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# Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts

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Janie Chuang\*

As evidenced by international treaties dating back to the early twentieth century, the problem of trafficking in women is by no means a new phenomenon. However, it has only been in recent years that the problem of trafficking has again drawn world-wide concern, partly in response to reports of the sexual enslavement of Muslim women in Serbian brothels during the conflict in the former Yugoslavia, and partly in response to the increasing prevalence of the trafficking of children for sexual purposes.<sup>1</sup>

Despite the considerable amount of attention recently paid to this issue, however, analyses and reporting have focused on the more traditional forms of trafficking and its obvious victims—i.e., women and children forcibly recruited for the purposes of forced prostitution. In contrast, modern manifestations of trafficking can involve the coerced recruitment and transportation of women not only for forced prostitution, but for a variety of other forced labor and slavery-like practices, such as forced domestic labor, factory labor, and commercial marriages.<sup>2</sup> Moreover, not all trafficked women ultimately are subjected to forced

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1. Nora Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT'L L.J. 163, 163-64 (1994). Children's rights advocates have called attention to the expansion of trafficking and forced prostitution into the sale of young children, who are valued for their innocence and virginity due to customers' fears of contracting AIDS. *See id.*

2. *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, U.N. ESCOR, Commission on Human Rights, 53rd Sess., Provisional Agenda Item 9(a), at 19, U.N. Doc. E/CN.4/1997/47 (1997) [hereinafter *Report of the Special Rapporteur on Violence Against Women*]. This Article uses the term "forced labor/slavery-like practices" to connote the wide range of coercive working and living conditions to which women can be subjected, including, among other practices, forced domestic labor, factory labor, forced marriages, and false adoptions.

labor/slavery-like practices, and not all women who are subjected to forced labor/slavery-like practices have been trafficked. With international migration on the rise, increasing numbers of women subjected to forced labor/slavery-like practices in a foreign country have not been trafficked, but rather have entered the country legally or illegally by other means. The narrow portrayal of trafficking as necessarily involving forced recruitment for the purposes of forced prostitution thus belies the complexity of the current trafficking problem, and overlooks numerous victims whose experiences diverge from more traditionally recognized forms of trafficking. Moreover, because international anti-trafficking law reflects this narrow conception of trafficking, the exigencies of modern manifestations of trafficking in women have rendered these laws inadequate to prevent and redress the trafficking problem. By defining trafficking as requiring both coercive recruitment and forced prostitution, women subject to one but not the other practice, as well as those subjected to non-sexual forced labor/slavery-like practices, remain ineligible for protection under international anti-trafficking law.

In response to the deficiencies of existing international anti-trafficking laws, numerous nongovernmental and intergovernmental organizations have called for a reformulation of the trafficking concept and an expansion of these laws.<sup>3</sup> While these institutions have agreed on the necessity of a reconceptualization of the trafficking problem, they have yet to reach a consensus on a minimum working definition of trafficking. Points of conflict concern such issues as whether coercion should be a necessary element of trafficking and forced labor/slavery-like practices, and if so, how coercion should be defined and measured. These issues also implicate related questions concerning whether or not prostitution *per se* and the recruitment aspect of trafficking are inherently exploitative, which, in turn, raise highly controversial issues concerning a woman's capacity to choose to sell her body or to consent to recruitment by a trafficker in order to immigrate by illegal means. These and other definitional issues challenge traditional assumptions regarding the nature of the violation to women's rights inflicted by trafficking and forced labor/slavery-like practices.

Apart from the necessity of resolving the definitional issues concerning international anti-trafficking law, a comprehensive approach to trafficking in women must also address the practical difficulties that arise with respect to the domestic enforcement of these international

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3. See *id.* at 19; see also, e.g., NOTRAF, *Basic Principles for a Code of Conduct within the Member States of the European Union to Prevent and Combat Traffic in Women* (visited Oct. 21, 1997) <<http://home.pi.net/~notraf/code.htm>> [hereinafter NOTRAF, *Basic Principles for a Code of Conduct*].

standards. Where international anti-trafficking laws apply, their capacity to provide effective remedies to victims of trafficking and forced prostitution is compromised by conflicting domestic immigration and anti-prostitution laws which, in the absence of these international legal standards, would hold these women criminally liable for prostitution and illegal immigration. The unfortunate reality of international law is that states often are reluctant to forego the enforcement of their domestic laws in order to adhere to international legal standards. Moreover, the fact that law enforcement officials sometimes are complicit, if not active participants, in trafficking and forced labor schemes can create a significant disincentive against local enforcement of international anti-trafficking law.

In light of the complex problems of definition and practice discussed above, this Article examines the scope and practical efficacy of existing and proposed legal protections applicable to victims of trafficking and forced labor/slavery-like practices.<sup>4</sup> Without offering authoritative solutions, this Article explores the potential ramifications of alternative approaches to these issues in order to provoke further thought and discussion toward developing viable solutions to the problem of trafficking in women.

With these objectives and reservations in mind, this Article begins, in Part I, with an overview of the sequence of events that can characterize the experiences of women who are trafficked and/or subjected to forced labor/slavery-like practices. Attentive to the women whose experiences diverge from the forced trafficking/forced prostitution stereotype, Part II surveys existing international anti-trafficking law and the recently proposed changes to this law. This discussion focuses on the normative consequences and practical difficulties caused by subtle differences in definition, particularly with respect to their effect on the range of women deemed eligible for protections against trafficking and forced labor/slavery-like practices. This section also discusses the various paradigms that might inform or influence the normative and strategic choices that must be made with respect to these definitional

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4. Given that the problem of trafficking implicates a wide range of issues, a few limitations are necessary to cabin the discussion contained in this Article. Though recognizing that trafficking and forced labor/slavery-like practices often victimize children, this Article assumes that the victims discussed herein are of the age of consent for two reasons. First, in order to illustrate more effectively the limitations of existing anti-trafficking law, this Article aims to draw attention to the less obvious victims of trafficking, or those victims whose experiences deviate from the stereotypical situation of forced recruitment and transportation, and forced prostitution. The situation of children tends to fall beyond the range of such cases because of the general assumption that children are not fully capable of giving informed consent. Second, and most significantly, children are protected under an additional body of law focused on children's rights, which may require remedies for child victims of trafficking and forced labor/slavery-like practices that significantly differ from remedies necessary to protect women victimized by these practices.

issues. Finally, in order to provide a more comprehensive picture of how these laws actually translate into practice, Part III analyzes the interaction—and conflict—between international anti-trafficking law and domestic immigration and anti-prostitution laws. Mindful of the situations in which these laws conflict, this section examines possible resolutions that would allow victims of trafficking and forced labor/slavery-like practices to remain protected under the appropriate legal regime.

## I. AN INTRODUCTION TO TRAFFICKING IN WOMEN

In what has become a flourishing international industry, thousands of women are trafficked and forced to work or live under slavery-like conditions as prostitutes, domestic laborers, sweatshop laborers, or commercial wives.<sup>5</sup> Trafficking, or the recruitment and transportation of women for profit, occurs both within countries<sup>6</sup> and across borders. Internationally, trafficking occurs primarily from the South to the North,<sup>7</sup> and increasingly, between Southern countries.<sup>8</sup> While trafficking patterns vary according to global supply of and demand for trafficked women, trafficking generally arises in conditions of poverty and in locations that lack viable economic opportunities relative to other countries.<sup>9</sup> Technological advances, such as the Internet, have expanded the scope of traffickers' networks and thus have facilitated effective response to the needs of the market.<sup>10</sup>

Trafficking in women is fueled by poverty, sexism, and racism, all of which combine to create a situation of unequal bargaining power and vulnerability. In developing countries or countries with economies in transition, conditions of poverty—which are aggravated for women

5. *Report of the Special Rapporteur on Violence Against Women*, *supra* note 2, at 19.

6. *Id.* at 20. For example, Brazil has an active network that traffics women and girls for prostitution to mining camps and large civil construction projects within the country. *Id.* Also, the trafficking of Chinese women for marriage is so prevalent that in some counties and villages, 30–90% of marriages result from trafficking. The shortage of women in rural areas of China, combined with the expense of non-forced wedding ceremonies, contributes to the high demand for trafficked women for forced marriages. *Id.* at 22–23.

7. *Id.* at 20. Examples include the trafficking of Colombian women for prostitution to Spain, Belgium, the Netherlands, Greece, Germany, and the United States. *See id.*

8. *Id.* at 19. Examples include the trafficking of Colombian women for prostitution to Venezuela, Ecuador, and Panama. *Id.* at 20.

9. The promotion of tourism as a development strategy has contributed to the prevalence of trafficking in women for prostitution. In Kenya, for example, the tourism industry has led to increased trafficking in the region, with traffickers luring women from Uganda and India to Kenya in order to provide prostitutes for the growing tourist population. *Id.*

10. Dr. Radhika Coomaraswamy, the U.N. Special Rapporteur on Violence Against Women, Its Causes and Its Consequences, reports that the Internet has become an “integral component” of trafficking in women for marriages, used both to advertise marriage brokers and to display potential brides. *Id.* at 20.

because of their traditionally lower economic status in these countries—can lead women to accompany traffickers. These conditions can also compel families to sell their female relatives to traffickers in the hopes that they will have an opportunity to earn money for themselves or their families. In addition, racial factors can drive international trafficking across borders for the purpose of recruiting foreign women to meet the racial preferences of certain brothel clientele.<sup>11</sup> Traffickers and pimps can more easily subjugate foreign women due to their inability to speak the language of the country in which they reside, their fear of local police who often are complicit in trafficking and forced labor/slavery-like practices, and their fear of deportation to their native communities where they might be treated as criminals for having engaged in prostitution.<sup>12</sup>

Traffickers use a variety of devices to recruit women into prostitution, forced labor, and slavery-like practices, often through deception and coercion, and sometimes with the complicity of the woman's family. Women from impoverished families in Bangladesh, Nepal, and Burma sometimes sell their daughters to traffickers—or these women might themselves agree to accompany the traffickers—believing that they will be able to earn money for the family through employment as maids, cooks, or in other jobs requiring few skills.<sup>13</sup> What these women and their families do not realize, however, is that their daughters could be subject to forced prostitution, domestic or sweatshop labor under slavery-like conditions, or forced marriages. To execute the deception, traffickers often use sham employment contracts and false visas to mislead women and their families about the type of work they will undertake.<sup>14</sup> Some traffickers will even go so far as to marry their

11. For instance, the preference in Indian brothels for Nepali prostitutes for their reputation for sexual acquiescence and their 'golden' skin can drive the trafficking from Nepal to India. HUMAN RIGHTS WATCH, *GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS* 232–33 (1995) [hereinafter *GLOBAL REPORT*].

12. Demleitner, *supra* note 1, at 188–89.

13. See ASIA WATCH AND THE WOMEN'S RIGHTS PROJECT, *A MODERN FORM OF SLAVERY: TRAFFICKING OF BURMESE WOMEN AND GIRLS INTO BROTHELS IN THAILAND* 45–46 (1993) [hereinafter *ASIA WATCH THAILAND REPORT*]. The report notes, however, that four out of the thirty women and girls (who had set out on their own) interviewed by Human Rights Watch knew when they left home that they would be involved in some form of prostitution. *Id.* at 46.

Human Rights Watch recounts a "pathbreaking study" of Burmese women in Thai brothels written by Hnin Hnin Pyne, who classified different means of entry into prostitution: voluntary, bonded, and involuntary:

Voluntary indicates that the woman, prostitute-to-be, approaches the owner/manager of a sex establishment herself; bonded implies the involvement of parents or guardians, who receive money from an agent or owner for giving away their daughter; and involuntary conveys the use of deception and coercion of the women by an agent or owner/manager.

*Id.* at 45.

14. Women from Central and Eastern European countries have found themselves forced into

victims as a ruse of recruitment<sup>15</sup> or to protect themselves and their victims from prosecution for illegal immigration and illegal sex.<sup>16</sup>

In order to control trafficked women, traffickers often subject their victims to debt bondage, a slavery-like practice banned under customary international law, and defined as:

the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.<sup>17</sup>

The debt may consist of the amount paid to the family or the trafficker, transport costs, protection money paid to police and other officials, and advances for the women's living expenses. Moreover, the amount paid to the girl's family or to the trafficker may be doubled to include interest.<sup>18</sup> In order to prevent them from escaping before they pay their debts in full, traffickers often forcibly detain women in apartments, factories, homes, or brothels. In addition to the pressure of debt payment, women may feel compelled to support their families by sending them whatever earnings they do receive, usually in tips.<sup>19</sup> In situations in which a woman's family has been complicit in her sale, her male relatives sometimes make periodic trips to the brothel to collect the woman's earnings, or the woman will send the money back to her family.<sup>20</sup> Typically unaware of how much the brothel owner paid for them, women trafficked into prostitution may be kept in debt bondage

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prostitution abroad, despite their having signed contracts for waitressing, child care, or domestic labor. *Report of the Special Rapporteur on Violence Against Women*, *supra* note 2, at 21.

15. Traffickers will use marriage offers to lure girls away from their homes and will sometimes even participate in an actual wedding ceremony. Human Rights Watch recounts the exploits of a trafficker who had trafficked nine girls by marrying them. Upon bringing each of them to Bombay, he would abandon the girl in a crowd. The trafficker's accomplice would approach the girl and offer to help her find her husband and, instead, lead her to a brothel. *GLOBAL REPORT*, *supra* note 11, at 242.

16. For example, Bengali traffickers marry their victims in order to protect themselves from being prosecuted under Islamic *huddud* laws in their trafficking of women to Pakistan. In spite of these efforts, Special Rapporteur Radhika Coomaraswamy reports, thousands of Bangladeshi women and children have been detained in Pakistan under these laws, charged with illegal entry and for having "illegitimate sex." *Report of the Special Rapporteur on Violence Against Women*, *supra* note 2, at 22.

17. *GLOBAL REPORT*, *supra* note 11, at 200-01 (quoting Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Section I, Article I (1957)).

18. *ASIA WATCH THAILAND REPORT*, *supra* note 13, at 54.

19. *GLOBAL REPORT*, *supra* note 11, at 248.

20. *Id.* at 247-48.

for a longer amount of time than necessary to reimburse the brothel owner.<sup>21</sup>

Local governments often are complicit and sometimes directly involved in trafficking and forced prostitution schemes. For instance, in the trafficking of Burmese women and girls into Thailand, there is "clear official involvement in virtually every stage of the trafficking process" yet little concerted effort by Thai authorities to investigate and punish such abuses by their own agents.<sup>22</sup> In addition to receiving bribes from traffickers along border checkpoints, Thai police often patronize the brothels themselves.<sup>23</sup> Similarly, in the trafficking of Nepalese women and girls to India, Indian brothel keepers will inform the police of the arrival of a new victim and pay a price for their silence, and may even provide brothel services to Indian police or hire these officers to serve as traffickers themselves.<sup>24</sup>

Trafficking victims who manage to escape from debt bondage may be subject to deportation, a process which threatens to be as corrupt and abusive as other aspects of the victims' ordeal. For instance, in Thailand, the deportation of Burmese women often involves further extortion and sexual abuse by Thai officials exploiting their fear of Burmese authorities.<sup>25</sup> For Burmese women trafficked into Thailand, return to Burma often results in criminal liability for having left the country illegally or having engaged in prostitution.<sup>26</sup> A woman might therefore be coerced into having sex with a Thai official in exchange for her safe return to Bangkok, or she might be lured into more brothel work by the offers of numerous brothel agents at the border.

For women who manage to escape forced prostitution, the social stigma attached to their former prostitution activities threatens to create a vicious cycle in which these women believe they have no alternative but to return to prostitution.<sup>27</sup> After leaving the brothel,

21. See HUMAN RIGHTS WATCH/ASIA, *RAPE FOR PROFIT: TRAFFICKING OF NEPALI GIRLS AND WOMEN TO INDIA'S BROTHELS* 17 (1995) [hereinafter *ASIA WATCH INDIA REPORT*] (recounting the case of "Maya," who never knew how much her pimp paid for her and who knew a fellow brothel inmate who had worked for thirteen years without ever managing to pay off her debt); see also *ASIA WATCH THAILAND REPORT*, *supra* note 13, at 54-59; *GLOBAL REPORT*, *supra* note 11, at 239.

22. *ASIA WATCH THAILAND REPORT*, *supra* note 13, at 75.

23. See *id.* at 75, 77.

24. See *ASIA WATCH INDIA REPORT*, *supra* note 21, at 44.

25. See *ASIA WATCH THAILAND REPORT*, *supra* note 13, at 6.

26. See *id.* at 7.

27. See *id.* at 74. The report recounts the situation of two girls who had returned to prostitution in Thailand after safely returning to their native villages. One believed that, since she had lost her virginity anyway, she might as well earn money for her family. The other girl felt that the shame of being known in her village as a former prostitute was too great, and went back into prostitution in order to help her family. *Id.* at 47. The report notes that these cases are instructive:

because they indicate the impact of brothels on the girls' self-image. Both [women]



these women may be sick and unable to work. Shunned by their families and their native communities, these women may resign themselves to a life of prostitution as their only available means of survival.<sup>28</sup> To the extent that these women feel they can return to their native villages, they often do so not as victims returning home with hopes of establishing a new life, but as recruiters in search of girls—either to take their own places and thus secure their own release from bondage, or to establish their own brothels.<sup>29</sup> Being particularly well-positioned to identify potential trafficking victims due to their familiarity with the local girls and families, these women—themselves victims of trafficking and forced prostitution—ironically, may be in the best position to perpetuate these practices. A lack of effective legal mechanisms that encourage victims to report abuses or that provide the remedies and support they need to rebuild their lives fuels this cycle and threatens to lead to the re-victimization of these women.

Hence, adverse socioeconomic factors and lack of recourse available to those victimized by trafficking and forced labor/slavery-like practices combine to create and to maintain a burgeoning worldwide trade in women. In order to be effective, efforts to combat these practices must respond to the wide range of circumstances that effect the victimization of women. For example, these measures must extend to women who are trafficked for any forced labor/slavery-like practice, including forced domestic labor, factory labor, and commercial marriages. Moreover, these measures must also take into account the fact that not all victims of forced labor/slavery-like practices were forcibly trafficked, and conversely, that not all trafficked women ultimately are subjected to forced labor/slavery-like practices, and, in light of such variations, extend protections to victims of either practice. In addition to expanding the

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decided that since they had lost their virginity anyway, there was no point in staying at home; they might as well return to Thailand and try to make more money. Their return to prostitution was voluntary only in the sense that they saw their first experience as having rendered them unfit for anything else.

*Id.* at 74. See also ASIA WATCH INDIA REPORT, *supra* note 21, at 50–51. The report recounts the description provided by a female police officer in Bombay of how most Nepalese women she encountered in brothel raids did not wish to return to Nepal. The reasons they gave were that they

felt violated and “spoiled” and therefore social pariahs; they believed they would never be free to leave for reasons of crushing “debt” to their madams or because they feared violent reprisals; they had nothing to return to; they feared the contempt and rejection of family members; they had no resources, either to make a new life for themselves or to placate their families.

*Id.*

28. Some women who have managed to earn enough money may be accepted into their communities and may even marry. However, diseases contracted in the brothels often leave the women sterile, and the marriages rarely last longer than the money the women bring into the marriages. See GLOBAL REPORT, *supra* note 11, at 231 & n.68.

29. See *id.* at 231, 239.

class of beneficiaries, comprehensive efforts must include some means of breaking the vicious cycle of victimization by providing recourse for victims of trafficking and forced labor/slavery-like practices to find viable, alternative means of survival once out of the grasp of their abusers.

## II. INTERNATIONAL LEGAL PROTECTIONS

While, in theory, international law could play a critical role in combating trafficking and forced labor/slavery-like practices, the development of standards which adequately respond to the complexities of these practices promises to be a project wrought with conceptual and practical difficulties. Premised on a definition in which trafficking is linked to forced prostitution, existing international anti-trafficking law is ill-equipped to address trafficking for forced domestic and sweatshop labor, and forced marriage. Attempts by various institutions to address these deficiencies through the formulation of a new definition of trafficking have met with sharp division,<sup>30</sup> with fault lines drawn along such issues as whether trafficking and forced labor/slavery-like practices should be defined separately, whether coercion should be a necessary element of each practice, and if so, how coercion should be defined. Not only do these definitional issues present complex theoretical distinctions, but they also implicate difficult normative choices. For instance, the view that coercion could be economic in nature might suggest a stance in favor of the abolition of prostitution *per se* based on the assumption that women are driven into prostitution by economic hardship. This position, in turn, would bring into scrutiny one's underlying assumptions regarding the potential empowerment of women to make informed choices about their lives, as opposed to an inevitable victimization of women by a perennial false consciousness or internalized oppression.<sup>31</sup> With these and other concerns in mind, this section

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30. For example, debates over the legalization of prostitution have created a sharp split within the anti-trafficking movement, most notably between the Global Alliance Against Trafficking in Women (GAATW) and the Coalition Against Trafficking in Women (CATW), two major coalitions of nongovernmental organizations working to combat trafficking. While GAATW and CATW agree on the need for decriminalization of prostitutes, GAATW seeks the legalization of prostitution as commercial sex work, whereas CATW adamantly opposes legalization on grounds that prostitution "reduces all women to sex." See COALITION AGAINST TRAFFICKING IN WOMEN, *A WORLD IN WHICH WOMEN'S RIGHTS ARE HUMAN RIGHTS* (on file with the *Harvard Human Rights Journal*). For a sense of the substance of the legalization debates, see *Point/Counterpoint: Would Legalizing Prostitution Help?*, TRANSITIONS: MAG. CHANGES POST-COMMUNIST SOCIETIES, Jan. 1998 (including opposing position pieces between Gillian Caldwell of the Global Survival Network, arguing for legalization and Donna Hughes of CATW, arguing against legalization) (on file with the *Harvard Human Rights Journal*).

31. The term "false consciousness" is used in this Article to refer to the idea that a woman is unable to recognize her own oppression. The origin of the term "false consciousness" has been attributed to the Italian Marxist philosopher Antonio Gramsci, who used "false consciousness" to

of the Article assesses existing and proposed definitions of trafficking and forced labor/slavery-like practices with a focus on their implications for the different strategies potentially adopted by the anti-trafficking movement.

### A. International Anti-Trafficking Law

#### 1. The Early Treaties

International trafficking in women has been recognized as an international offense since the late nineteenth century, when concern over "white slave traffic," or the export of European women into brothels in various parts of colonial empires, prompted the signing of the International Agreement for the Suppression of White Slave Traffic in 1904 ("1904 Agreement").<sup>32</sup> The 1904 Agreement distinguished between "pure and innocent" women and former prostitutes, a distinction which continues to foster an ambivalent attitude toward victims of trafficking for forced prostitution.<sup>33</sup> While the 1904 Agreement required States Parties to promise to collect information regarding the procurement of women abroad, it was not until the promulgation of the International Convention for the Suppression of White Slave Traffic ("1910 Convention") that States Parties were required to criminalize the procurement of women.<sup>34</sup> The 1910 Convention bound its signatories to punish severely any person who hired, abducted, or enticed for immoral purposes any woman under the age of twenty-one, or used violence, threats, fraud, or any compulsion on a woman over twenty-one for the same purpose.<sup>35</sup> However, the retention of a girl or woman in a brothel against her will was excluded from the purview of the 1910 Convention because such matters were considered to fall within a country's domestic jurisdiction.<sup>36</sup> Both the 1904 Agreement and the

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refer to a phenomenon "in which the oppressed come to identify with their oppressors, internalize their views, and thus appear to consent to their subordination." Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 674 (1993) (quoting ANTONIO GRAMSCI, LETTERS FROM PRISON (Lynne Lawner ed. & trans., 1973); SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI, 416-18 (Quintin Hare & Geoffrey N. Smith eds. & trans., 1971)). Some commentators prefer the phrase "internalized oppression" over "false consciousness," because the latter term "simultaneously emphasizes the importance of internal constraints on identity and avoids the suggestion that 'true consciousness' is possible." Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1703 n.173 (1997).

32. Laura Reanda, *Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action*, 13 HUM. RTS. Q. 202, 207 (1991).

33. Demleitner, *supra* note 1, at 167.

34. *Id.* at 167-68.

35. *Id.* at 168-69.

36. *Id.* at 169; *see also* U.N. DEP'T OF ECONOMIC & SOCIAL AFFAIRS, STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION at 1, U.N. Doc. ST/SOA/SD/8, U.N. Sales No. 59.IV.5 (1959) [hereinafter 1959 U.N. STUDY].

1910 Convention thus were explicitly limited to the process of recruitment or transportation, and did not address the end purposes of the trafficking. The International Convention for the Suppression of the Traffic in Women and Children ("1921 Convention"), and the International Convention on the Suppression of the Traffic in Women of Full Age ("1933 Convention") continued to consider the end purposes of trafficking to be a matter of domestic jurisdiction.<sup>37</sup> Notwithstanding this limitation, the 1921 Convention expanded the scope of the protective measures provided in previous instruments to non-white women and children of either sex.<sup>38</sup> Moreover, the 1933 Convention declared that although a woman might consent to being trafficked, such consent would not constitute a defense to the crime of international trafficking.<sup>39</sup>

## 2. Current International Anti-Trafficking Law

In an attempt to consolidate the prior treaties on trafficking, the United Nations promulgated, in 1949, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (the "1949 Convention").<sup>40</sup> The 1949 Convention was the first international agreement to conceive of trafficking in gender neutral terms, and to penalize procurement, irrespective of consent, in both international and domestic trafficking. Most notably, the 1949 Convention was the first international instrument to consider forced prostitution a matter of international law, rather than strictly an issue of domestic jurisdiction.<sup>41</sup> This extension of the 1949 Convention to the issue of domestic prostitution influenced the decision of a number of States Parties to the earlier anti-trafficking instruments to refuse to accede to this new convention.<sup>42</sup>

The 1949 Convention does not provide explicit definitions of trafficking and forced prostitution. It does, however, define actions that are

37. Demleitner, *supra* note 1, at 170.

38. *Id.*; 1959 U.N. STUDY, *supra* note 36, at 1.

39. Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential*, 10 HARV. HUM. RTS. J. 213, 217 (1997).

40. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 272, 282 (entered into force July 25, 1951) [hereinafter 1949 Convention].

41. Demleitner, *supra* note 1, at 172.

42. Less than half (66 out of 160) of the United Nations member states ratified the 1949 Convention. Grounds for refusal to ratify ranged from incompatibility with domestic constitutions to criticism of the basic assumptions in the text. NOTRAF, *Background Study on Basic Principles for a Code of Conduct within the Member States of the European Union to Prevent and Combat Traffic in Women*, § 2.2 (visited Oct. 17, 1997) <<http://home.pi.net/~notraf/backgrd/develop.htm>> [hereinafter NOTRAF, *Background Study*].

prohibited by the Convention, penalizing any person who, "to gratify the passions of another":

- (1) [p]rocures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- (2) [e]xploits the prostitution of another person, even with the consent of that person.<sup>43</sup>

Based on these conceptions of trafficking and forced prostitution, the 1949 Convention establishes three types of state obligations.<sup>44</sup> First, it binds states to a general anti-trafficking principle and obliges signatories to work for the abolition of sex trafficking. Viewing trafficked women as victims of pimps and customers, the 1949 Convention requires signatories to refrain from penalizing women who engage in prostitution, and to refrain from subjecting prostitutes to any special supervision or registration.<sup>45</sup> Second, in accordance with Articles 8 through 15, signatories agree to participate in specific enforcement measures, including cooperating in the extradition of traffickers, coordinating investigation efforts, sharing information, and recognizing foreign trafficking convictions.<sup>46</sup> Third, in accordance with Article 16, the signatories agree to attempt to rehabilitate and otherwise support the victims of prostitution by using various social welfare tools such as public education, health care, and social services.<sup>47</sup>

While the 1949 Convention is fairly precise in establishing the specific obligations of States Parties, commentators have criticized its ambiguity with respect to whether or not the framers of 1949 Convention intended to abolish all forms of prostitution, or only forced prostitution. Under the terms of the Convention, prostitution and trafficking are "incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community."<sup>48</sup> As revealed by a report issued by the U.N. pursuant to the 1949 Convention, the drafters of the 1949 Convention intended

43. 1949 Convention, *supra* note 40, arts. 1–2, at 274.

44. See Susan F. Toepfer & Bryan S. Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & L. 83, 96 (1994).

45. Article 6 requires that each party agrees:

to take all necessary measures to repeal or abolish any existing law, regulation or administrative provision by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification.

1949 Convention, *supra* note 40, art. 6, at 276.

46. Toepfer & Wells, *supra* note 44, at 97 (citing 1949 Convention, *supra* note 40, arts. 8–15, at 276–80).

47. *Id.* (citing 1949 Convention, *supra* note 40, art. 16, at 280).

48. *Id.* preamble, at 272.

neither to regulate nor to prohibit prostitution, however, but rather to work toward abolition of the "exploitation of prostitution."<sup>49</sup> A number of studies conducted under the auspices of the League of Nations in the 1920s and 1930s had concluded that 'the fear that abolition would result in an increase of venereal disease or would be prejudicial to public order has been proved [sic] to be unfounded, and that the danger of international trafficking has been diminished by the closing of the houses.'<sup>50</sup> Based on these findings, the framers concluded that measures should be taken to abolish the regulation of prostitution. Accordingly, under Article 6 of the 1949 Convention, States Parties agree to abolish any existing laws or regulations under which persons who engage in prostitution are subject to special registration or exceptional requirements for supervision or notification.<sup>51</sup> At the same time, however, the framers did not want to prohibit or criminalize prostitution, for fear that prohibition would drive prostitution underground, and that laws designed to punish both the client and the prostitute, in practice, would be selectively enforced only against the prostitutes.<sup>52</sup> Nevertheless, while it is clear that States Parties are to refrain from regulating prostitution and prosecuting prostitutes, it is unclear whether, in requiring states to combat the "exploitation of prostitution," such efforts are to be targeted at all forms of prostitution or only forced prostitution.<sup>53</sup>

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49. See U.N. DEP'T OF INT'L ECONOMIC & SOCIAL AFFAIRS, ACTIVITIES FOR THE ADVANCEMENT OF WOMEN: EQUALITY, DEVELOPMENT AND PEACE at 18, U.N. Doc. ST/ESA/174, U.N. Sales No. E.85.IV.11 (1985) [hereinafter 1985 U.N. REPORT].

50. 1959 U.N. STUDY, *supra* note 36, at 8. In his 1985 report, the Special Rapporteur on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others states that regulation can place the prostitute in a marginal position, can cause the prostitute to be considered and to consider herself a criminal, and, as a result, make it virtually impossible for her to escape prostitution. 1985 U.N. REPORT, *supra* note 49, at 18.

51. See 1949 Convention, *supra* note 40, art. 6, at 276.

52. See 1959 U.N. STUDY, *supra* note 36, at 11.

53. The Programme of Action for the implementation of the 1949 Convention and the 1985 Report of the Special Rapporteur on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others do suggest, however, a long-term goal of complete abolition of all forms of prostitution. Concluding the 1959 U.N. STUDY, the Programme of Action includes a plan designed to combat the traffic in persons and the exploitation of the prostitution of others, as well as measures necessary to, and in conjunction with, the suppression of the regulation of prostitution. See 1959 U.N. STUDY, *supra* note 36, at 32. The Programme of Action includes a list of suggested measures to increase the "prevention of prostitution" which contains no indication of a distinction between forced prostitution and prostitution generally, and certainly does not target only forced prostitution. See 1959 U.N. STUDY, *supra* note 36, at 33. Indeed, language contained in the 1985 REPORT equating all prostitution with forced prostitution indicates that the ambiguity over whether the 1949 Convention aims to prohibit prostitution *per se* or, rather, only coercive forms of prostitution ultimately may reduce to a false distinction. The 1985 U.N. REPORT states that, "even when prostitution seems to have been chosen freely, it is actually the result of coercion," citing testimony by three collectives of women prostitutes from two developed countries:

As prostitutes we are well aware that *all* prostitution is forced prostitution. Whether

The only other international treaty to address explicitly the issue of trafficking in women is the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women<sup>54</sup> ("CEDAW"). A broad, non-discrimination treaty, CEDAW requires States Parties to take all appropriate measures to remove obstacles and to foster the conditions necessary for women to realize their full potential as the equals of men.<sup>55</sup> Accordingly, CEDAW Article 6 mandates that all States Parties "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."<sup>56</sup> The separation of the phrases "all forms of traffic in women" and "exploitation of prostitution" in Article 6 could be interpreted to include within its protections victims of trafficking for purposes other than forced prostitution, such as trafficking for forced domestic labor and forced marriage. While CEDAW arguably encompasses a broader range of trafficking victims than does the 1949 Convention, as evidenced by the rejection of a Moroccan proposal to include a provision obligating states to combat all forms of prostitution, CEDAW clearly intends to prohibit only forced prostitution.<sup>57</sup>

### 3. Proposed New Definition of Trafficking

Notwithstanding the possibility of interpreting CEDAW to encompass trafficking for purposes other than prostitution, the prevailing interpretation of international anti-trafficking law, as defined by the terms of the 1949 Convention, limits the applicability of its protections to victims of forced prostitution and trafficking for forced prostitution. Since these practices constitute only a portion of the wide variety of trafficking and forced labor/slavery-like practices, existing international anti-trafficking law clearly is inadequate to respond to the needs of many victims of modern forms of trafficking.

In response to the limited scope of the definition of "trafficking" under current international law, numerous nongovernmental and inter-governmental organizations have proposed alternative definitions of trafficking. Perhaps the most prominent of these proposals has been drafted by the Global Alliance Against the Trafficking of Women ("GAATW"), a coalition of nongovernmental organizations working

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we are forced to become prostitutes by lack of money or by housing or unemployment problems, or to escape from a family situation of rape or violence . . . or by a procurer, we would not lead the "life" if we were in a position to leave it.

1985 U.N. REPORT, *supra* note 49, at 10.

54. Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

55. *See id.* preamble, at 33.

56. *Id.* art. 6, at 37.

57. NOTRAE, *Background Study*, *supra* note 42, § 2.4.

toward the elimination of trafficking in women. Numerous nongovernmental women's rights groups have used the GAATW definitions as a springboard for assessing alternative policies and strategies to combat trafficking, forced labor, and slavery-like practices.<sup>58</sup>

The GAATW approach separates the act of recruitment from the end purposes of trafficking, defining the former as "trafficking" and the latter as "forced labour and slavery-like practices." GAATW defines "trafficking" as:

All acts involved in the recruitment and/or transportation of a person within and across national borders for work or services by means of violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion.<sup>59</sup>

The GAATW defines "forced labour and slavery-like practices" as:

The extraction of work or services from any person or the appropriation of the legal identity and/or physical person of any person by means of violence or threat of violence, abuse of authority or dominant position, debt-bondage, deception or other forms of coercion.<sup>60</sup>

As will be discussed in the following section, the GAATW definitions significantly expand previous conceptions of trafficking to encompass a broader range of the activities described above in Part I.

58. For example, the International Human Rights Law Group, an international human rights organization based in Washington, D.C., with the help of the Harvard Law School Human Rights Clinical, recently convened a working meeting of representatives of U.S.-based women's rights organizations to identify and assess current issues facing the anti-trafficking movement, including an exploration of the problems of definition and the ramifications of proposed legal remedies and advocacy strategies. The GAATW definitions proved to be a useful framework for the discussions. For a survey of the issues discussed at this meeting, see Harvard Human Rights Clinical, *International Trafficking in Women: An Exploration of the Issues* (Jan. 29, 1998) (unpublished paper presented at International Human Rights Law Group Roundtable on Trafficking in Persons) (on file with the *Harvard Human Rights Journal*). Also, NOTRAF, a network of European nongovernmental organizations, has used the GAATW definitions as the basis for its analysis and policy. See, e.g., NOTRAF, *Basic Principles for a Code of Conduct*, *supra* note 3.

59. Global Alliance Against Traffic in Women and the Foundation for Women in cooperation with the Foundation Against Trafficking in Women: Standard Minimum Rules for the Treatment of Victims of Trafficking in Persons, Forced Labour and Slavery-like Practices 1 (April 1997) (unpublished manuscript, on file with *Harvard Human Rights Journal*) [hereinafter GAATW: Standard Minimum Rules].

60. *Id.*



*B. Analysis and Critique of International Legal Protections—  
Definitional Issues*

A comparison between the definitions of trafficking set forth in the GAATW proposal and the 1949 Convention reveals the breadth and complexity of the issues implicated in the trafficking of women. For example, the bifurcation of the GAATW definition into recruitment and forced labor/slavery-like practices, and the catalogue of material elements of each practice elucidate the wide variety of circumstances and practices that can effect the victimization of women. Moreover, the inclusion and exclusion of a coercion requirement in the GAATW and the 1949 Convention definitions, respectively, evoke conflicting images with respect to the nature of the victimization, whether by coercive circumstances or by an inescapable false consciousness. Subtle definitional differences range from straightforward line-drawing problems as to who does or does not qualify as a victim of these practices, to competing assumptions with respect to the potential empowerment of women. These differences of definition can play a definitive role in the formulation of strategies to provide remedies and protections to the victims of these practices.

Attentive to the victims who are not protected under current international legal standards—i.e., those victims whose experiences diverge from the traditional trafficking/forced prostitution scenario—this section assesses the potential for a new definition that would provide protections to a broader range of victims. More specifically, the discussion in this section focuses on the issues implicated in the GAATW definition and existing definitions of trafficking under international anti-trafficking law, including: (1) the expansion of the traditional prostitution-linked conception of trafficking to include trafficking for non-sexual forced labor/slavery-like practices; (2) the distinction between abusive recruitment practices and abusive living and working conditions; and (3) the definition of consent and its significance to the determination of whether or not a woman has been victimized by trafficking and/or forced labor/slavery-like practices. This section concludes with a discussion of the overarching paradigms that may inform, if not significantly influence, one's position on these definitional issues.

1. Inclusion of Trafficking for Non-Sexual Forced Labor/Slavery-Like Practices

The emergence of new manifestations of trafficking such as trafficking for domestic labor or commercial marriages, has made obvious the need for an expansion of the trafficking definition to incorporate trafficking for exploitative purposes other than forced prostitution. As discussed above, the 1949 Convention narrowly conceives of trafficking

as necessarily linked to prostitution, and would neither penalize those who traffic women and girls for purposes other than prostitution, nor protect their victims.

Responding to these deficiencies in the definition of trafficking under the 1949 Convention, the GAATW has developed a broader definition of trafficking, which encompasses trafficking for any form of forced labor/slavery-like practices. The GAATW definition of forced labor/slavery-like practices skillfully incorporates non-sexual forms of forced labor/slavery-like practices by highlighting common elements among forced prostitution, forced domestic labor, and forced marriages. Like trafficking for forced prostitution, women who are trafficked for forced domestic labor and marriage are recruited by deceptive, coercive, or violent means, and are subjected to slavery-like living and working conditions under which they are denied their fundamental human rights and freedoms.<sup>61</sup>

These newer forms of trafficking often share with their more traditional counterparts the characteristic of occurring in areas that traditionally have been associated with women's work.<sup>62</sup> Indeed, these may be the only areas of employment accessible to women, particularly in countries experiencing economic deprivation.<sup>63</sup> In such contexts, "women's work" typically occurs in the informal sector of the economy, an area traditionally considered beyond the realm of state responsibility and, consequently, lacking in formal labor laws and regulations.<sup>64</sup> In addition, laws pertaining to property, inheritance, marriage, divorce, and residence often deny women independence, mobility, and legal autonomy, and can thus foster trafficking and forced labor/slavery-like practices within marriages.<sup>65</sup> Hence, the general absence of regulations governing the conditions of women's work in these areas, coupled with continued, even increasing, economic marginalization of women, necessitate that women victimized by these practices be included in the anti-trafficking agenda.

## 2. Separation of Trafficking and Forced Labor/Slavery-Like Practices

While the 1949 Convention addresses prostitution separately from trafficking, it addresses trafficking only as it is linked to prostitution, penalizing any person who, "to gratify the passions of another," "procures, entices or leads away, *for purposes of prostitution*, another person,

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61. See NOTRAF, *Background Study*, *supra* note 42, § 3.5.

62. *See id.*

63. *See id.*

64. *See id.*

65. European NGO Conference, *NGO Statement 7 April 1997* (visited Oct. 21, 1997) <<http://home.pi.net/~notraf/stat.htm>>.

even with the consent of that person.”<sup>66</sup> By collapsing the distinction between trafficking and forced prostitution in its treatment of trafficking, the 1949 Convention confuses the notion of whether trafficking as an act of recruitment absent any intent to force the women into prostitution is a prohibited practice.

In contrast, by conceptually identifying trafficking (i.e., the recruitment and transportation process) and forced labor/slavery-like practices (i.e., the conditions in which women are forced to live and work) as two separate practices, the GAATW definitions emphasize that not all trafficking victims are subjected to forced labor/slavery-like practices, and not all women subjected to forced labor/slavery-like practices are also victims of trafficking. The distinction recognizes that one practice can be an act of choice, while the other act an imposition of force, deceit, or abuse. For example, a woman may be recruited under coercive conditions and forcibly transported for the purpose of a forced marriage, yet ultimately find herself in a marriage that does not amount to a slavery-like situation. On the other hand, a woman may find herself in a forced labor or slavery-like practice without ever having been trafficked, but rather having engaged in illegal migration by her own resources. Indeed, many women freely choose, within their available options, to migrate from one country to another, or from rural to urban areas within a country.<sup>67</sup> Although these women might consent to the migration, they might not consent to subjugation under forced labor/slavery-like practices.

The separation of the act of recruitment from the forced labor/slavery-like practice is important analytically. On a descriptive level, the separation of the two practices enables a clearer understanding of the different dimensions of the trafficking problem. On a prescriptive level, since measures to address abusive recruitment are not necessarily the same as measures to prevent or to combat exploitative living and/or working conditions, the conceptual separation of the two practices facilitates a more precise formulation of policies and strategies to combat these abuses.

The practical benefit of having separate definitions of trafficking and forced labor/slavery-like practices is that protections could extend to women victimized by one, but not the other practice.<sup>68</sup> Another advantage of the definitional separation is that the identification of forced

66. 1949 Convention, *supra* note 40, art. 1, at 274.

67. See NOTRAF, *Background Study*, *supra* note 42, § 3.4.

68. Imagine, for example, a raid of a factory in which all of the workers were working under slavery-like conditions. To make a distinction between workers who were trafficked and those who were not trafficked, and to accord protections and remedies only to the former would seem to yield an inconsistent result, considering that all of these workers were currently being forced to work under slavery-like conditions.

labor/slavery-like practices as a problem in and of itself focuses attention on the interest of protecting women, rather than the state interests of restricting immigration or combating organized crime, which are typically emphasized with respect to trafficking as recruitment.

The problem, however, with identifying trafficking and forced labor/slavery-like practices as two distinct problems is the risk that states might only be willing to adopt international legal protections for victims of trafficking, but not for victims of forced labor/slavery-like practices. For instance, a state might refuse to adopt protections for the latter on grounds that forced labor/slavery-like practices are solely a matter of domestic jurisdiction, to be addressed through national, rather than international legislation.<sup>69</sup> As a practical matter, the problem of forced labor/slavery-like practices may carry less political currency than trafficking, and may, therefore, tend to be overlooked. Addressing this potentiality may require the anti-trafficking movement to advocate explicitly on behalf of victims of forced labor/slavery-like practices as a separate class of victims equally in need of protections.

### 3. Significance and Identification of Consent

The 1949 Convention considers consent to be irrelevant to the determination of whether a woman has been victimized by trafficking and the "exploitation of prostitution." In Article 1, the 1949 Convention penalizes anyone who, "to gratify the passions of another . . . procures, entices or leads away, for the purposes of prostitution, another person, *even with the consent* of that person."<sup>70</sup> Article 2 similarly disregards a woman's consent, penalizing those who "exploit the prostitution of another person, *even with the consent* of that person."<sup>71</sup>

Unlike the 1949 Convention, the GAATW framework requires coercion<sup>72</sup> as a necessary element of both trafficking and forced labor/slavery-like practices. The GAATW distinction between the act of recruitment and the conditions in which women are forced to live and work is analytically useful in determining the presence or absence of consent in the trafficking scenario. The requirement of coercion as a necessary element of each of these practices recognizes that force can operate on two equally important, but separate domains—on one level,

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69. Indeed, a number of States Parties to the early anti-trafficking instruments refused to sign onto the 1949 Convention due, in part, to the perception that the 1949 Convention encroached on states' domestic jurisdiction over prostitution occurring within their borders. See *supra* text accompanying notes 41–42.

70. 1949 Convention, *supra* note 40, art. 1, at 274 (emphasis added).

71. *Id.* art. 2, at 274 (emphasis added).

72. Note that coercion under the GAATW definition includes violence, threat of violence, abuse of authority or dominant position, debt-bondage, deception or other forms of coercion. See *supra* text accompanying notes 59–60.

to create abusive recruitment and transportation practices, and on another level, to create abusive living and working conditions.

### a. The Significance of Consent

By eliminating the “even with consent of” language of the 1949 Convention in its definitions of trafficking and forced labor/slavery-like practices, the GAATW framework appears to preserve two controversial possibilities. First, the GAATW framework appears to admit, as a descriptive fact, that it is possible that a woman might choose to accompany a trafficker, engage in prostitution or domestic or factory labor, or enter into a commercial marriage. Second, by virtue of its agnosticism toward the possibility of consent—i.e., by not penalizing, for example, procurement of a woman with her consent—the GAATW framework appears to adopt a normative position that would allow—or at least not object to—a woman’s involvement in consensual trafficking, prostitution, domestic labor, and commercial marriage.<sup>73</sup> Both possibilities have provoked much divisiveness within the anti-trafficking movement, particularly with respect to normative debates over whether or not women should be able to engage in consensual prostitution or consensual trafficking.

As will be discussed in the following section, too much attention to the normative question of whether a woman should be able to consent to trafficking and prostitution overlooks the empirical fact that women actually do consent to these practices,<sup>74</sup> and, moreover, risks neglecting important descriptive facts regarding the *quality* of a woman’s consent to these practices. This oversight threatens to subsume the important distinction between, for instance, a woman who consents to prostitution, and a woman who consents to prostitution under debt-bondage. Becoming 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, and divert attention

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73. The normative position one takes with respect to the permissibility of consensual prostitution and consensual trafficking can lead to the promotion of different legal measures. For instance, with respect to prostitution, those who adhere to a normative stance against consensual prostitution might support prohibiting prostitution and penalizing women who choose to engage in prostitution, or they might favor penalizing only clients and procurers in an attempt to preclude women from consenting to prostitution. On the other hand, those who adopt a normative position that allows for consensual prostitution might object to penalization of the women and their clients or procurers, and, instead, support only penalization of those involved in subjecting a woman to forced prostitution. With respect to trafficking, those who maintain a normative stance against consensual trafficking might support distinguishing trafficking victims from other illegal migrants, and favor providing additional protections to the former. Conversely, those who adopt the opposite stance might support treating those who consent to trafficking differently from those who are forcibly trafficked, treating the former as they would other illegal migrants.

74. See, e.g., *supra* text accompanying note 13.

away from an actual source of the exploitation. For instance, in the case of a woman forced into prostitution who was deceived by a trafficker's lure of an attractive waitressing job abroad, or a woman who intended to engage in self-regulated prostitution and found herself in a debt-bondage situation, the source of exploitation might be misinformation or debt-bondage, respectively. Deeming consent irrelevant to the women's victimization also risks portraying women as perennial victims of false consciousness, incapable of making autonomous choices regarding their means of migration and employment.

On the other hand, the practical advantage of considering consent irrelevant to a woman's victimization by these practices lies in the potential correlation between a state's willingness to accord protections and the perceived degree of the woman's victimization. In other words, the greater the extent to which women are portrayed as victims—which is more likely to be the case where consent is irrelevant—the more inclined a state might be to accord these women substantive legal protections.

#### i. Consent to Prostitution

Advocates debate whether or not the decision to engage in prostitution could ever be the result of free choice. Some argue that whether forced by a lack of money, housing, or employment, or threat of violence, these women would not otherwise choose to prostitute themselves.<sup>75</sup> Others insist that even if conditions were such that a woman were able to self-regulate her activities, a woman conceivably might still choose prostitution as her profession.<sup>76</sup> These advocates claim that, although prostitution may presently seem to be an undesirable occupation since prostitution, as with other societal institutions, has been rendered exploitative by social and political inequality, prostitution as a profession is not inherently or necessarily exploitative.

Assuming that it would be possible to choose freely to engage in prostitution, the normative question of whether women should be able to consent to prostitution remains a controversial issue. The controversy arises from debates regarding whether or not the physical act of prostitution is inherently exploitative. Those who argue that women should not be allowed to consent to prostitution argue from the view that prostitution is inherently exploitative—whether as an act of violence against women's bodies, or as a practice which, by commodifying women's bodies and sexuality, reinforces traditional hierarchical power

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75. For discussion of this debate, see Reanda, *supra* note 32, at 202.

76. See Carol H. Hauge, *Prostitution of Women and International Human Rights Law: Transforming Exploitation into Equality*, 8 N.Y. INT'L L. REV. 23, 24 (1995).

structures premised on male dominance.<sup>77</sup> On the other hand, those who argue that women should be permitted to consent to prostitution base their argument on the belief that prostitution does not necessarily operate as an instrument of women's oppression, but rather can be a viable economic option, if not an expression of women's equality or an act of sexual self-determination.<sup>78</sup>

The normative debates over whether women should be permitted to consent to prostitution tend to derail efforts to combat the forced or slavery-like conditions under which a prostitute may work. In particular, the normative position against consensual prostitution threatens to conflate the question of whether or not the physical act of prostitution itself is inherently exploitative with the question of whether or not one has consented to the conditions under which one engages in prostitution. Deeming consent impossible and treating prostitution as an inherently exploitative physical act risks dismissing the fact that some women actually do choose to engage in prostitution,<sup>79</sup> but do not consent to the abusive conditions to which they are subjected in the course of their work. Consequently, attention can be diverted from efforts to eradicate the abusive living and working conditions to which prostitutes may be subjected.

While some might argue that this distinction is a semantic difference relevant only to the description of the exploitation, the distinction has important practical implications for victims of non-sexual forced labor/slavery-like practices. Emphasis on the inherent exploitation caused by the physical act of prostitution rather than on the forced conditions of the prostitution activity creates a problematic distinction between forced prostitution and other forced labor and slavery-like practices. For example, to the extent that attention is drawn away from the coercive conditions of forced labor/slavery-like practices, domestic workers, whose vulnerability to abuse lies primarily in their working conditions, could receive lesser protections under international laws against trafficking and forced labor/slavery-like practices. Domestic labor does not raise the same concerns as prostitution with respect to whether the activity is inherently exploitative as a physical act. However, domestic labor does implicate the same concerns as prostitution with respect to the way in which the activity is organized—as either self-regulated or controlled by another person in an exploitative manner. Creating an inherent distinction between prostitution and other forms of forced labor/slavery-like practices, therefore, could work against the move-

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77. See *id.* at 23.

78. See *id.* at 24; see also Reanda, *supra* note 32, at 202 (discussing whether prostitution constitutes a human rights violation).

79. See *supra* Pyne's description of "voluntary" prostitution at note 13.

ment to expand the definition of trafficking to include trafficking for non-sexual forced labor/slavery-like practices.

## ii. Consent to Trafficking

Debates over the significance of consent also occur with respect to trafficking, or the recruitment or transportation of women for forced labor/slavery-like practices, although the trafficking debates tend to be less morally charged<sup>80</sup> and differ slightly from those over prostitution. Whereas the prostitution debates threaten to subsume the distinction between prostitution and forced prostitution—drawing attention away from the latter problem—the trafficking debates draw attention to trafficking by problematizing trafficking as distinct from the broader category of illegal immigration. This difference in focus, notwithstanding, a comparison between the prostitution and trafficking debates is useful because these two debates share similar argumentation regarding the significance of consent as potentially dispositive of a woman's victimization by these respective practices.

As with its definition of forced labor/slavery-like practices, the GAATW definition of trafficking requires some form of coercion in the recruitment or transportation of the woman.<sup>81</sup> In contrast, the United Nations General Assembly ("UNGA") definition of trafficking does not require coercion as a necessary element of the violation:

[Trafficking is defined as the] illicit and clandestine movement of persons across national or international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment and false adoption.<sup>82</sup>

By not requiring coercion, the UNGA definition does not appear to admit the possibility that a woman could consent to the trafficking. Based on its view that the act of recruitment is inherently exploitative,

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80. Whereas those who view prostitution as inherently exploitative can invoke the imagery of prostitution as a physical act of violence against women's bodies, those who view trafficking as inherently exploitative lack recourse to such visceral representations. Instead, any inherently exploitative nature of the trafficking lies in the ill intentions of the traffickers ultimately to place a woman in the hands of someone who will subject her to forced labor/slavery-like practices.

81. Coercion includes "violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion." See *supra* text accompanying note 59.

82. *Report of the Special Rapporteur on Violence Against Women*, *supra* note 2, at 19.



the UNGA presumably would favor the view that women should not be able to engage in consensual trafficking.<sup>83</sup> To allow a woman to consent to the trafficking would make it extremely difficult to distinguish trafficking from illegal migration, an outcome which the UNGA views as unacceptable because a person's voluntary migration across frontiers without authorization is substantively different from the trafficking of a person with that person's consent. Unlike illegal migration, trafficking occurs through the instrumentality of another person, and has the end purpose of forcing the person into a forced living or working situation.

On one hand, the UNGA distinction between illegal migration and trafficking carries the advantage of focusing attention on the violation of the woman's rights, rather than on the illegality of her act.<sup>84</sup> In other words, to consider a woman who consents to be trafficked as simply engaging in illegal migration risks treating the woman as a collaborator of the trafficker and risks overlooking the trafficker's underlying self-serving and possibly malevolent purposes. Relatedly, acknowledging the distinction between trafficking and illegal migration yields the practical benefit of encouraging states to provide trafficked women protections that states might otherwise deny to illegal immigrants. In the absence of this distinction, states might argue that a woman who consented to the trafficking, as with any other illegal migrant, does not deserve special protections for having knowingly violated state sovereignty by illegal border-crossing.<sup>85</sup> A state could use this argument to deny protections to a woman who consented to be trafficked, but was later subjected to a forced or slavery-like living or working situation.<sup>86</sup>

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83. In its report to the 50th session of the General Assembly, the Secretary-General of the United Nations commented that:

The question must be asked . . . whether trafficking is the same as illegal migration. It would seem that the two are related, but different. Migration across frontiers without documentation does not have to be coerced or exploitative. At the same time, persons can be trafficked with their consent. A distinction could be made in terms of the purpose for which borders are crossed and whether movement occurs through the instrumentality of another person. Under this distinction, trafficking of women and girls would be defined in terms of "the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations" and the fact that it is done "for the profit of recruiters, traffickers and crime syndicates."

See NOTRAF, *Background Study*, *supra* note 42, § 2.4.

84. Similarly, in the prostitution context, a focus on the abusive conditions under which a forced prostitute works could draw attention away from the illegality of her activity in countries that prohibit prostitution.

85. See *infra* text accompanying notes 108–111.

86. Indeed, a woman who also initially intended to engage in illegal but voluntary prostitution in the destination country, but ended up in a forced prostitution situation, could be denied protections by the state on grounds that, in addition to intending to immigrate illegally, she intended to engage in another crime once within the destination country.

On the other hand, maintaining the distinction between trafficking and illegal immigration sacrifices belief in a woman's autonomy to migrate to another country or region. The UNGA view appears to deny paternalistically the possibility that a woman might consciously and freely choose to use a trafficker for the purposes of her own migration. To consider such consent, if not impossible, at least irrelevant to the determination of whether a woman has been victimized by trafficking, the UNGA sets up a distinction between trafficking and illegal migration that could be difficult to justify. The UNGA's exclusion of a coercion requirement thus implies that, if the trafficking were to occur with the woman's consent, the mere fact of the trafficker's ill-purpose, even if ultimately unexecuted, would violate her rights in a way that straightforward illegal migration would not. In response, one might argue that ill-intent constitutes weak grounds for distinguishing between trafficking and illegal migration, and even weaker justification for providing women who consent to trafficking special protections that would be denied to other illegal migrants. Besides, one might argue, requiring more than mere ill-intent would still allow women who consent to trafficking some measure of protection. Even if by consenting to the trafficking, the woman might indeed become the object of the ill-intentions of the trafficker to subject her to forced labor/slavery-like practices, these ill-intentions would translate to a victimization of the woman only if the trafficker were to succeed in delivering her into the intended exploitative living or working situation. If the trafficker were successful, the woman would still receive protections as a victim of forced labor or slavery-like practices, though perhaps not as a victim of abusive recruitment.

Hence, in both the prostitution and the trafficking contexts, the issue of whether to require coercion as a material element of these practices gives rise to difficult normative choices. Eliminating the coercion requirement might render more women eligible to receive protection and remedy under international laws against trafficking and forced labor/slavery-like practices. However, ridding the definitions of the coercion requirement also risks treating women as perennial victims, incapable of making choices about their bodies and their means of migration.

One's positions on whether to require a coercion element in the definitions of prostitution and trafficking, respectively, may or may not be consistent with each other. One might prefer to retain a coercion requirement for prostitution, yet consider coercion irrelevant to the question of whether one has been victimized by trafficking, or vice versa. Assuming coercion to be relevant to the determination of whether a woman has been victimized by trafficking and/or forced labor/slav-

ery-like practices, the following section discusses the complex question of how coercion is to be assessed.

#### b. The Identification of Coercion

Critical to the determination of whether the circumstances of a woman's decision to engage in prostitution, domestic labor, or marriage amount to the requisite level of coercion are two fundamental questions: (1) procedurally, at what point in a sequence of events is coercion or a lack of consent dispositive of a woman's victimization; and (2) more substantively, what constitutes coercion or lack of consent. The complexity of these inquiries can perhaps best be illustrated with reference to what will be referred to in the Article as the "Re-entry Scenario." The Re-entry Scenario describes the situation of a woman who, having escaped or having been released from debt bondage as a forced prostitute, "voluntarily" decides to re-enter the trafficking industry as a prostitute, believing that alternative forms of employment would be unavailable to her due to the social stigma against former prostitutes. The fact that the woman was initially trafficked and forced into prostitution gives rise to the question of when in the trafficking scenario the lack of a woman's consent becomes dispositive of her status as victim. Furthermore, the possibility that the woman's decision to re-enter prostitution in this scenario may have been driven by economic hardship gives rise to the substantive question of what constitutes coercion. The following section aims to explore both these issues in more detail and to assess their implications for the anti-trafficking movement.

#### i. The Timing of Consent

One commentator has noted that the question of a woman's free will is, in part, an issue of timing, or the determination of what point in the trafficking and/or forced labor scenario intent should be measured.<sup>87</sup> This question suggests at least two possibilities: first, an approach that focuses on original intent; and second, an approach that focuses on the immediate conditions of a woman's situation and her ability to change them. These two approaches to the timing of consent yield inconsistent outcomes, the ramifications of which could drastically affect the range of victims eligible for protections under international standards against trafficking and forced labor/slavery-like practices.

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87. See Demleitner, *supra* note 1, at 187.

If, on the one hand, one were to adopt an approach based on original intent, the label "forced prostitution" would apply only to women who never intended to work as prostitutes. For instance, if intent were to be measured at the time the trafficker or procurer approached her, then the woman in the Re-entry Scenario, having never intended to enter into prostitution, would still be considered a forced prostitute because of the initial coercion, despite her current willingness to continue prostituting herself. Conversely, a woman who had initially consented to engage in prostitution, even if she were currently prostituting under forced conditions, would not be considered a forced prostitute.

If, on the other hand, one were to adopt an approach that focused on the immediate circumstances under which the woman works and her ability to change these conditions, the label "forced prostitute" would apply to any woman prostituting under forced conditions, irrespective of her original intentions.<sup>88</sup> This approach has been analogized to date rape doctrine: regardless of whether the woman intended to have sex when she agreed to go to the man's apartment, her actions there determine whether the sex act would be classified as date rape or consensual sex.<sup>89</sup> For example, the immediate conditions analysis would consider a forced prostitute any woman currently prostituting under forced conditions, even if her initial entry into prostitution was consensual. On the contrary, if applied to the Re-entry Scenario, the immediate conditions analysis would hold that, even though the woman was forced to prostitute initially, she is now "voluntarily" engaging in prostitution, and is therefore no longer a victim of forced prostitution.<sup>90</sup>

The immediate conditions analysis has the obvious advantage of according protections to women currently being victimized by forced labor/slavery-like practices, whereas the original intent analysis has the counterintuitive effect of denying protections to these women based on the woman's original intent to enter into an activity which only later became corrupted by forced labor/slavery-like conditions. The disadvantage, however, of the immediate conditions analysis is that it could fail to take adequately into account how the fact of an initial coercion might have affected the range of options currently available to the woman. For instance, with respect to the woman in the Re-entry

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88. *See id.* at 188 (citing Lan Cao, Note, *Illegal Traffic in Women: A Civil RICO Proposal*, 96 *YALE L.J.* 1297, 1297 n.1 (1987)). Note that the focus on the immediate conditions under which a woman works would also provide fewer burden of proof problems than would an original intent analysis.

89. *See id.*

90. Note that this analysis assumes that economic hardship does not constitute coercion. For an argument based on the opposite assumption, see discussion of the Re-entry Scenario in the following section. *See infra* text accompanying notes 91-94.

Scenario, one could argue that the immediate conditions analysis fails to consider how the woman's past prostitution activities probably limited the range of economic options subsequently available to her due to the social stigma attached to her former prostitution activities. Unless this woman could argue that extreme economic hardship constituted coercion, this woman would not be considered a victim of forced labor/slavery-like practices under the immediate conditions analysis. Hence, in this limited respect, the original intent analysis carries the benefit of rendering the initial coercion dispositive of the woman's victimization and providing the woman in the Re-entry Scenario protections accordingly.

While, in most circumstances, the original intent analysis clearly yields less beneficial outcomes from the victim's perspective than does the immediate conditions analysis, it is useful to realize how, from the state's perspective, this analysis is useful in gauging the culpability and consequent entitlement to protections of a particular victim. For instance, a state might argue that, as between two women currently being forced to prostitute—one woman having known at the time she was trafficked that she would be engaging in prostitution, and the other woman having believed that she would be waitressing in the destination country—the latter would be more entitled to protections and remedies. Whereas the former entered the state fully intending to violate the state's laws against prostitution, the latter had no such intent to commit a crime once within the state's territory. Accordingly, a state could find reason to deny or lessen the protections to the former based on her original intent.

Hence, from the perspective of victim protection, the immediate conditions analysis has significant advantages over the original intent analysis, with the exception of its application to situations such as the Re-entry Scenario, in which the presence or absence of original intent could have effectuated the presence or absence of immediate intent. In this scenario, the initial coercion of the woman into forced prostitution created a subsequent situation of economic hardship—i.e., the fact of the woman's former prostitution activities caused her to be socially ostracized, which, in turn, prevented her from finding and partaking in other forms of employment. If, however, economic hardship were to be considered a form of coercion under the definition of forced labor/slavery-like practices, the immediate conditions analysis would consider the woman in the Re-entry Scenario a victim of forced prostitution. Hence, as will be discussed in the following section, the underinclusiveness of the immediate conditions analysis might be countered with a broader definition of coercion that would account for the lingering effects of past coercion in creating a present coercion.

## ii. The Substance of Consent

The immediate conditions analysis of the Re-entry Scenario aptly illustrates how the question of whether or not economic hardship constitutes a form of coercion can drastically affect the outcome of the analysis. As discussed above, under an assumption that economic hardship does not constitute coercion, the woman in the Re-entry Scenario would not be considered a victim of forced prostitution. However, the opposite assumption would call into question whether or not the "choice" to re-enter prostitution was genuinely voluntary in the context of extreme hardship.<sup>91</sup> For instance, had job training programs been available to these women as part of an effort to facilitate their reintegration into mainstream society, perhaps these women would have had a viable opportunity to leave prostitution and pursue some other means of survival.

The current proposed definitions of trafficking and forced labor/slavery-like practices differ in the extent to which economic hardship serves as an indicator of coercion. For instance, the GAATW definitions do not explicitly identify economic coercion in their list of coercive factors: "violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion."<sup>92</sup> Admittedly, "other forms of coercion" could be construed to include economic coercion. However, given that GAATW probably was familiar with the debates over whether or not prostitution is inherently exploitative and with the claims that economic conditions are a source of that exploitation, one could interpret the absence of "economic coercion" in the list to be the result of a conscious exclusion. Indeed, in elaborating on the meaning of "violence or threat of violence," "deception," "abuse of authority," and "debt-bondage and practices similar to debt-bondage" in its definitions of trafficking and forced labor/slavery-like practices, NOTRAF, a network of European organizations which includes member organizations of the GAATW, makes no mention of economic coercion.<sup>93</sup> In contrast, the UNGA at least

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91. Indeed, case histories compiled by Human Rights Watch/Asia indicate that there are a number of women who feel that after having been forced to work in a brothel, their only alternative is to continue prostituting themselves. See *supra* text accompanying notes 27–28.

92. See GAATW: Standard Minimum Rules, *supra* note 59, at 1.

93. In its *Basic Principles for a Code of Conduct*, NOTRAF explains that

[f]orce can take various forms, including, but not limited to:

- *violence or threat of violence*, including deprivation of freedom (e.g., of movement, or personal choice);
- *deception*, *inter alia* with regard to working conditions and/or the nature of the work to be done;
- *abuse of authority*, ranging from confiscation of personal documents to bringing or keeping a person in a position of dependence by abusing one's dominant social position or abusing the vulnerable position of persons without legal status;

acknowledges economic need to be a contributing factor of trafficking. The UNGA offered, in 1994, the following definition of trafficking:

{The} illicit and clandestine movement of persons across national or international borders, *largely from developing countries with economies in transition*, with the end goal of forcing women and girl children into sexually or *economically oppressive* and exploitative situations for the profit of recruiters, traffickers and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment and false adoption.<sup>94</sup>

By describing trafficking as a phenomenon that originates largely in developing countries and economies in transition, and by including “economically oppressive” situations in its description of the end goals of trafficking, the UNGA acknowledges the role of economics in both the recruitment process and the exploitative living and working conditions.

While including economic hardship as a form of coercion certainly would increase the number of trafficked women eligible for protection under international law, it would be difficult, as a practical matter, to identify clearly the level of economic hardship sufficient to constitute coercion. Given the universal role that economic considerations play in decisionmaking, there would have to be a fairly specific measure of hardship. If, for instance, the baseline were economic equality between men and women, most women would be considered victims or potential victims, given their generally lower economic status relative to men. Unlike physical or emotional coercion, defining economic coercion poses the far more complex task of developing a comprehensive understanding of the socio-economic factors that can influence women’s decisionmaking.

#### 4. A Conflict of Paradigms

Definitional difficulties aside, the reluctance to include economic hardship as a form of coercion in the GAATW definitions may stem, in part, from a desire to call attention to the contributions women make to the informal sector of the economy, as opposed to the unfor-

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• *debt-bondage and practices similar to debt-bondage*, i.e., pledging the personal services or labour of a person as security for a debt, if the value of those services or labour as reasonably assessed is not applied towards the liquidation of the debt, or the length and nature of those services or labour are not limited and defined.

NOTRAE, *Basic Principles for a Code of Conduct*, *supra* note 3, at 2.

94. See *Report of the Special Rapporteur on Violence Against Women*, *supra* note 2, at 19 (emphasis added).

tunate circumstances that may have motivated them to turn to this sector for employment. This difference in focus, in turn, may reflect an acceptance of the practical reality that, in many countries, socio-economic conditions force women to turn to these sectors for employment and that this situation is unlikely to change in the foreseeable future. Accordingly, the GAATW definitions might preference strategies which aim to eliminate the coercive conditions of their employment, as opposed to those which aim to eradicate these forms of employment altogether. This same underlying concern may have motivated the GAATW to adopt a normative position in favor of allowing women to be able to engage in consensual prostitution and trafficking.

The position one adopts regarding these coercion issues, as well as the other definitional issues discussed earlier in this Part, ultimately may derive from the operation of two distinct assumptions regarding women's role in society, or, rather, the role society allows women to play. One paradigm, which could be referred to as the "empowerment model," is premised on the belief in a woman's autonomy, especially her capacity to choose to engage in certain activities that could place her in a position of vulnerability—i.e., consent to prostitution and consent to trafficking. To the extent that these activities render her vulnerable to exploitation by others, the empowerment model encourages the development of strategies to address the sources of such external exploitation, rather than to eradicate these activities altogether. For instance, the empowerment model might encourage lobbying efforts aimed at the development of labor standards applicable to prostitution, domestic labor, and factory labor. At the local level, the empowerment model might invite proactive efforts to establish programs that empower women to combat and overcome victimization, such as special employment training programs for jobs in the formal sector.

In contrast, another paradigm, which could be referred to as the "protection model," focuses on eliminating any potential source of the exploitation of women, and rather than support activities that might leave women vulnerable to external exploitation, aims to eradicate these activities altogether. For instance, the protection model might endorse lobbying efforts directed at increased restrictions on international migration, as well as the abolition of prostitution. The protection model might also favor the formulation of measures which address problems that immediately arise out of the victimization of these women by forced labor/slavery-like practices, such as the provision of shelter and medical care to these victims.

Although the measures adopted by either approach need not be mutually exclusive, they differ in important respects. For instance, in addition to the measures described above, the protection model might



also support the establishment of training programs for victims, and the empowerment model might also support the provision of medical care and shelter. However, these models likely would diverge with respect to the focus of their broader lobbying efforts. Since these two approaches view the fundamental nature of the exploitation of these women by trafficking and forced labor/slavery-like practices differently—i.e., the protection model viewing the exploitation as intrinsic to the employment, and the empowerment model viewing the exploitation as externally imposed—proponents of these two models would have difficulty agreeing on a strategy to eliminate the source of the exploitation. Therefore, while the empowerment model might favor an approach that seeks to shelter women from the exploitative conditions of their employment (e.g., debt-bondage) the protection model might encourage approaches aimed at eliminating certain forms of employment altogether (e.g., prostitution *per se*).

Both models have their respective advantages and disadvantages. For instance, one could argue that the protection model seems less likely to succeed, as a practical matter, since it is improbable that any campaign could completely abolish prostitution, and might actually force prostitution further underground, particularly in the absence of viable alternatives to prostitution. At the same time, one could argue in favor of the protection model on grounds that, often, a woman ultimately subjected to trafficking or forced labor/slavery-like practices was never in a position to effect autonomous decisions—i.e., her socio-economic conditions largely predetermined which choices she viewed as possible and potentially favorable—and, therefore, should be protected from making decisions that could lead to her exploitation. While this assignment of a “false consciousness” might offend some western feminists, if given a choice between the empowerment model and the protection model, the potential and actual victims of these practices might favor the latter for the wider cast of its safety net. Hence, adherence to one model over the other not only turns on one’s substantive perception of the nature of the exploitation, but may differ according to one’s position in relation to the actual victimization.

### III. CONFLICTS OF LAWS—INTERNATIONAL ANTI-TRAFFICKING/FORCED PROSTITUTION LAWS VS. DOMESTIC IMMIGRATION AND ANTI-PROSTITUTION LAWS

Even assuming the satisfactory resolution of the various issues involved in redefining trafficking and forced labor/slavery-like practices, lax enforcement of international legal standards threatens to prevent the realization of these legal protections. In particular, domestic immi-

gration and prostitution laws that penalize trafficked women for illegal immigration or prostitution can undermine the protections otherwise accorded to victims of trafficking and forced labor/slavery-like practices under international law. The practical significance of this threat is reflected by the fact that these victims often are reluctant to seek help from local authorities for fear of being arrested for illegally immigrating or for engaging in prostitution. These victims may believe that a threat exists either within the countries to which they have been trafficked, or in the communities to which they may be deported.<sup>95</sup>

These concerns are not unfounded, given the practical realities affecting the enforcement of international law. As a primary matter, many states are reluctant to defer to international law,<sup>96</sup> particularly when at the expense of retaining domestic legal standards.<sup>97</sup> Even where a state purportedly accedes to international legal standards, there is no guarantee that its local law enforcement authorities would defer or conform to the international norm. Indeed, Article 12 of the 1949 Convention permits states to defer to domestic legal standards in the enforcement of its provisions, stating that the 1949 Convention does not affect the principle that the offenses to which it refers "shall in each State be defined, prosecuted, and punished in conformity with its domestic law."<sup>98</sup> The absence of a provision that explicitly prohibits the prosecution of trafficking and forced prostitution victims for violating domestic immigration and prostitution laws opens the door to further victimization of these women.

### A. *Domestic Immigration Laws*

As discussed in Part I, many victims of trafficking and forced labor/slavery-like practices have illegally immigrated to the countries in which they live and work and, consequently, risk being prosecuted or deported under domestic immigration laws. For some, deportation to their native communities would subject them to further criminal liability under the emigration and prostitution laws of their native countries. Moreover, the social stigma and shame some victims would suffer upon return to their native communities after having been

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95. See, e.g., *supra* text accompanying notes 25–26.

96. For a discussion of the different approaches states have taken with respect to balancing international and domestic law within a single legal order, see HENRY J. STERNER & PHILLIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAWS, POLITICS, MORALS* 725–41 (1996).

97. The history of the 1949 Convention is particularly telling in this respect. Many of the States Parties to the early anti-trafficking instruments refused to accede to the 1949 Convention due to a perception that, by addressing prostitution within state borders, the Convention encroached on states' domestic jurisdictions. See *supra* text accompanying notes 41–42.

98. 1949 Convention, *supra* note 40, art. 12, at 278.

subjected to forced labor/slavery-like practices—forced prostitution, in particular—could lead to their social and economic ostracization and further compound their victimization. This situation underscores the necessity of creating international protections against liability and, in some cases, against deportation of these women.

The 1949 Convention addresses the immigration issue only to the extent of requiring that States Parties take measures to prevent immigration for the purposes of trafficking, and to repatriate women who have been trafficked for purposes of prostitution.<sup>99</sup> The 1949 Convention does not prohibit states from prosecuting trafficking victims for their status as undocumented aliens. Given the absence of such a prohibition, coupled with the Article 12 recognition of States Parties' prerogative to define, prosecute, and punish offenses in the 1949 Convention in conformity with domestic laws,<sup>100</sup> a state could avoid providing the substantive protections which would be accorded under the 1949 Convention in the absence of conflicting domestic law by simply deporting the victim in accordance with domestic immigration law.

At present, the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>101</sup> ("Migrant Workers Convention") is the only international instrument that comes close to providing rights to victims of international trafficking and forced labor/slavery-like practices, although under the rubric of rights accorded to undocumented aliens. However, having only received seven signatories, the Migrant Workers Convention has not yet entered into force, and therefore is of limited authority in international law, much less the domestic laws of most countries. Moreover, even if the Migrant Workers Convention were in force, it would offer only limited protections to these victims. Much as the Article 12 deference to domestic law limits the protections applicable to trafficking and forced prostitution victims under the 1949 Convention, the tension within the text of the Migrant Workers Convention between the competing concerns of human rights protection of undocumented workers and the interests of states in territorial sovereignty similarly threatens to undermine its capacity to address the human rights abuses suffered by victims of trafficking and forced labor/slavery-like practices. If not for this tension, trafficking victims

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99. See *id.* arts. 17 & 19, at 282. Article 17 discusses immigration issues only at the level of prevention of trafficking, rather than as a solution to a trafficking victim's immigration status problem. See *id.* art. 17, at 282. Note also that Article 6, which requires States Parties to repeal or abolish "any existing law, regulation or administrative provision" under which people engaging in prostitution are subject to special registration or required to have special documentation, makes no mention of laws specific to the victim's immigration status. *Id.* art. 6, at 276.

100. See *supra* text accompanying note 98.

could stand to benefit from a broad range of human rights protections under the Migrant Workers Convention.<sup>102</sup>

Unfortunately, juxtaposed against the Migrant Workers Convention's broadly enumerated protections for undocumented workers is the Migrant Workers Convention's overriding commitment to states' sovereign prerogatives to control immigration. This commitment threatens to undermine or defeat the very rights the Migrant Workers Convention potentially provides to victims of trafficking and forced labor/slavery-like practices. Although Article 25 requires that "States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment," this provision fails to specify which state actions adequately "ensure" against such deprivation.<sup>103</sup> Moreover, Articles 34 and 79 could render Article 25 ineffective with respect to victims of trafficking and forced labor/slavery-like practices, particularly forced prostitution.<sup>104</sup> Articles 34 and 79 state, respectively:

Nothing in the present part of the Convention shall have the effect of relieving migrant workers and the members of their families from either the obligation to comply with the laws and regulations of any State of transit and the State of em-

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101. International Convention on the Protection of the Rights of All Migrant Workers and Their Families, U.N.GAOR 3rd Comm., 45th Sess., Annex, Agenda Item 12, at 1519, U.N. Doc. A/RES/45/158 (1991) [hereinafter Migrant Workers Convention].

102. Because trafficking victims often are illegal aliens in the countries in which they work, the most relevant provisions of the Migrant Workers Convention are those that protect undocumented or "irregular" migrant workers. Article 2 of the Migrant Workers Convention defines "migrant worker" as a person "who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national." *Id.* art. 2(1), at 1523. Linda Bosniak interprets the Migrant Workers Convention as defining irregular migrant workers as "people who have arrived in the state of employment or residence without authorization, who are employed there without permission, or who entered with permission and have remained after the expiration of their visas." Linda S. Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention*, 25 INT'L MIGRATION REV. 737, 742 (1991); see also Migrant Workers Convention, *supra* note 101, art. 5, at 1525.

Under the "irregular migrant workers" rubric, articles relevant to victims of trafficking and forced labor/slavery-like practices include the right to not be subjected to torture, or cruel, inhuman or degrading treatment or punishment (Article 10); the right not to be held in slavery or servitude, and not to be required to perform forced or compulsory labor (Article 11); and the right to effective protection by the states against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions (Article 16(2)). See Migrant Workers Convention, *supra* note 101, arts. 10, 11, and 16(2), at 1526, 1528.

103. Migrant Workers Convention, *supra* note 101, art. 25, at 1532.

104. One could argue that some forced prostitutes also should be considered migrant workers because they engage in remunerated activity and, moreover, because there is no explicit requirement that the "work" in which the undocumented migrant engages be a legal activity. However, it is unlikely that the Migrant Workers Convention would apply to victims of commercial marriage, as these victims would not be engaging in a remunerated activity.

ployment or the obligation to respect the cultural identity of the inhabitants of such States.<sup>105</sup>

and

Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families.<sup>106</sup>

Hence, these provisions, in effect, reaffirm the prerogative of States Parties to enforce their domestic laws concerning unauthorized entry, employment, or residence against the victims of trafficking and forced labor/slavery-like practices. In the absence of an additional article explicitly prohibiting the prosecution of undocumented migrants for immigration violations based on testimony or other information obtained in the course of the migrants' attempt to claim protections under the Migrant Workers Convention, trafficking victims would risk exposing themselves to expulsion with any attempt to avail themselves of the protection of the state for abuses they suffered at the hands of their employers. Moreover, even if contacting the state's immigration officials in response to a trafficking victim's exercise of a right under the Migrant Workers Convention were prohibited under this proposed article, a state would not be likely to forego prosecuting a trafficking victim for violations of its immigration laws simply because the victim's employer might also be subject to prosecution.<sup>107</sup>

Not only do domestic immigration laws deter victims of trafficking and forced labor/slavery-like practices from reporting the abuses they have suffered, but these laws also may further victimize these women by requiring their deportation. For some victims of trafficking and forced labor/slavery-like practices, the fundamental conflict these victims have with domestic immigration laws is not based merely on a personal preference for remaining in their country of employment, but rather the practical impossibility of returning home without facing re-victimization. As discussed above in Part I of this article, for some victims of trafficking and forced labor/slavery-like practices, particularly those forced into prostitution, returning to their native countries is a dangerous and painful alternative, as the social stigma attached to

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105. *Id.* art. 34, at 1535.

106. *Id.* art. 79, at 1550.

107. See Bosniak, *supra* note 102, at 761. Bosniak also notes that a migrant worker who has been expelled or is in detention is not well-situated to vindicate her employment rights. In addition, the mere threat that an employer might notify immigration officials of her undocumented status is often enough to convince a migrant worker, such as a trafficking victim, to relinquish the exercise of her rights. See *id.*

their having been a prostitute could lead to social and economic ostracization by their families and communities. While the additional article, proposed above, might bolster Article 25 protections, this article would provide only a temporary solution for these victims. Even assuming, under this proposed article, that local officials were prohibited from prosecuting trafficking victims for illegal immigration based on information gained from her reporting abuses to the authorities, these victims could, nevertheless, be subject to prosecution for illegal immigration in other contexts—for instance, upon being discovered in a brothel raid.

A comprehensive approach to protecting the victims of trafficking, therefore, would require the prophylactic measure of providing trafficking victims residency status in the country to which they have been trafficked or in which they have been subjected to forced labor/slavery-like practices. However, the prominent role that state territorial sovereignty has played in international legal and political systems creates a serious obstacle to according undocumented victims of trafficking and forced labor/slavery-like practices adequate protections under international law. Despite variations in the legal and social treatment of undocumented aliens from state to state, one common feature is the presupposition that an alien's presence results from a breach or a failure of national territorial borders.<sup>108</sup> In practice, protections available to individuals who are legally in the country can be denied to undocumented aliens on the basis of territorial sovereignty, or a state's competence to "prescribe and apply law to persons, things and events within its territorial domain to the exclusion of other states."<sup>109</sup> A state's power to refuse immigrants entry and to expel aliens has been integral to its territorial sovereignty since the nineteenth century.<sup>110</sup>

Reflective of the general tendency under international law to exclude undocumented aliens from fundamental rights and freedoms, various human rights instruments contain restrictions on the rights of aliens, allowing entry of aliens to be conditioned on the country's consent.<sup>111</sup> A state's gate-keeping power to "determine the composition of the community to which state obligations are owed" is considered a legitimate justification for unequal protection of aliens' human rights.<sup>112</sup>

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108. *See id.* at 742.

109. *See id.* at 743 (quoting LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 117 (1989)).

110. *See id.*

111. *See id.* at 743 (citing International Covenant on Civil and Political Rights (Article 13); American Convention on Human Rights (Articles 22(6) and (9)); African Charter on Human Rights (Articles 12(4) and (5)); and the European Convention on Human Rights (Article 4 of the Fourth Protocol)).

While, as human beings, aliens theoretically are entitled to treatment which complies with internationally recognized human rights standards, states are *not* required to treat aliens identically with citizens.<sup>113</sup>

Although the idea of providing residency status seems radical when viewed against the backdrop of the general reluctance of states to accord undocumented aliens protection, the proposal is not a novel one. In a 1989 resolution, the European Parliament recommended the provision of residency status for women whose personal safety might be endangered upon return to their homeland, or who, upon arrival, might again become victims of exploitation.<sup>114</sup> In 1993, the European Parliament expanded these measures, calling upon Member States to provide *permanent* residency status in cases in which the victim's personal safety would be endangered upon return to her home country.<sup>115</sup> Along the same lines, the GAATW Standard Minimum Rules for the Treatment of Victims of Trafficking in Persons ("Standard Minimum Rules")<sup>116</sup> prohibits treatment of trafficked persons as illegal immigrants, and, instead, requires that the destination state provide residency status to the trafficked person in order to ensure that she has the option of legal recourse.<sup>117</sup> Following the GAATW example, the governments of Belgium and the Netherlands have amended their laws

112. Bosniak, *supra* note 102, at 755.

113. Examples of this distinction include Article 25 of the International Covenant on Civil and Political Rights ("ICCPR"), granting certain political participation rights to *citizens*; and Article 12, granting freedom of movement to those *legally* within the territory; and Article 13, providing procedural safeguards for expulsion of *lawful* aliens. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 54-55, U.N. Doc. A/6316 (1966) (emphasis added) [hereinafter ICCPR]. Meanwhile, Article 2(3) of the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") empowers states to determine the extent to which they will guarantee the ICESCR's economic rights to non-nationals. *See International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966). In addition, Article 2(2) calls for non-discrimination in the application of ICESCR provisions based on a fixed list of "protected" traits, which does not include nationality. *See* Kevin Yamaga-Karns, *Pressing Japan: Illegal Foreign Workers under International Human Rights Law and the Role of Cultural Relativism*, 30 TEX. INT'L L.J. 559, 565 (1995). Similarly, Article 1(2) of the International Convention on the Elimination of Racial Discrimination ("CERD") provides that CERD "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to [CERD] between citizens and non-citizens." *International Convention on the Elimination of All forms of Racial Discrimination, opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 216 (entered into force Jan. 4, 1969).

114. Demleitner, *supra* note 1, at 179. The Resolution also urged E.C. Member States to accede to the 1949 Convention, suggested introducing or strengthening penalties against exploiters of prostitution, and called for rehabilitative measures such as employment programs, shelters, social rehabilitation, free health care, education, and training. *Id.* at 178-79.

115. NOTRAF, *Background Study*, *supra* note 42, § 2.3.

116. GAATW: Standard Minimum Rules, *supra* note 59.

117. *Id.*, Rule 5. Rule 5 states:

In order to ensure the victim's ability to remain in the country during all proceedings pursuant to having been a victim of trafficking and/or forced labour, slavery-like practices, the victim shall, for the duration of his/her stay, be guaranteed:

e) Resident status, in order to take legal action against the offenders and to regain

to provide temporary residency status to victims of trafficking who are willing to pursue prosecution of their exploiters.<sup>118</sup>

Though controversial, a compelling argument could be made for providing residency status to trafficking victims, especially with respect to those subjected to forced labor/slavery-like practices. The standard argument against providing status, which holds that undocumented workers are not entitled to the benefits of community membership (i.e., rights) because these workers "entered the state's territory without state consent and in direct violation of the state's expressed intention to condition entry upon consent,"<sup>119</sup> would simply not apply to trafficked women because their migration was coerced. Admittedly, this particular argument would not be applicable to women subjected to forced labor/slavery-like practices who were not also trafficked. However, one could argue that non-trafficked victims of forced labor/slavery-like practices nonetheless are entitled to rights because they are *de facto* members of the national community due to their economic contributions, and states and employers should not benefit from the labor of victims of trafficking and forced labor/slavery-like practices without being required to accord them fundamental rights and protections.<sup>120</sup> Moreover, states receiving these women must bear at least part of the responsibility for irregular migration because it is the states' "persistent demand for migrant labor and their history of political and economic penetration" into the workers' country of origin that causes

control over her/his life

f) Adequate and safe housing

g) Access to all [state-provided] health and social services

h) Adequate financial support

i) Opportunities for employment, education and training

*Id.* It is interesting to note that a prior draft of the GAATW Standard Minimum Rules explicitly included a provision which required states to provide permanent residency status "if it is proved that there is a danger to their well-being and this danger includes stigmatization or social rejection on returning to the country of origin." Global Alliance Against Traffic in Women, *Standard Minimum Rules for the Treatment of Trafficked Persons*, INT'L CAMPAIGN NEWS BULLETIN (STV Foundation Against Trafficking in Women, Netherlands), July 1995, at 6. In contrast, the April 1997 Draft of the Standard Minimum Rules shifts the onus of protecting the victim from social stigmatization to the state of origin under Rule 1(h). Specifically, Rule 1(h) requires all countries, including countries of destination, transit, and origin, to guarantee to all victims of trafficking and forced labor and slavery-like practices that

[t]he victim's history of being trafficked and/or being subjected to forced labour and slavery-like practices shall not be a matter of public or private record and shall not be used against her, her family or friends in any way whatsoever, particularly with regard to the right to freedom of travel, marriage, search for gainful employment.

GAATW: Standard Minimum Rules, *supra* note 59, at 3.

See also *infra* text accompanying note 127, describing GAATW proposed rule allowing a duress defense against criminal prosecution for offenses committed in part due to the victimization of the woman by trafficking or forced labor/slavery-like practices.

118. *Report of the Special Rapporteur on Violence Against Women*, *supra* note 2, at 26.

119. Bosniak, *supra* note 102, at 750.

120. *Id.*



the migration.<sup>121</sup> In the long term, recognition of the rights of these victims of trafficking and forced labor/slavery-like practices could curtail irregular migration, as empowering these women with rights would leave them less vulnerable to exploitation, and ultimately limit demand for the type of labor that they provide.<sup>122</sup>

### B. Domestic Anti-Prostitution Laws

For trafficking victims who are subjected to forced prostitution, the provision of residency status would provide only partial protection against further victimization. In countries that prohibit prostitution,<sup>123</sup> victims of forced prostitution could be subject to prosecution for having engaged in prostitution—in spite of the forced conditions of their activity, and especially where local officials are complicit in the trafficking and forced prostitution schemes.<sup>124</sup> Neither CEDAW nor the 1949 Convention offer any recourse, both lacking provisions that explicitly prohibit the prosecution of these victims for engaging in prostitution. Moreover, the Article 12 recognition of states' prerogative to define, prosecute, and punish in conformity with its domestic law, could be interpreted so as to allow the prosecution of women engaging in prostitution.<sup>125</sup> In addition, the Migrant Workers Convention does not explicitly address the vulnerability of women migrants to prostitution and sexual abuse. Indeed, its Article 34 requirement that migrant workers comply with the laws and regulations of the state of employment could be construed to permit prosecution for prostitution.<sup>126</sup>

The GAATW Standard Minimum Rules offer limited protection against prosecution for prostitution in the form of a possible defense

121. *Id.* See also discussion of economic colonialism in Marilyn Selby, *Human Rights and Undocumented Immigrant Workers in Japan*, 26 *STANFORD J. INT'L L.* 325, 356 (1989).

122. See Bosniak, *supra* note 102, at 748–49.

123. Note that countries approach the legality of prostitution differently. Countries have taken three main approaches to dealing with prostitution: prohibition, abolition, and regulation. Some countries, such as the United States (excluding Nevada), the Philippines, and Japan strictly prohibit prostitution. However, other countries, such as Great Britain, Canada, Thailand, and India, take an “abolitionist” approach, eliminating regulation and criminalizing trafficking, procurement and brothel-keeping, but leaving prostitutes alone so long as they refrain from overt soliciting. Meanwhile, “regulationist” countries consider prostitution a legal activity, but subject the practice to a system of licensing and registration. See Reanda, *supra* note 32, at 203.

124. The issue of whether prostitution should be legalized is beyond the scope of this Article. For more discussion on this topic, see Reanda, *supra* note 32, at 202–07; see generally Hauge, *supra* note 76. For a discussion of the influence of this debate on the feminist movement in Japan, see *The Movement Today: Difficult but Critical Issues* (a dialogue with Ehara Yumiko, Nakajima Michiko, Matsui Yayori, and Yunomae Tomoko), in *VOICES FROM THE JAPANESE WOMEN'S MOVEMENT* 38, 43–48 (edited by AMPO-Japan Asia Quarterly Review) [hereinafter *VOICES*].

125. See *supra* text accompanying note 98.

126. See *supra* text accompanying note 105.

against a criminal charge. These rules require that if the trafficked person committed criminal acts during the time she was trafficked or committed a crime in part due to the fact that she was trafficked or subjected to forced labor/slavery-like practices, this would be “considered in any defense of duress or coercion raised by the victim during the pre-trial and trial proceedings and as mitigation in sentencing if convicted.”<sup>127</sup> However, the option of using a defense of duress against prosecution hardly provides a guarantee that such prosecution for prostitution would not occur or that the woman would be successful in mounting such a defense. For instance, a local judge could take into account the coercion yet ultimately choose to proceed with the prosecution of the woman for illegal prostitution and ultimately convict her, even though this activity was one which the woman was forced to commit. The duress defense would be even more ineffective with respect to a woman in the Re-entry Scenario who, having been a victim of trafficking and forced prostitution in the past, is currently “voluntarily” engaging in prostitution, or working as a trafficker and brothel owner herself,<sup>128</sup> though this defense might be more effective if an argument could be made that her current activities were still forced—i.e., by economic coercion.<sup>129</sup>

The problem posed by the potential conflict between international laws against forced prostitution and domestic prohibitions against prostitution *per se* mirrors the problem of potentially conflicting laws, discussed above, in the immigration context. As was the case in the immigration context, and for analogous rationales—i.e., the obligation of the destination state to provide protections to victims of practices from which the state might derive economic benefit—a comprehensive solution to the problem posed by the capacity of states to prosecute forced prostitution victims for prostitution would require a prophylactic blanket prohibition against the prosecution of these women.

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127. See GAATW: Standard Minimum Rules, *supra* note 59, Rule 14. Note that this provision could operate to create a defense against criminal charges brought on grounds of illegal immigration. However, for the same reasons that this provision would accord inadequate protections to victims of forced prostitution, discussed here, this provision would similarly prove of limited use for victims of trafficking or forced labor/slavery-like practices indicted for illegal immigration.

128. For instance, the woman could argue, in her defense, that her acts, even if “voluntary,” were committed “in part at least due to the fact that she was trafficked.” Whether she could successfully argue this, however, could depend on how long she was “voluntarily” prostituting—if she were at the level of brothel keeper or trafficker, the mitigating effect of her once having been a victim of trafficking would likely be attenuated.

129. See text accompanying *supra* notes 91–94.

## IV. CONCLUSION

Grounding discussions in the practical realities facing victims of trafficking and forced labor/slavery-like practices, this Article has aimed to redirect the traditional analysis of trafficking in women toward an approach more attuned to the practical difficulties and normative implications of current and proposed strategies for combating these practices. This Article has attempted to demonstrate how the inability of the 1949 Convention to provide effective protection and remedies against the newer manifestations of trafficking and forced labor/slavery-like practices attests to the need for a reconceptualization of the trafficking problem and a reformulation of the strategies necessary to combat these practices. Efforts to redefine trafficking further require challenging previous assumptions and rationales behind existing international anti-trafficking law and making difficult normative choices regarding the treatment of women. In addition, efforts to develop measures to ensure the enforcement of international laws against trafficking and forced labor/slavery-like practices in the face of conflicting domestic immigration and prostitution laws require the development of special legal safeguards against the enforcement of these domestic laws in a manner adverse to these victims.

While international legal standards and guidelines are meaningful mechanisms with which to combat the problem of trafficking and forced labor/slavery-like practices, they can only be effective where political and social will support the enforcement of these international legal norms, particularly where these norms threaten to restrict the exercise of domestic laws. Whereas in some countries the role of law may be to effect change, such that the mere passage of a law creates societal consensus in favor of its terms, in other countries, the role of law may be to reflect a pre-existing societal consensus on particular issues. Where laws are not reflective of such a consensus, they are ignored in practice.<sup>130</sup> In the former context, the development of clear laws based on informed policy decisions might be sufficient to eradicate trafficking in women. In the latter context, however, it is important to emphasize the critical role nongovernmental organizations can play in effecting grassroots change, being well-positioned to garner the popular support and societal consensus necessary for legal reform or stricter enforcement of existing legal standards.<sup>131</sup>

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130. See, e.g., Marilyn Selby, *supra* note 121, at 368.

131. Societal acceptance of a practice may stem from any number of reasons, such as the importance of industry to the local economy, see Matsui Yayori, *Economic Development and Asian Women*, in VOICES, *supra* note 124, at 56, or the fact that women who are victimized by such practices are foreign women whose welfare is of no concern to the population of that particular

Subjecting the issue of trafficking in women to a more contextualized examination thus demonstrates that the capacity of international law to combat trafficking and forced labor/slavery-like practices turns on its ability to respond to the complexities of the full range of circumstances that characterize the experiences faced by women victimized by these practices. Addressing problems as entrenched in the socio-economic structure as these demands that we think “outside the box” in search of innovative solutions and the means to foster the conditions for their implementation.