Law also includes sentencing enhancements dependent upon several factors relevant to the severity of the exploitation and harm caused by the trafficker.[145] Specified enhancements alter sentences upwards to a statutory maximum if the means or methods of trafficking include rape, extreme violence, death, multiple victims, etc.[146] Restitution to victims is mandatory.[147] Most states have adopted these enhancements, most commonly addressing enhancements such as severe bodily injury, rape, sexual assault, and the number of victims involved.

This model of sentencing parity with enhancements has been widely adopted by states following the Model Law and is one of the key structural provisions that states have followed. Even states that adopted the federal bifurcated definition usually adopt sentencing parity between sex and labor trafficking. A handful of states, however, including New York,[148] Kansas,[149] Louisiana,[150] and

145. § XXX.02(4) states, in relevant part:

(4) SENTENCING ENHANCEMENTS:

(A) Statutory Maximum — Rape, Extreme Violence, and Death. If the violation of this Article involves kidnaping [sic] or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be imprisoned for any term of years or life, or if death results, may be sentenced to any term of years or life [or death].

(B) Sentencing Considerations within Statutory Maximums.

(1) Bodily Injury. If, pursuant to a violation of this Article, a victim suffered bodily injury, the sentence may be enhanced as follows: (1) Bodily injury, an additional ___ years of imprisonment; (2) Serious Bodily Injury, an additional ___ years of imprisonment; (3) Permanent or Life-Threatening Bodily Injury, an additional ___ years of imprisonment; or (4) if death results, defendant shall be sentenced in accordance with Homicide statute for relevant level of criminal intent.

(2) Time in Servitude. In determining sentences within statutory maximums, the sentencing court should take into account the time in which the victim was held in servitude, with increased penalties for cases in which the victim was held for between 180 days and one year, and increased penalties for cases in which the victim was held for more than one year.

(3) Number of Victims. In determining sentences within statutory maximums, the sentencing court should take into account the number of victims, and may provide for substantially-increased sentences in cases involving more than 10 victims.

146. *Id.*

147. *Id.* § XXX.02(5).

148. *Compare* N.Y. PENAL LAW § 230.34 (McKinney 2009) (making sex trafficking a class B felony) *with* N.Y. PENAL LAW § 135.35 (McKinney 2009) (making labor trafficking a class D felony).

149. *Compare* KAN. STAT. ANN. § 21-3446(b) (2009) (making labor trafficking a level 1 felony) *with* KAN. STAT. ANN. § 21-3447(b) (2009) (making sex trafficking a level 2 felony).

150. LA. REV. STAT. ANN. § 46.2 (2009). Interestingly, Louisiana has a unitary definition

Tennessee,[151] provide explicitly higher penalties for sex trafficking than labor trafficking. However, this parity makes great practical sense, as discussed in Section II above. This scheme ensures that those subjecting their victims to sexual assault as a part of a labor trafficking scheme will be punished to the same extent as sex traffickers employing the same means of exploitation. The emphasis of punishment is on the actions taken by the traffickers rather than on the activities the victim is forced to perform.

III. WHAT ABOUT INDEPENDENT STATE MODELS?

Although most states have followed the federal or Model Law example, several states have chosen to develop their own distinct anti-trafficking statutes. A few states tied the anti-trafficking law to smuggling provisions,[152] and some add sections regulating international marriage brokers.[153] Some have no mention of sexual conduct[154] and some focus on sex almost exclusively.[155] Two models stand out as examples of very different approaches to anti-trafficking legislation: California and New York. The development of the trafficking statutes in California and New York was heavily influenced by feminist organizations, albeit of different theoretical stripes. Both are top five destination states for trafficking victims; together these state laws affect a large proportion of human trafficking cases.[156] Both laws seek to be comprehensive in scope and are relatively unique. Both shed light on current anti-trafficking policy debates.

A. California

1. Governance Feminist Model in California: Individualist

The California law is greatly influenced by a variety of feminist responses that generally recognize the societal forces acting upon

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of trafficking, but doubles the punishment if commercial sexual acts or criminal sexual conduct is involved. This would provide greater sentences for labor traffickers who subjected their victims to sexual abuse, while maintaining focus on the traffickers' behavior.

151. *Compare* TENN. CODE ANN. § 39-13-308 (2009) (making labor trafficking a class C felony) *with* TENN. CODE ANN. § 39-13-309 (2009) (making sex trafficking a class B felony).

152. Notably Arizona (ARIZ. REV. STAT. ANN. §§ 13-2319(A),13-1307, 13-1308 (2009)), Nevada (NEV. REV. STAT. ANN. § 200.468 (LexisNexis 2009)), and Utah (UTAH CODE ANN. § 76-5-310 (2009)). This is somewhat unsurprising considering their proximity to the United States/Mexico border and their large populations of undocumented migrants.

153. HAW. REV. STAT. § 489N-2 (2009); WASH. REV. CODE ANN.§ 19.220.010 (West 2009).

154. California (CAL. PENAL CODE § 236.1 (West 2009)); Oregon (OR. REV. STAT. ANN. § 163.266 (West 2009)); Virginia (VA. CODE ANN. § 18.2-47(B) (2009)).

155. Alaska (ALASKA STAT. § 11.41.360 (2009)); Kansas (KAN. STAT. ANN. § 21-3447 (2009)); New York (N.Y. PENAL LAW §230.34 (McKinney 2009)); Ohio (OHIO REV. CODE ANN. § 2929.01(AAA) (LexisNexis 2009)).

156. *See Hidden Slaves*, *supra* note 9, at 48.

women in the sex industry, but that seek to similarly recognize women's autonomy. As with traditionally liberal responses to social inequality, individualists focus on the need for a framework of individual rights to protect trafficked persons.[157] The centrality of the individual and respect for her autonomy means that women should be free to make choices for their lives,[158] even bad choices.[159] As discussed below, this theory shares many of its basic premises with traditionally liberal civil and human rights theories that also make individual rights primary. Indeed, many individualists also advocate a human rights response to trafficking, moving beyond strictly feminist theory to include explicit human rights discourses.

Encompassed within the individualist perspective is the socialist/sexual liberationist response to trafficking: that sex work should be treated as any other form of wage labor.[160] Sex work theories applied to trafficking often explicitly apply human rights theory rather than feminist theory. Under this view, all trafficking is labor trafficking, because sex work is included in all forms of labor.[161] This is the polar

157. Halley et al., *supra* note 26, at 350.

158. *Id.*

159. *See* Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 116-18, 122, 166 (2007) (relating to the discussion of women being free to make bad choices, and discussing a group of "third wave" feminists who find sex work and the sex industry to be potential sources of female empowerment). Third wave feminists reject structuralist and cultural feminist claims, although they adopt similar essentializing tendencies regarding women generally. Regarding sex work, third-wavers take an individualist approach and view sex work and pornography as methods women use to extract maximum financial benefit from men's ubiquitous appropriation of women's bodies through looks and comments. Because third wave feminists primarily view women's actions through a lens of individual empowerment rather than victimization, they serve as the antithesis of structuralist theory. While this may be a useful analysis regarding sex work, it offers little to trafficked women who are clearly not in the same situation as voluntary participants in the sex and labor industries. Third wave feminism's emphasis on empowerment primarily impacts women at the point that they leave the trafficking situation, when the exercise of volition should be promoted through individual action and benefits and assistance programs to enable them to become fully empowered, self-determined people. Thus, third wave feminism, while useful in other contexts, has not played an active role in the development of feminist intervention in human trafficking.

160. The articulation of sexual labor as requiring general labor protections has been recognized by several scholars. *See* Hernández-Truyol & Larson, *supra* note 14, at 391, 440 (arguing that "a labor paradigm is the proper human rights model for the study of prostitution"); McGinley, *supra* note 30, at 91 (applying Title VII sexual harassment principles to legal sex work in Nevada brothels, and suggesting that "dividing women by their job choices . . . relies on a punitive attitude toward women who choose to work in sexualized environments, and fails to recognize these women's realities"); *see also* McKinstry, *supra* note 30, at 679 (suggesting that a labor union model would alleviate workplace problems for sex workers).

161. Halley et al., *supra* note 26, at 350-51; *see also* Hernández-Truyol & Larson, *supra* note 14, at 391, 393 (arguing that even when sex work is chosen, it is a form of exploitative labor).

opposite view of structuralists, who maintain that all prostitution is trafficking, because prostitution can never be considered labor.[162] Sex-discriminatory aspects of the labor market are viewed as having the same origins as those aspects of prostitution, although sex discrimination in the labor market could also explain the continued existence of prostitution.[163] Sexual stereotyping of "women's work" causes degradation of working conditions in those gendered industries, affecting waitresses, secretaries, housekeepers, and sex workers.[164] Recognition of commercial sex as labor does not prevent treating the harms involved in the sex industry as sex discrimination. Forms of commercial sex are not considered inherently any more sexist or degrading than other sex-segregated jobs.[165] The exploitation, physical danger, emotional abuse, racism, sexism, poverty, and human trafficking endemic to the sex industry similarly occur to women in all industries and are all forms of sex discrimination.[166]

Recognition of sex work as a form of labor often translates into a legal response to prostitution consisting of decriminalization of all aspects of prostitution (buying and selling) and regulating the industry through health and safety codes.[167] In anti-trafficking laws specifically, individualists call for definitions that recognize an explicit separation between consensual sex work and non-consensual, coerced sex trafficking.[168] This tracks the distinguishing of labor trafficking from regular, consensual employment relationships. Scholars note that by selectively criminalizing and highlighting sex trafficking, as often occurs in structuralist but not individualist models, the root causes of all forms of exploitation in human trafficking remain unchallenged.[169] Individualist theory in trafficking tends to center the analysis for both sex and labor trafficking on the coercive and exploitative behavior of the trafficker rather than on the type of labor the person has been forced or coerced to provide. Individualist legal responses more easily lead to recognition of the commonality between sexual and labor exploitation that is the hallmark of human trafficking.

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162. Halley et al., *supra* note 26, at 351.
163. Hernández-Truyol & Larson, *supra* note 14, at 440.
164. Schultz, *supra* note 13, at 227-28.
165. *Id.* at 228.
166. *Id.* at 228, 233.
167. *See* Hernández-Truyol & Larson, *supra* note 14, at 391-92 (recognizing that this conclusion brings "little to the existing debate," but arguing that a human rights perspective allows for investigations of the issue beyond coercion and consent, i.e., the structuralist theory model and its opponents).
168. Halley et al., *supra* note 26, at 351.
169. Chang & Kim, *supra* note 6, at 328.

Indeed, individualist feminists have often called for greater human rights protections as the preferred response to human trafficking.[170] Cynthia L. Wolken, in her review of feminist responses to human trafficking, ends her analysis with a direct call for human rights legislation over feminist-oriented legislation, because feminist models could not encompass the breadth of human trafficking.[171] Explicitly addressing sex work and human rights, Berta Hernández-Truyol and Jane Larson articulate a human rights model for the study of prostitution that largely encompasses the classification of sexual labor as labor in most contexts.[172]

Hernández-Truyol and Larson posit that the move toward recognizing the intersection of civil/political rights and economic/social rights in the context of sex work and labor allows the creation of common ground between the seemingly irreconcilable feminist positions.[173] Analyzing sex work from a labor perspective allows them to restore agency to women — agency that structuralist theory denies.[174] The labor lens also shows how similar the economic motivations are that lead women into both sex work and exploitative labor, and shows how similar sex work is to that exploitative labor.[175] Women struggling for survival have to make hard economic choices when finding employment. Their choice of sex work as the best option for them should not then be used to further deny those women the bargaining power to insist upon decent conditions at their workplace.[176] Similarly, when women choose to enter sex work or servitude because they see no other options, they should still be able to be classified as trafficking victims if they are exploited. This form of the individualist theory is particularly applicable to human trafficking, since the crime as defined in most jurisdictions, domestic and international, encompasses both sexual and labor exploitation.[177]

2. Practical Effects

a. Overview of the Legislation

One of the first states to criminalize human trafficking, California, crafted a law that exemplifies individualism and human

170. Halley et al., *supra* note 26, at 350.
171. Wolken, *supra* note 56, at 436-37.
172. Hernández-Truyol & Larson, *supra* note 14, at 441.
173. *Id.* at 404-05.
174. *Id.* at 395.
175. *Id.*
176. *Id.*
177. *See supra* Part II.A.2.

rights theory.[178] As the California Penal Code already included crimes such as slavery and kidnapping in the indentured servitude definition, the statute seeks to provide a comprehensive set of statutes to combat trafficking.[179] Passed in 2005, California's law provides parity in definitions and sentencing — in fact, no distinction is made between sex trafficking and labor trafficking.[180] Human trafficking is the sole trafficking crime in the Penal Code, tucked into the false imprisonment chapter.[181] Similar in structure to the unitary definition in the Model Law, the definitions of key terms are also neutral.[182] The clear emphasis of this statute rests on the means of exploitation by the deprivation of personal liberty rather than on the end form of that exploitation.

A particularly victim-centered human trafficking bill created the criminal statute.[183] The criminal statute explicitly states that its definition of human trafficking is consistent with the federal definition, ensuring that victims identified under the California law will still be eligible for federal immigration relief and benefits.[184] In a strikingly victim-friendly move, California allows a trafficked person to file a civil cause of action against their trafficker alongside mandatory criminal restitution.[185] The law also provides a caseworker privilege for human trafficking caseworkers,[186] and requires state law enforcement

178. CAL. PENAL CODE § 236.1 (West 2009 & Supp. I 2009); Matthew Garber, *Chapter 240: Human Trafficking — Combating the Underground Slave Industry in California*, 37 MCGEORGE L. REV. 190, 193-94 (2006).

179. §§ 181, 207-10.

180. § 236.1.

181. *Id.* § 236.1(a) states:

> Any person who deprives or violates the personal liberty of another with the intent to effect or maintain a felony violation of sections 266 [enticement of unmarried female into prostitution], 266h [pimping], 266i [pandering], 267 [abduction], 311.4 [sexual assault/child pornography], 518 [extortion], or to obtain forced labor or services, is guilty of human trafficking.

182. § 236.1(d)(1) states, in relevant part:

> For purposes of this section, unlawful deprivation or violation of the personal liberty of another includes substantial and sustained restriction of another's liberty accomplished through fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out.

§ 236.1(e) states, in relevant part:

> For purposes of this section, 'forced labor or services' means labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, or coercion, or equivalent conduct that would reasonably overbear the will of the person.

183. Assem. 22, 2005-06 State Assem., Reg. Sess. (Cal. 2005).

184. § 236.1(f) ("The Legislature finds that the definition of human trafficking in this section is equivalent to the federal definition of a severe form of trafficking found in Section 7102(8) of Title 22 of the United States Code.").

185. CAL. CIV. CODE § 52.5 (West 2007).

186. CAL. EVID. CODE § 1038 (West 2008).

to submit documents in support of trafficking victims' applications for federal immigration relief.[187] The California law also provides for state-level benefits for trafficked persons.[188]

A new section added in 2008 increases the potential identification of trafficking victims by requiring law enforcement to assess whether a victim of domestic violence or rape, a person suspected of violating prostitution and solicitation codes, or a person deprived of his or her personal liberty is also a victim of human trafficking.[189] Again, as with the prior sections, the definition is clear to provide parity between victims of sexual or labor exploitation, although in practice more sex trafficking crimes are likely to be identified through these other crimes.

b. Defining the Crime

The California definition of trafficking is quite simple. California Penal Code § 236.1(a) states that a "person who deprives or violates the personal liberty of another with the intent to effect or maintain [violations of specified felonies] ... or to obtain forced labor or services, is guilty of human trafficking."[190] Deprivation or violation of personal liberty is defined via a listing of the most common means of exploiting trafficking victims, such as coercion and deceit.[191] The listed felonies include mostly sex-related crimes, such as pimping, enticing or procuring a person into prostitution, and child pornography.[192] Extortion is also listed,[193] presumably to include debt bondage situations.

Interestingly, the statute does not include references to preexisting slavery or kidnapping felonies, both of which outlaw activities remarkably similar to trafficking.[194] The related slavery statute criminalizes asserting, buying, or selling a right of ownership over another person, but does not include the usual methods of gaining control over the victim, such as recruitment, enticement, etc.[195] The kidnapping statute, however, does appear to cover trafficking for slavery and forced labor by prohibiting forcible, coercive, or fraudulent holding of a person with the intent to sell them into slavery or involuntary

187. CAL. PENAL CODE § 236.5 (West 2009).
188. CAL. WELF. & INST. CODE § 13283 (West Supp. I 2009).
189. CAL. PENAL CODE § 236.2 (West Supp. I 2009).
190. *Id.* § 236.1(a).
191. *Id.* § 236.1(d)(1).
192. CAL. PENAL CODE §§ 266, 266h, 266i, 267, 311.4 (West 2009).
193. CAL. PENAL CODE § 518 (West 2009).
194. § 236.1.
195. CAL. PENAL CODE § 181 (West 2009); *see also* Garber, *supra* note 178, at 193 (discussing the difficulty of applying California's preexisting anti-slavery laws to human trafficking cases).

servitude in another state or in California.[196] It is not clear why California legislators did not believe these existing statutes were sufficient to cover trafficking activities. The Assembly Judiciary Committee's analysis of the bill cited the need to expand the slavery law to cover persons who had transported victims but had never used them as forced laborers,[197] although it would appear that the kidnapping statute would cover this activity.

As with most trafficking statutes, the California law separates the definition of trafficking into three distinct elements: methods of gaining control over the victim; means the trafficker used to exploit the victim; and specified end forms of exploitation.[198] California combines the methods of gaining control over the victim with the means of exploitation within the definition of an unlawful deprivation or violation of the personal liberty of another.[199] The deprivation must be "substantial and sustained," which simplifies and broadens the federal laundry list of methods of gaining control over the person.[200] The means need only be shown through evidence of the deprivation itself rather than showing specific methods of gaining control.[201] The emphasis of the definition is on the means used by the trafficker to exploit the victim, expanding the usual means of fraud, coercion, and violence to include duress, deceit, menace or threat of unlawful injury to the person or another.[202] The means by which traffickers overcome the will of their victims are the most important part of this definition rather than the various methods for gaining control over the victim or the end exploitation. This feature is analogous to the Model Law's focus on means as the method of determining punishment within proscribed ranges.

By placing the emphasis on the means, rather than methods of gaining control over the victim, the statute shifts the focus from how a victim was placed in a trafficking situation to the means that the trafficker used to keep them in a position of servitude. This is a classic individualist approach to the trafficking definition. Like New York and other states, California does list separate end-form exploitations, referencing forced labor or services and pimping, pandering, and extortion laws.[203] However, in the setting of a unified definition of

196. CAL. PENAL CODE § 207(c) (West 2009).

197. Garber, *supra* note 178, at 193 (*citing* ASSEMBLY JUDICIARY COMM., COMMITTEE ANALYSIS OF AB 22, at F-G (Cal. Apr. 28, 2005)).

198. § 236.1.

199. § 236.1(d)(1).

200. *Id.*

201. *Id.* § 236.1(a), (d)(1).

202. *Id.* §§ 236.1(d)(1)-(2).

203. *See* § 236.1(a) (stating that someone violating certain California exploitation statutes is guilty of human trafficking).

trafficking, these ends simply become a list of possible human trafficking situations, rather than a way to separate and distinguish multiple types of trafficking crimes.

c. Punishing the Crime

The California law recommends sentences of "three, four, or five years" for a trafficking offense,[204] with a single sentencing enhancement if the victim of the trafficking was under the age of eighteen.[205] In comparison to the federal prison term of twenty years,[206] or to the New York penalties for sex trafficking, these sentences seem very short. However, the terms are consistent with comparable high level felonies in the California penal structure.[207] By penalizing all forms of trafficking of adults under one level and all forms of trafficking of children under a higher level, California has set penalties that treat both sex and labor trafficking with an equity that would please individualism feminists.

Gender is not mentioned anywhere in the statutory scheme, which is likely a result of the human rights orientation of this statute.[208] Although prostitution-related crimes are referenced, the scheme recognizes the different vulnerabilities of children and adults rather than the differences in exploitation between men and women. This scheme will ensure that victims of labor and sex trafficking receive the same protection under the criminal laws, but it tends to erase the distinctively gendered nature of trafficking.

Just as individualists would find little satisfying about the New York law, structuralist theorists would likely disapprove of the California approach. The words "sex" and "prostitution" do not appear anywhere in relevant sections of the statute, not even in the definition of forced labor or services.[209] The California law practically eliminates specific mention of sex crimes in its broad definition of forms of trafficking, apart from the numerical listing of referenced pimping and pandering statutes. California shares with New York and the Model Law a strong emphasis on the means of trafficking, but diverges sharply from New York regarding end-form exploitations. New York's

204. *Id.* § 236.1(b).
205. *Id.* § 236.1(c).
206. 18 U.S.C.S. § 1589 (LexisNexis 2009).
207. *See* CAL. PENAL CODE § 181 (West 2009) (deeming slavery "punishable by imprisonment in the state prison for two, three or four years"); CAL. PENAL CODE § 208 (West 2009) (deeming kidnapping "punishable by imprisonment in the state prison for three, five, or eight years" but enhancing sentencing for kidnapping of minors under the age of 14).
208. § 236.1.
209. *Id.*

listing of specific end forms of exploitation leaves no interpretive room for the statute to be construed to include all forms of exploitation in the sex industry nor for advocates to use the law in an effort to change social mores regarding the sex industry.[210] The individualist approach taken by California, de-emphasizing the division between sex and labor, squarely places the focus on ending all exploitation regardless of form.

B. New York Model

1. Governance Feminism Model in New York: Structuralist

The New York State law was primarily drafted and advocated for by a coalition of organizations that came together around the political goal of eradicating prostitution, as defined by structuralist feminists.[211] Structuralist theory posits that women cannot voluntarily engage in an equitable monetary exchange for sex in the context of the abusive and oppressive power dynamics inherent in male-female relations.[212] In structuralist terms, sex for money in a patriarchal society is always exploitative due to the power imbalance between men and women.[213] An elision is created between sex trafficking, involving some form of overt force, fraud, or coercion on the part of the trafficker, and prostitution crimes, which generally assume freedom of choice by the parties engaging in those activities.[214] Structuralist theorists and their advocates passionately reject distinctions between coerced and voluntary

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210. N.Y. PENAL LAW § 135.35 (McKinney 2009); N.Y. PENAL LAW § 230.34 (McKinney 2009).

211. Nina Bernstein, *Foes of Sex Trade Are Stung by the Fall of an Ally*, N.Y. TIMES, March 12, 2008, at A1 (detailing the perspective and involvement of former Governor Spitzer's anti-trafficking bill); *see also* New York Anti-Trafficking Coalition, http://www.stophumantraffickingny.org (last visited Aug. 25, 2009) (containing news materials regarding human trafficking legislation in New York and links to other coalition members' websites).

212. *See* Barry, *supra* note 31, at 9-10 ("[I]nstitutionalized sexual slavery, such as is found in prostitution, is understood in terms of economic exploitation which results in the lack of economic opportunities for women, the result of an unjust economic order."); *see also* Berman, *supra* note 55, at 279 (noting that, for radical feminists, prostitution exemplifies a site "of male sexual violence upon which women's subordination is built").

213. Berman, *supra* note 55, at 279.

214. *Id.* Radical feminists "have identified what they believe to be an inexorable link between trafficking and prostitution by defining all movement of sex workers across borders as human trafficking." *Id.* Berman also notes that this elision, created by a coalition of radical feminists and conservative Christians, currently "dominates public accounts of, and U.S. policies on, human trafficking." *Id.* at 289. Weitzer similarly notes this elision in the TVPA Reauthorization of 2005, which included provisions repeatedly referring to combating "trafficking in persons and demand for commercial sex acts." Weitzer, *supra* note 6, at 465.

prostitution.[215] All prostitution is forced and coerced by the social and economic inequality of women, driving them into the commercial sex industry in which women are paid for accepting the same male-patterned violence that they were trained to accept as children.[216] Structuralist theory in the trafficking context emphasizes the end-form of the exploitation involved in the trafficking case: almost exclusively commercial sexual exploitation.[217] There is no need to focus on the means of accomplishing that exploitation, as the means of exploitation are always the same coercion inherent in a society that oppresses women.[218]

Critiques of structuralist theory, when applied to prostitution, pornography, and other perceived forms of sexual exploitation, often show how this theory derives more from moral panic regarding sex than it does from actual exploitation of women and their services.[219] One of the best examples of this moral panic is the long-term connection between structuralist activists and morally conservative activists on issues such as pornography and prostitution.[220] Structuralists explain these political alliances as deriving "from the shared view that 'sexual liberalism' has led to the 'normalization of prostitution' and thus [has] prevented the United States from having a more proactive response to trafficking."[221] Structuralist theory often dovetails with the aims of social conservatives to also abolish pornography and prostitution, just as individualist theory often dovetails with human rights solutions as shown above.[222] This political alliance reflects the fact

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215. Berman, *supra* note 55, at 279.

216. Farley, *supra* note 31, at 110-11; *see also* Berman, *supra* note 55, at 279 ("Thus, from this [structuralist] perspective, any alleged consent to prostitution by women has been structurally, functionally, and practically coerced by men and therefore cannot be considered an honest expression of a woman's choice.").

217. Berman, *supra* note 55, at 279-82; Halley et al., *supra* note 26, at 351.

218. Halley et al., *supra* note 26, at 351; Berman, *supra* note 55, at 279; *see also* Farley, *supra* note 31, at 109-12 (analyzing empirical data on the harms of prostitution and sex trafficking produced by systemic discrimination).

219. *See, e.g.*, Berman, *supra* note 55, at 281 (noting that characterizing the sex industry as an "international business" stokes "fears of a breakdown in the public moral order"); Weitzer, *supra* note 6, at 447 (stating that "[a] robust moral crusade against sex trafficking has appeared in the past decade").

220. Berman, *supra* note 55, at 272 ("[S]hared views of sexuality, prostitution, the role of morality in public life, and universalist constructions of women have combined to produce a conflation of trafficking in women and prostitution that has made possible the alliance between conservative Christians and radical feminists in the fight against human trafficking.").

221. *Id.* at 286 (quoting Phyllis Chesler & Donna M. Hughes, *Feminism in the 21st Century*, WASH. POST, Feb. 22, 2004, at B7). Chesler and Hughes also recommend that feminists should refrain from demonizing conservative faith-based groups because those groups have fully accepted the need for women's freedom and equality. *Id.* at 286-87.

222. Weitzer, *supra* note 6, at 448-50.

that when theories are implemented in the actual world rather than a politically purified one, odd consequences often result.[223]

In its practical legal application, structuralism leads to policies supporting the decriminalization of prostitution with the concomitant criminalization of all third party involvement in the sex industry, such as pimps and johns.[224] This model is commonly known as the Swedish model because of the passage of a 1999 Swedish law criminalizing the "demand" for prostitution.[225] In the context of trafficking, the structuralist model generally focuses on prostitution at the expense of labor trafficking. Labor trafficking is simply not part of the equation of structuralist theory and is completely ignored.[226] The particular harms of coercion and physical violence involved in sex trafficking become subsumed into the larger issues of eradicating prostitution and the sex industry per se.[227]

2. Practical Effects

a. Overview of the Legislation

In May of 2007, the New York State Legislature passed legislation to create new crimes of sex trafficking and labor trafficking, increase penalties for pimping and pandering, and to provide social services to victims of trafficking who were otherwise ineligible for state-level services.[228] The legislation was a huge victory for structuralist feminists, and its passage utilized the active participation of the prominent national feminist organizations adopting an anti-prostitution stance.[229] Reflecting structuralists' close participation with the governor's office in drafting this legislation,[230] the bill provides strong penalties for sex trafficking but far lower penalties for labor trafficking.[231] The legislation makes clear substantive and penological distinctions between sex and labor trafficking.[232] This distinction is largely due to the structuralist theorists' focus on prostitution and the sex industry and their governance feminist engagement with the drafting

223. Halley et al., *supra* note 26, at 422.
224. *Id.* at 351.
225. *Id.* at 396.
226. Berman, *supra* note 55, at 285.
227. Halley et al., *supra* note 26, at 396-97.
228. Hakim & Confessore, *supra* note 20.
229. Bernstein, *supra* note 211.
230. *Id.*
231. Hakim & Confessore, *supra* note 20.
232. *See* N.Y. PENAL LAW §§ 135.35, 230.34 (McKinney 2009) (defining labor trafficking and sex trafficking, respectively).

process.[233] The practical effect of this law is that labor trafficking victims are left with little protection.

The New York definitions of trafficking crimes are longer and more detailed than the trafficking definitions of most other states. The first section of the anti-trafficking statute focuses not on human trafficking but on a new crime of sex tourism.[234] This Class D felony is one of the first state law provisions to specifically criminalize all sex tour companies on the basis that they advance or profit from prostitution activity, whether or not that activity was legal in the jurisdiction in which it occurred. By starting the statute with this provision, the emphasis on sex work and prostitution-related crimes over human trafficking and slavery is evident.

Next, the statute details the two human trafficking provisions: the bifurcated crimes of sex trafficking[235] and labor trafficking.[236]

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233. Halley et al., *supra* note 26, at 348-49.

234. N.Y. PENAL LAW § 230.25 (McKinney 2009) states, in relevant part:

> Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes, or a business that sells travel-related services knowing that such services include or are intended to facilitate travel for the purpose of patronizing a prostitute, including to a foreign jurisdiction and regardless of the legality of prostitution in said foreign jurisdiction . . . .

235. § 230.34 states in relevant part:

> A person is guilty of sex trafficking if he or she intentionally advances or profits from prostitution by:
>
> 1. unlawfully providing to a person who is patronized, with intent to impair said person's judgment: (a) a narcotic drug or a narcotic preparation; (b) concentrated cannabis as defined in paragraph (a) of subdivision four of section [3302] of the public health law; (c) methadone; or (d) gamma-hydroxybutyrate (GHB) or flunitrazepan, also known as Rohypnol;
> 2. making material false statements, misstatements, or omissions to induce or maintain the person being patronized to engage in or continue to engage in prostitution activity;
> 3. withholding, destroying or confiscating any actual or purported. . . government identification document. . . of another person with intent to impair said person's freedom of movement; provided, however, [exception for correction of social security administration or immigration agency records not made for the purpose of any express or implied threat];
> 4. requiring that prostitution be performed to retire, repay, or service a real or purported debt;
> 5. using force or engaging in any scheme, plan or pattern to compel or induce the person being patronized to engage in or continue to engage in prostitution activity by means of instilling a fear in the person being patronized that, if the demand is not complied with, the actor or another will do one or more of the following:
>
> a) cause physical injury, serious physical injury, or death to a person; or
> b) cause damage to property, other than the property of the actor; or
> c) engage in other conduct constituting a felony or unlawful imprisonment in the second degree [statutory reference omitted]; or
> d) accuse some person of a crime or cause criminal charges or deportation proceedings to be instituted against some person; provided, however,

The definition of labor trafficking also provides an affirmative defense

that it shall be an affirmative defense to this subdivision that the defendant reasonably believed the threatened charge to be true and that his or her sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge; or

e) expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

g) use or abuse his or her position as a public servant by performing some act within or related to his or her official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

h) perform any other act which would not in itself materially benefit the actor but which is calculated to harm the person who is patronized materially with respect to his or her health, safety, or immigration status.

Sex trafficking is a class B felony.

236. § 135.35 states in relevant part:

A person is guilty of labor trafficking if he or she compels or induces another to engage in labor or recruits, entices, harbors or transports such other person by means of intentionally:

1. unlawfully providing a controlled substance to such person with intent to impair said person's judgment;
2. requiring that the labor be performed to retire, repay, or service a real or purported debt that the actor has caused by a systematic ongoing course of conduct with intent to defraud such person;
3. withholding, destroying, or confiscating any actual or purported passport, immigration document, or any other actual or purported government identification document, of another person with intent to impair said person's freedom of movement; provided, however, [exception for correction of social security administration or immigration agency records not made for the purpose of any express or implied threat];
4. using force or engaging in any scheme, plan or pattern to compel or induce such person to engage in or continue to engage in labor activity by means of instilling a fear in such person that, if the demand is not complied with, the actor or another will do one or more of the following:

a) cause physical injury, serious physical injury, or death to a person; or

b) cause damage to property, other than the property of the actor; or

c) engage in other conduct constituting a felony or unlawful imprisonment in the second degree in violation of section 135.05 of this chapter; or

d) accuse some person of a crime or cause criminal charges or deportation proceedings to be instituted against such person; provided, however, that it shall be an affirmative defense to this subdivision that the defendant reasonably believed the threatened charge to be true and that his or her sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge; or

e) expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

g) use or abuse his or her position as a public servant by performing some act within or related to his or her official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

Labor trafficking is a class D felony.

to trafficking victims who are accused of accomplice liability related to the trafficking scheme.[237] The statute then returns squarely to the topic of prostitution. Section 230.04 of the statute increases penalties for patronizing a prostitute.[238] Section 168-a of the New York Correction Law adds sex trafficking and patronizing of a prostitute less than seventeen years of age to the list of crimes for which a convicted offender must register as a sex offender.[239] The remaining sections of the statute address the services and other governmental support available to victims of sex and labor trafficking.[240] Sex and labor trafficking are also designated as criminal acts that can serve as the basis for an enterprise corruption charge or an eavesdropping charge.[241]

Thus, the overall structure of this bill reflects an anti-prostitution emphasis on prostitution-related crimes, including sex trafficking, while leaving labor trafficking largely as a side issue relegated to a separate section of the penal code. This distinction becomes clearer upon examining the definition and punishment of the crimes in depth.

b. Defining the Crime

The New York law has a bifurcated definition of trafficking, separating out labor trafficking and sex trafficking.[242] The definitions are much more detailed than most state statutes, and the emphasis is on the means by which the exploitation is obtained from the victim.[243] The primary means of both sex and labor trafficking are straightforward and familiar from federal and other state statutes. The means include: debt bondage, withholding of documents, and force and threats of force.[244] The means definitions also include actions defined in other statutes as coercion, but defined here as engaging in a "scheme, plan, or pattern" to instill fear in the person that the trafficker will perform any one of a number of violent or harmful acts.[245] Thus, although it is more detailed than other trafficking statutes, the basics of force and coercion are included in both definitions.

However, the means included under the sex trafficking provisions are broader than labor trafficking, making sex trafficking easier to

237. N.Y. PENAL LAW § 135.36 (McKinney 2009).

238. *Compare* N.Y. PENAL LAW § 230.04 (McKinney 2007) *with* N.Y. PENAL LAW § 230.04 (McKinney 2009) (extending criminal liability to all those patronizing a prostitute, not just those over the age of twenty-one patronizing a prostitute under the age of seventeen).

239. N.Y. CORRECT. LAW §§ 168-a(1), (2) (McKinney 2009).

240. N.Y. SOC. SERV. LAW. § 483-bb (McKinney 2009).

241. N.Y. CRIM. PROC. LAW § 700.05 (McKinney 2009); N.Y. PENAL LAW § 460.10(3), (4) (McKinney 2009).

242. N.Y. PENAL LAW §§ 135.35, 230.34 (McKinney 2009).

243. *Id.*

244. *Id.*

245. *Id.* §§ 135.35(4), 230.34(5).

prove.[246] Sex trafficking can be accomplished through the common means of fraud by the "making of material false statements, misstatements, or omissions to induce" a person to continue prostitution activity.[247] Essentially, this provision outlaws a common recruitment bait-and-switch tactic of traffickers, wherein the victim is offered a position as a nanny and is then coerced upon arrival to work in prostitution.[248] Fraud in the labor trafficking provision is limited to fraud in the context of debt bondage.[249] Law enforcement agencies, such as the District Attorney's Office, expressed concerns during the drafting that a more inclusive fraud provision in the labor trafficking definition would transform all false statements or omissions made in the course of ordinary employment relationships into criminal acts.[250] Although the merits of criminalizing fraudulent acts against actual or prospective employees regarding material conditions of their employment contract could be debated, New York chose to leave those violations to the civil realm. Although New York legislators were willing to criminalize the general range of exploitation within the sex industry, they were unwilling to do so for the general range of worker exploitation. Thus, sex trafficking can be accomplished by means of any material fraud, while labor trafficking involving fraud is limited only to debt service.

This limitation on fraud also functions as a limitation on proving one of the most common means of labor trafficking: debt bondage. This provision limits debt bondage only to situations where the debt is intended to defraud the victim.[251] While this extra requirement of proof in the labor trafficking context is likely due to the concerns articulated above regarding fraud in hiring and employment practices, its omission allows for far simpler prosecutions of sex trafficking. For example, where sex trafficking criminalizes requiring prostitution to repay or service a debt,[252] labor trafficking adds that such debt bondage must be committed with the specific intent to defraud the victim.[253] Employers accused of labor trafficking have an automatic

246. *Id.* §§ 135.35, 230.34.

247. § 230.34(2).

248. Srikantiah, *supra* note 57, at 163-64 (describing how many female trafficking victims are deceived into migrating by the promise of gainful employment but are subsequently forced into sex labor).

249. § 135.35(2).

250. Part of this concern may stem from the broad use of the term "labor" in the labor trafficking definition. Most labor trafficking statutes define the end exploitation as involuntary servitude, peonage, slavery, and the like. New York only defines the crime through its means, leaving no limit to the type of labor or services involved in labor trafficking. Thus, without a limitation on fraud, a recruiter promising a better salary or benefits than those actually given to the worker could be considered a trafficker.

251. § 135.35(2).

252. § 230.34(4).

253. § 135.35(2).

defense that the labor was pursuant to working off an actual, or even just purported, debt that was not intended to defraud the victim.[254] Since trafficking schemes regularly involve the working off of real or purported smuggling debts to which the victim may have agreed prior to entering the United States, this is a large loophole in favor of labor traffickers.[255]

Another difference in means between the sex and labor trafficking definitions is that the sex trafficking means of coercion includes a catch-all provision that is not included in labor trafficking. The sex trafficking statute prohibits "any scheme, plan, or pattern" which involves performing any type of act which does not "materially benefit the actor but which is calculated to harm the person patronized materially with respect to [the person's] health, safety, or immigration status."[256] This appears to be a catch-all provision, and it is not clear why this would not be included in the labor provision. Again, this difference may be due to concerns that the inclusion of a catch-all category in labor trafficking would criminalize civil violations, such as violations of health and safety regulations that endanger workers. The lack of a similar catch-all provision for coercion in labor trafficking is another significant loophole in labor traffickers' favor. If a labor trafficker uses threats that do not fall on the narrowed list, they are legally allowed to carry on with their activities.[257]

The list of examples of how traffickers can instill fear is further qualified in labor trafficking, including an exception that allows employers to use the threat of deportation to keep someone working.[258] This particular exception eviscerates any hope that the cases of labor-trafficked non-citizens will be prosecuted because it specifically writes out the most common form of threat made against trafficking victims.[259]

In fairness to New York legislators, many may have been concerned that applying the broad language of the sex trafficking statute, which specifically references criminal activity, to employment situations would criminalize behavior that is only considered a civil violation at most. However, this legislative choice turns a blind eye to labor abuses and general exploitation of migrant workers. This is consistent with structuralists' focus on sexual exploitation. Other

254. *Id.*

255. *See, e.g., Hidden Slaves, supra* note 9, at 77, 83 (describing cases where human trafficking victims were held in order to repay debt resulting from the cost of transportation).

256. § 230.34(5)(h).

257. *Compare* § 230.34(5)(h) ("any other act" language) *with* § 135.35 (labor trafficking limited to certain situations).

258. § 135.35(d).

259. *Hidden Slaves, supra* note 9, at 51-52.

jurisdictions have not seen labor trafficking provisions used to punish civil-type violations despite having much broader language on their books. Employers in those jurisdictions have not complained about no longer being able to defraud their workers with material misstatements about the job or threaten their undocumented workers with deportation to keep them enslaved. By making labor trafficking much harder to prove in court than sex trafficking, and thus less likely for prosecutors to bring cases, New York State has made it clear that labor trafficking is in practical terms an afterthought of this legislation. The complete lack of labor trafficking cases prosecuted to date in New York is a direct effect of this disinterest and of the heavy focus on sex trafficking underlying it.

c. Punishing the Crime

The difference in punishment between the two types of trafficking is striking. Labor trafficking is listed in Title H of the New York Penal Code amongst the "Offenses Against the Person Involving Physical Injury, Sexual Conduct, Restraint and Intimidation" as one of the "Kidnapping, Coercion and Related Offenses" (Article 135), and is a class D felony.[260] This crime is in the same class of felonies as reckless endangerment and statutory rape.[261] Class D felonies carry sentences up to seven years in prison, although a definite sentence of less than one year may be set.[262] "Sex trafficking" is listed under Title M, "Offenses Against Public Health and Morals," as one of the Prostitution Offenses and as a Class B felony.[263] This puts sex trafficking in the same class as assault, burglary, rape, and manslaughter, which carry sentences of up to twenty-five years.[264] As described above, this legislation also expanded the definition of "Promoting prostitution in the third degree" to include travel-related businesses involved in arranging so-called "sex tours," introducing that crime also as a class D felony.[265] This arrangement effectively equates keeping slaves with traveling to another jurisdiction for commercial sex by designating the same punishment for both. Apparently, operating a tour company for people to travel for commercial sex in other jurisdictions where commercial sex may be legal is considered as morally reprobate as

260. § 135.35.

261. N.Y. PENAL LAW § 120.25 (McKinney 2009) (reckless endangerment); N.Y. PENAL LAW § 130.30 (McKinney 2009) (rape in the second degree, prohibiting sexual intercourse when one partner is over eighteen years of age and the other is younger than fifteen).

262. N.Y. PENAL LAW § 70.00 (McKinney 2009).

263. N.Y. PENAL LAW § 230.34 (McKinney 2009).

264. § 70.00(2)(b).

265. N.Y. PENAL LAW § 230.25 (McKinney 2009).

forcing a group of deaf workers to sell trinkets in the subway system,[266] keeping a domestic servant working twenty-hour days with no days off or pay,[267] or trapping a group of men and boys to remain working on a farm for extremely low pay under constant harassment and threats of deportation.[268] The thrust of punishment in New York's trafficking laws is clearly morally based rather than focused on the exploitation of people.

If the New York legislature was intending a deterrent effect with the introduction of its labor trafficking criminal statute, it appears to have missed the mark. No labor trafficking cases have been filed in New York State in the years since passage of the bill. The New York law simply tells traffickers to shift their business from exploiting sex workers to forced labor as the safer option if they are interested in minimizing risks. The retributive effects of this punishment would be slim to none, particularly when a trafficker could be held for a fraction of the time as his victims were held.[269] Even assuming that labor traffickers will likely be charged with and convicted of related offenses with longer sentences, such as kidnapping and assault, incapacitation for such a short time for the labor trafficking offense will not serve the interests of society well.

The New York law precisely illustrates the practical effects of the structuralist focus on sex trafficking to the detriment of labor trafficking. The offense of labor trafficking will continue to be seen as minor and unimportant in the eyes of law enforcement until it achieves sentencing parity with sex trafficking. The lack of sentencing parity will impede implementation of the law and prosecutions of traffickers.[270] First, the low potential sentences for labor trafficking do little to encourage victims to come forward to law enforcement, one of the most challenging aspects of prosecuting trafficking cases. Survivors are generally terrified of their traffickers, and even years

266. Margaret Ramirez, *Ringleader/Woman Admits Role in Mexican Slave-Labor Ring*, NEWSDAY, Dec. 19, 1997, at A6 (describing the Paoletti case, also known as the "Deaf Mexicans" case).

267. United States v. Sabhnani, 539 F.Supp. 2d 617, 620 (E.D.N.Y. 2008).

268. Dan Herbeck, *Contractor Gets 46 Months in Prison for 'Despicable' Abuse of Farm Labor*, BUFFALO NEWS, May 27, 2005, at D1 (referencing the Garcia case in upstate New York involving forty-one men and boys).

269. Meeting Minutes from N.Y. Anti-Trafficking Network Meeting (Oct. 12, 2007) (on file with author) [hereinafter Meeting Minutes].

270. *See* MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE § XXX.01(4) (Dep't of Justice 2004), *available at* http://www.usdoj.gov/crt/crim/model_state_law.pdf (definition of forced labor or services, including commercial sex); §§ XXX.02(1), (3) (criminal punishment for both sex and labor trafficking, inclusively). The Justice Department's example of a Model State Anti-Trafficking Criminal Statute treats all trafficking crimes as equal and punishes sex and labor trafficking identically in order to maximize the implementation of trafficking laws.

later suffer mental health setbacks when their abusers are released from prison.[271] Trafficking victims are legitimately concerned about their safety and that of their family members. Non-citizen traffickers are often removed from the United States upon release, but this puts family members in their home country at even greater risk, as there they may have no real system of protection.[272] Upon being informed that their trafficker might not even go to jail for their offense, many labor trafficking victims will not believe that assisting law enforcement is worth the safety risks and re-traumatization involved and may understandably decide to not assist the prosecution.[273]

Second, in public discussions regarding the implementation of the anti-trafficking laws, state officials recognized that the low penalties greatly minimized the potential impact of the labor trafficking statute, and that it was likely not in the state's interest to prosecute labor trafficking cases.[274] New York Department of Criminal Justice (DCJS) officials recommended that training for local and state law enforcement include the proviso that if local or state police encounter a labor trafficking case, they should transfer the case to federal law enforcement for investigation and prosecution because the penalties under New York law are so minimal compared to federal penalties.[275] The DCJS officials believed that federal prosecution of labor trafficking cases was better for victims since it would take advantage of the significantly higher sentences, whereas sex trafficking cases should be prosecuted by New York because they were easier to prosecute under New York law than under the federal statute and carried similarly high penalties.[276] This decision by state law enforcement officials is exactly why sentencing parity is crucial to the prosecution of labor trafficking cases.

Leaving aside the disturbing notion that prior to the statute coming into force the primary state agency in charge of this new law was not intending to apply it to labor trafficking cases, the glaring problem with New York's decision to rely on federal officials to handle their labor trafficking cases is that the federal government has similarly little interest in prosecuting labor trafficking cases. According to the federal government's own report, during the first five years after the passage of the TVPA (2001-2005), the DOJ prosecuted twenty-three labor trafficking cases as compared to sixty-eight sex

271. *Hidden Slaves*, *supra* note 9, at 89-90, 94.
272. *Id.* at 83, 104.
273. *Id.* at 80, 83, 99-100.
274. Meeting Minutes, *supra* note 269.
275. *Id.*
276. *Id.*

trafficking cases.[277] The sex trafficking prosecutions constituted an 871% increase on the previous five year period, whereas the labor trafficking cases accounted for a 109% increase.[278] Abdication on the part of state law enforcement, combined with the clear preference at the federal level for sex trafficking prosecutions, means that labor trafficking victims in New York will have essentially no protection under the criminal law, and thus no ability to access state or federal assistance or federal immigration protections that require assistance from law enforcement. This official lack of interest in labor trafficking is a direct outgrowth of the application of structuralist theory to trafficking law, and results in a clear privileging of sex trafficking victims under the law.

IV. RECOMMENDATIONS FOR FUTURE STATE LEGISLATION

Governance feminism is likely to continue as a force behind state legislatures, urging them to criminalize human trafficking.[279] Because of the clear differences between the underlying theories that animate these actors, legislatures will often be faced with the difficult task of deciding which model to follow as they are pulled in opposing policy directions. States have few resources to focus on trafficking cases, thus the practicality of implementation and the ability to encompass the greatest number of cases are crucial elements to any state trafficking law. Although both feminist camps may want states to make broad policy statements with criminal legislation, their goals will only be achieved if legislation reflects a workable strategy for law enforcement to implement. If states are truly going to combat human trafficking, criminal statutes must focus on the exploitative milieu in which trafficking thrives. Although states have little power to affect the international migration routes and globalized systems of exploitation that bring trafficking to their doorstep, states have the on-the-ground infrastructure of local police forces, housing and business inspectors, social workers, and other first responders who are most likely to encounter a trafficking situation and to intervene to save the lives of the victims and punish those responsible. Since states are often in the best position to identify victims and prosecute traffickers, it is crucial that state laws be up to the task at hand.[280]

Although the majority of states have already adopted anti-trafficking laws, adapting those laws to the actual experiences of

277. DOJ REPORT, *supra* note 63, at 25, 27.
278. *Id.*
279. Halley et al., *supra* note 26, at 336-39.
280. Kara, *supra* note 16, at 667.

trafficked persons will ensure that more victims are found and more traffickers are convicted.[281] State laws must be clear that the basis for criminalization of human trafficking is exploitation — all forms of exploitation. The most effective state laws focus on the traffickers' behavior, specifically the methods of gaining control of the victim and means of maintaining exploitative control, rather than the underlying form of exploitation.[282]

The definition of human trafficking must be unitary. As individualism theory emphasizes, human trafficking is a violation of an individual's civil and human rights, and this violation must be recognized at law. This focus on individual rights and individual experiences inevitably will lead to greater recognition of the gender dynamics that underlie the majority of trafficking cases.[283] However, focus on the means of exploitation should not erase the particularities of individual trafficking crimes. Traffickers should be punished for preying on particular social vulnerabilities such as gender. State laws' emphasis on means of exploitation largely encompasses the structuralists' view that women are disproportionately exploited because of their gender. However, state laws can further expand this insight and include the various and intersecting ways, beyond sexuality, that women and men can be vulnerable. Trafficking is a crime that tracks social disenfranchisement, and this particular aspect of exploitation can be addressed through criminalization of both methods *and* means rather than limiting criminalization to particular forms of exploitation. The middle path is to recognize individual rights and to punish exploitation based on particular vulnerabilities.

A. Criminalize the Means Not the End Forms of Exploitation

The Model Law approach focuses heavily on the methods of gaining control over the victim and the means of exploitation rather than on the exploitative ends.[284] To truly address all forms of human trafficking, state criminal laws must shift the focus from what type of labor or services trafficking victims are forced to perform and the relative merits of that work and exploitation to the exploitative actions traffickers use to gain and maintain control over their victims. Broader definitions of means, such as those in the Model Law[285] or

281. POLARIS PROJECT, *supra* note 24 (stating that as of June 2008, forty-three states had anti-trafficking criminal provisions).

282. *See supra* section II.B.

283. *See* Bravo, *supra* note 6, at 232-35.

284. MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE §§ XXX.01(4), XXX.02(1) (Dep't of Justice 2004), *available at* http://www.usdoj.gov/crt/crim/model_state_law.pdf.

285. *Id.*

California's law,[286] that encompass many different means of coercion, duress, and threat or use of force are preferable. State trafficking laws should resist bifurcation of sex and labor trafficking and encompass all forms of human trafficking in one definition so that law enforcement and the greater society can more readily identify all forms of trafficking.

B. Place Trafficking in the Context of a Continuum of Civil and Criminal Laws Which Target Underlying Exploitation, Including Training and Support for Investigations of Labor, Workplace, and Code Violations

The placement and location of human trafficking in a criminal code is crucial to how that law is used and interpreted. For example, the placement of California's law under the "False Imprisonment" section of the criminal code[287] underscores the nature of human trafficking as a crime against the person and as a crime involving restraint and the breaking of a person's will. Bifurcated definitions placed in different sections of the criminal code only reinforce the conception of sex and labor trafficking as different social ills, rather than interrelated systems of abuse and oppression. Obviously, when new laws are passed and implemented, it is crucial that civil and criminal law enforcement be properly trained on how to identify, investigate, and prosecute such violations.

C. Ensuring That Gender-Specific Crimes, Such as Rape, Are Included in Trafficking Laws as Sentencing Enhancements

Because approximately seventy-five percent of trafficking occurs in traditionally gendered labor sectors, other gender-specific crimes should be referenced and included in the sentencing structure as enhancements to the underlying crime of trafficking. Rape and other forms of sexual violence are common methods used to break the will of trafficking victims forced into all forms of labor,[288] and these methods target women for violence because they are women. Recognition of women's particular vulnerability to trafficking and the gender-specific means of exploitation used by traffickers should be explicitly included in trafficking statutes either as sentencing enhancements

286. CAL. PENAL CODE § 236.1 (West 2009).

287. *Id.*

288. *See* Srikantiah, *supra* note 57, at 163-64 (stating that trafficking is often characterized by assault, kidnapping, sexual abuse, rape, torture, threats, and starvation, which lead to psychological coercion).

or as an integral part of the definition. This can easily be accomplished without bifurcating the definition of human trafficking. Female victims of all forms of gender-based trafficking exploitation deserve both to have such violations explicitly criminalized under trafficking statutes and for those gender-specific means to be prosecuted as integral parts of all trafficking cases.

CONCLUSION

Governance feminism has made great strides in domestic law through the enactment of state anti-trafficking laws. However, there is still much work to be done before state laws truly reflect the nature of human trafficking in order to effectively combat its gender-based roots. A middle path between the two primary feminist camps is possible, and the strongest laws can be crafted by drawing upon the insights of both structuralism and individualism. As governance feminists often cannot anticipate the practical effects of their legislative efforts once they are implemented by what are often decidedly non-feminist state law enforcement and agencies, attention to the practical effects of feminists' legal projects is warranted. Trafficking laws must encompass the varied experiences of individual trafficked persons in one coherent definition of exploitative practices. Trafficking laws must neither ignore the particularly gendered expression of human trafficking in the United States nor essentialize the crime or its victims along that one axis of oppression. Feminists of all stripes agree that gender-based exploitation of women's labor in traditionally gendered occupations must be stopped.

To that end, state level human trafficking laws are an opportunity to ensure that all women's lives are free from forced and coerced labor and exploitation. States should ensure that their anti-trafficking laws contain a unified definition of human trafficking, encompassing both sex and labor exploitation, with sentencing enhancements to take into account the gendered nature of many aspects of trafficking without downplaying or erasing the very real exploitation of all forms of labor and all types of people that trafficking represents. Ultimately, human trafficking is about exploitation, and exploitation should remain the focus of human trafficking criminal definitions. Until state laws are properly targeted to the exploitative behavior of traffickers rather than to what form of exploitation victims are forced to endure, slavery will continue to exist in the United States.