

**FROM THE INTERNATIONAL TO  
THE LOCAL IN  
FEMINIST LEGAL RESPONSES TO  
RAPE, PROSTITUTION/SEX WORK, AND  
SEX TRAFFICKING:  
FOUR STUDIES IN CONTEMPORARY  
GOVERNANCE FEMINISM**

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#### INTRODUCTION

Feminist advocacy projects on rape and prostitution have, by now, a significant track record of achievement in international law. Feminists have scored important advances in international humanitarian law governing rape in armed conflict and have helped to devise international protocols and aid/sanctions schemes governing sex trafficking. We came together in this conversation in order to figure out whether feminist achievements have become sufficiently institutionalized to warrant our describing them and the advocacy networks that produced them Governance Feminism (“GF”). Our answer: Yes. And we wondered whether, by comparing our different projects on sexual violence and prostitution/trafficking, we could find any common features in GF. We kept comparing the legal results, the legal attitudes taken by the feminists who prevailed, the strands of feminism that “docked” most effectively in GF or the legal results it helped to produce, and the situation of feminists operating in the First or the developing world: were there any patterns? Our answer: Yes.

This Article is the result of an intense series of text and telephone exchanges among the four of us, taking place from December 2005 to April 2006. Each of us has her own project which forms the basis of her con-

tribution to this conversation. Janet Halley is working on new rules governing wartime sexual violence in international humanitarian law, specifically the place of rape and sexual slavery in the decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Chantal Thomas has published widely on the law of trade;<sup>1</sup> one of her papers examines the feminist debate over the 2001 U.N. Trafficking Protocol.<sup>2</sup> Hila Shamir and Prabha Kotiswaran have studied emergent national regimes addressing the connection between local prostitution markets and international “sex trafficking” in Holland, Sweden, and Israel (Shamir) and in India (Kotiswaran). Shamir compares legal regimes for governing sex trafficking and the related prostitution industry within national borders; Kotiswaran studies the highly local negotiations between stakeholders in the sex industry in India through field work in Tirupati and Kolkata. Shamir and Kotiswaran take special note of the striking but very different impact of the 2001 Protocol and the United States’ Victims of Trafficking and Violence Protection Act (the VTVPA)<sup>3</sup> in Israel and India.

Halley introduces our concept of GF in Part One below, providing some examples from her study of feminist achievements in International Humanitarian Law (“IHL”). The rest of Part One presents Thomas’s, Shamir’s, and Kotiswaran’s understanding of GF in the evolving sex trafficking regime. Part Two presents some thoughts by all four of us on the methodological implications of thinking about legal feminism in this way.

Before getting underway, a few terminological and methodological matters need a moment’s attention. First, it hardly seems coincidental that the legal regimes we examine center on criminal prohibition.

We take it as a given, for a distributively focused legal analysis, that punishing conduct as a crime does not “stop” or “end” it, as governance feminists (“GFeminists”) sometimes seem to imagine. Rather, it enables a wide range of specific institutional actors to do a wide range of things. Prosecutors can indict actual violations as well as perfectly legal conduct; courts can convict defendants who are guilty as well as those who are perfectly innocent; the criminal system will almost always leave some actual violations unsanctioned—producing what Duncan Kennedy helpfully terms the “tolerated residuum of abuse.”<sup>4</sup> In sex work settings, police and landlords can extract bribes from legally “guilty” and legally “innocent” actors; prohibited conduct can “go underground” and become regulated by means that are not specifically legal. In addition, we assume that the objects

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<sup>1</sup> See, e.g., *infra* note 32.

<sup>2</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 25, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001) [hereinafter 2001 Trafficking Protocol].

<sup>3</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 106, 114 Stat. 1464 (2000) [hereinafter Victims of Trafficking and Violence Protection Act].

<sup>4</sup> DUNCAN KENNEDY, *Sexy Dressing*, in *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 126, 137 (1993).

of criminal attention, including “victims” real or putative, are not passive, but engage actively in “bargaining in the shadow of the law”:<sup>5</sup> shifts in the rules create the possibility for shifts in bargaining power among various stakeholders in the criminalized social world; and we assume finally that these can be quite complex.<sup>6</sup>

All of those observations (and many more) bear on the feminist goal of criminalizing sexual violence and rape in war through international humanitarian law. We also note a wide range of regulatory modes specific to sex trafficking regimes, differently affecting the players we see as the key “stakeholders” in the regime: the sex worker, the pimp, the john, the brothel-keeper, and the landlord. Thus we will distinguish four “ideal types” of regulation:

A *complete criminalization* regime criminalizes all aspects of sex work, so that both the sale and purchase of sex by the sex worker and the john, and all third party involvement (of the pimp, the brothel-keeper, and the landlord) can be prosecuted and punished criminally.

An *abolitionist or partial decriminalization* regime decriminalizes the activities of sex workers alone, but criminalizes involvement of other actors in the sex industry, including customers. As we understand it, the term “abolition” is adopted to claim an analogy with nineteenth-century American antislavery abolitionism.<sup>7</sup> Decriminalizing sex worker involvement in sex

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<sup>5</sup> Lewis Kornhauser & Robert Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>6</sup> We initially designated the method we were striving for as a “new legal realism,” only to discover a current profusion of efforts to operate under this rubric. For a highly rationalist one, aiming to weld cognitive psychological empiricism to progressive law reform efforts, see *New Legal Realism Symposium: Is It Time for a New Legal Realism*, 2005 WIS. L. REV. 335–745 (2005). Our project, by contrast, draws more directly from the theoretical contributions of key American legal realists and from their redeployment in critical legal studies. We still like the term, and use it in what follows.

<sup>7</sup> The locus classicus for this analogy is probably Victor Hugo’s letter to Josephine Butler, the influential Progressive-era anti-prostitution feminist reformer, stating that “[t]he slavery of black women is abolished in America, but the slavery of white women continues in Europe.” Letter from Victor Hugo to Josephine Butler (Mar. 20, 1870), in JOSEPHINE E. BUTLER, *PERSONAL REMINISCENCES OF A GREAT CRUSADE* 13 (1911). Hugo’s letter establishes the conceptual link between prostitution and slavery that gave rise to the term “white slave trade” of the early twentieth century and created the basis for anti-prostitution activists to see themselves as abolitionists. See also BARBARA HOBSON, *UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION* 139–64, 209–36 (Univ. Chi. Press ed., 1990).

The analogy has a colonial dimension as well. Late nineteenth-century feminists Elizabeth W. Andrew and Katherine Bushnell repeatedly described the condition of the natives under legalized prostitution in India as enslavement. ELIZABETH W. ANDREW, *THE QUEEN’S DAUGHTERS IN INDIA* (London, Morgan and Scott 1899). Thus, they decried the “re-enslavement” of native women by compulsory examination measures, construe Indian legalized prostitution as an attempt to “frighten an unwilling Christian public into a reluctant consent to return to a system which regards . . . the slave trade in women [as] an important part of the business of the state.” *Id.* at 100–01. They drew parallels between American slaves and Indians in order to assert that English control of India constitutes virtual ownership of a nation of slaves: “the worst feature of all in slavery is the appropriation of women by their masters.” *Id.* at 102.

work is motivated, in this formulation, by the assumption that sex workers are vulnerable victims of systematic patriarchal exploitation, and that at minimum the state should protect them by not criminalizing their sex work activity.

*Complete*, as opposed to partial, *decriminalization* involves the repeal of any special criminal legislation dealing with sex work. Various activities involved in sex work can still be prosecuted as criminal offenses under generally applicable laws.

*Legalization* involves complete decriminalization coupled with positive legal provisions regulating one or more aspect of sex work businesses. The typical options include labor law, employment law, zoning of sex businesses, compulsory medical check-ups, licensing of sex workers, etc.

As far as we know, there is no GF project in sex trafficking/prostitution to promote complete criminalization; but feminists have differed sharply over the other four models. GF, when it seeks to regulate rape and sexual violence in war, has only one goal: prohibition. One striking agreement that emerged early in our conversations was that GFeminists—though they

The conceptual and political link between chattel slavery and prostitution continues to be forged in current feminist theory and in work in the field. Sometimes it's just a simile: Carole Pateman, for example, argues that "In prostitution, the body of the woman, and sexual access to that body, is the subject of the contract. To have bodies for sale in the market, as bodies, looks very like slavery." CAROLE PATEMAN, *THE SEXUAL CONTRACT*, 203–04 (1988). At other times, the abolitionist conception is reflected in legal scholarship that explicitly defines prostitution as a form of slavery and that would adopt the Thirteenth Amendment as the appropriate legal response. See Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 22 (1993) ("the Thirteenth Amendment to prostitution claims enslavement as a term and reality of wider application, which historically it has been"); see also Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791 (1993) ("Like slaves, prostitutes are raped, beaten and tortured at the whim of the men who control them").

Activist work is deeply invested in the analogy. For example, the NGO "Anti-Slavery International" defines its mandate to include historical chattel slavery, contemporary forced labor, and sex trafficking. See Anti-Slavery International, <http://www.antislavery.org/homepage/antislavery/modern.htm> (last visited Apr. 25, 2006) (responding to the question "what is slavery today?"). Certain groups, like the International Abolitionist Federation, have been active both during the historical campaign against the white slave trade, and during the present campaign against sex trafficking. See Stephanie A. Limoncelli, *International Voluntary Associations, Local Social Movements and State Paths to the Abolition of Regulated Prostitution in Europe, 1875–1950*, 21 INT'L SOC. 31, 36–38 (2006) (describing historical efforts of International Abolitionist Federation against white slavery); see also Kumar Katyal, *supra*, n.4 (describing contemporary efforts of International Abolitionist Federation).

Of course the analogy is subject to critique. For an assessment of the upsides and downsides of nineteenth-century feminist deployments, see Mary Ann Irwin, "White Slavery" as Metaphor: Anatomy of Moral Panic, 5 EX POST FACTO: HIST. J. (1996), available at <http://www.walnet.org/csis/papers/irwin-wslavery.html>; for a critique of contemporary feminist work to criminalize "sexual slavery," see Julie O'Connell Davidson, *Will the Real Sex Slave Please Stand Up?*, 83 FEMINIST REV. (forthcoming 2006); and for a method for assessing the advantages and dangers of movement-to-movement and identity-to-identity analogies transmitted rhetorically through actual legal regimes, see Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW* (David Kairys ed., Temp. Univ. Press 3d ed. 1998), revised version entitled *Like-Race Arguments*, in *WHAT'S LEFT OF THEORY?* 40–74 (Judith Butler, John Guillory & Kendall Thomas eds., 2000).

differ intensely, often bitterly—all imagine their favored criminal law reform to operate simply by actually eliminating precisely and only the conduct it outlaws. This observation holds whether the method preferred is abolition *or* decriminalization: both are imagined to be directly liberatory for women. In our view, however, all of these regimes can be given enhanced/intensified enforcement, on one hand, or weakened/partial enforcement, on the other; and different degrees of intensity can be exhibited even at the same moment by various administrative, judicial, and executive authorities. The complexity of the resulting bargaining endowments is considerable. We also take it as given that it would be rare to find any of the “ideal typical” sex work regimes operating in its pure form, and inconceivable that IHL will ever operate as a pure sovereigntist command. Rather we look for complex law-in-action/law-in-the-books contingency. The result is, we think, an exciting new research paradigm for feminists and non-feminists alike. We offer some thoughts on that in the conclusion.

#### PART ONE: DESCRIBING GOVERNANCE FEMINISM

JANET HALLEY

I'll first reflect on Governance Feminism generally, and then provide some examples of its activity in recent reforms in international humanitarian law (“IHL”). GF is, I think, an underrecognized but important fact of governance more generally in the early twenty-first century. I mean the term to refer to the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power. It takes many forms, and some parts of feminism participate more effectively than others; some are not players at all. Feminists by no means have won everything they want—far from it—but neither are they helpless outsiders. Rather, as feminist legal activism comes of age, it accedes to a newly mature engagement with power.

Just think of the range of feminist achievements visible all around us. Inside the United States we can see it in elaborate sexual harassment programs in corporate and educational settings, in the tracking of female prosecutors into “sex crimes” units, in the elaboration of feminist *expertise* about gender policy ranging from home economics to reproductive policy to educational reform, and in the formation of non-governmental organizations (NGOs) and special offices designated to the production and consumption of this expertise in policy and law settings across our legal landscape.

Many of the most breathtaking advances have been made in the rapidly evolving world of international law. One wonders, indeed, whether it can be a coincidence that GF and “the new governance” have grown up together. GF seen as an assemblage of strategies is thus quite complex. It is not a monolithic top-down power. Rather, it piggybacks on existing forms by power, intervening in them and participating in them in many, simul-

taneous, often conflicting, and, in many examples anyway, highly mobile ways. It has found the novelty and civil-society open-texturedness of “the new governance” and “global governance” to be quite hospitable; it seeks not a monopoly of these forms but rather a plentiful presence within them. GF-as-a-strategic-enterprise, in our examples anyway, shares with these very complex moments an understanding of legal power as highly fragmented and dispersed; they deemphasize the politics/law distinction in order to work not only in the spectacularly legal domains of litigation, legislation, and policymaking, but also in personal pressure campaigns, consciousness raising, and highly discretionary legal moments such as prosecutorial charging strategy. I like the word “governance” here precisely because it suggests multiplicity, mobility, fragmentation, a regulatory or bureaucratic legal style, as well as ready facility with non-state and para-state institutional forms (NGOs, law school clinics, ad hoc expert groups doing letter writing campaigns). I use it to dodge the assumption that all legal power inheres in the state and comes down from a pinnacle of legitimate coercive power. Behind my use of it lies Michel Foucault’s distinction between sovereigntist and governmental or managerial forms of power:

[W]ith sovereignty, the instrument that allowed it to achieve its aim—that is, obedience to the laws—was the law itself: law and sovereignty were absolutely inseparable. On the contrary, with government it is a question not of imposing law on men but of disposing things: that is, of employing tactics rather than laws, and even of using laws themselves as tactics—to arrange things in such a way that, through a certain number of means, such-and-such ends may be achieved.<sup>8</sup>

It is very odd, then, to see across the range of GF projects that we included in this conversation a strong trend to advocate, and to gain GF successes in the form of, very state-centered, top-down, sovereigntist feminist rule preferences. Seen as a substantive rather than strategic project, GF emphasizes *criminal* enforcement. It speaks the language of total prohibition. It envisions the legal levers it pulls as activating a highly monolithic and state-centered form of power. This is so whether abolition is the preferred feminist legal method (then, the effect envisioned is, simply, abolition) or whether decriminalization/legalization are foregrounded (then, the goal is liberation). Just to get a sense of how remarkably this is so, compare the criminal law/prohibitionist imaginaire that permeates the legal regimes examined in this conversation with international environmental law: in the latter, the strategy of new governance legalism is to ar-

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<sup>8</sup> MICHEL FOUCAULT, *Governmentality*, in THE ESSENTIAL WORKS OF FOUCAULT, 1954–84, VOLUME 3: POWER 211 (James D. Faubion ed., Robert Hurley trans., The New Press 2000).

ticulate *principles* which are subject to *negotiation* and *rearrangement* as stakeholders grapple in various fora with emerging conflicts.<sup>9</sup> The profound turn in American feminism to criminal/social control visions of law, traceable in feminist legal theory over the 1990s and persisting today, is thus being internationalized. As between the techniques of power that GF strategically deploys to make its changes, and the mode of state power it seeks to recruit in our examples, there is an almost complete reversal.

To study the resulting feminist reforms *as if* they will function as sovereign rather than governmental power is, I think, to make a tempting but fundamental mistake. It is at this moment that all four of us turn for help to American legal realism and the consequentialist attitude toward rights best stated, for legal thinkers, in critical legal studies.

*Some Examples of GF.* The International Criminal Tribunal for Yugoslavia (“ICTY”) / International Criminal Tribunal for Rwanda (“ICTR”) / Rome Statute process gives us a chance to see feminism acting in direct involvement with highly powerful actors, writing on a clean legal slate, and dealing with a large amount of social content relating to sexuality. How were feminists involved, what achievements did they claim, and (perhaps most interesting) which feminist ideas were able to “dock” in IHL and which were left at sea?

Kelly Askin, a feminist activist deeply involved in the process, describes some of the things feminists did:

The cases demonstrate that female judges, investigators, prosecutors, and translators, particularly those with expertise in gender crimes, are extremely useful in the prosecution of gender crimes. They further demonstrate that there must be political will to prosecute sex crimes, and that pressure exerted from NGOs is often indispensable to ensuring that gender crimes are investigated and indicted.<sup>10</sup>

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<sup>9</sup> See generally PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, VOLUME I: FRAMEWORKS, STANDARDS AND IMPLEMENTATION* (1995).

<sup>10</sup> Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993–2003*, 11 HUMAN RIGHTS BRIEF 16, 19 (2004). Engle collects other feminist statements to the same effect. See also Joanne Barkan, *As Old as War Itself: Rape in Foca*, DISSENT, Winter 2002, at 60, 62 (“From the start, most observers considered the [ICTY] a sop to human rights and feminist activists who wanted intervention . . . . Almost no one expected it to succeed. And yet, to some extent . . . it did.”); Christine Chinkin, *Reconceiving Reality: A Ten-year Perspective*, 97 AM. SOC. INT’L L. PROC. 55, 55 (2003) (observing that the effort to secure recognition of “gender crimes” from the ICTY “has met with considerable success”); Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379, 386 (1999) (arguing that the ICTY recognition of sexual violence as criminal under IHL “was the result of considerable work and lobbying by women’s organizations”); *International Justice for Women: the ICC Marks a New Era*, HUMAN RIGHTS WATCH BACKGROUNDER, July 1, 2002, <http://www.hrw.org/campaigns/icc/icc-women.htm>. (“Women’s rights activists throughout the world—of every political stripe, faith, sexual orientation, nationality, and ethnicity—mobilized at each step of the International Criminal Court



Note the confident invocation of female professionals in a wide range of roles, and the conclusion that they (among others) were “indispensable” in concentrating ICTY attention on the successful prosecution of “sex crimes.”

Other feminists seem to concur. Joanne Barkan notes:

[T]he new International Criminal Tribunal for Yugoslavia looked like an exceptional chance in 1993 for advocates of human rights for women to make some progress. But every step forward, as it turned out, required a lobbying campaign. Nongovernmental organizations and university-based institutes wrote briefs and letters, requested meetings, did press work, and held seminars and conferences.<sup>11</sup>

Rhonda Copelon provides evidence of the close interaction between feminist activists, judges, and prosecutors as the ICTY charges were being drawn up.<sup>12</sup>

The struggle was often intense: as Barkan testifies, “The advocates’ work had to be thorough.”<sup>13</sup> When ICTY chief prosecutor Justice Richard Goldstone (of the Constitutional Court of South Africa) issued his first document making “cursory reference” to mass rapes of women but specifically singling out, as “what was worse,” a man’s being forced to bite off the testicles of another man, a swift and effective NGO coalition was formed to intervene: “The Blaustein Institute, the Women’s International Human Rights Clinic, and the Harvard University Human Rights Program made their critique in an *amicus* memorandum, and the prosecutor’s office reworded the motion.”<sup>14</sup> “Even in the early stages of the tribunal’s work, the lobbying to get prosecutors to pay attention to sexual offenses paid off.”<sup>15</sup>

Barkan understands this intervention to be *feminist*. We are seeing here a fascinating infiltration of specifically *feminist* activism into *generalist* forms of power-wielding. The result is the transposition of feminist ideas into specifically not-feminist forms of power. For instance, Justice Richard Goldstone, looking back on his work as prosecutor before the ICTY and the ICTR and, perhaps contemplating the very exchange which Copelon records, has recalled the effect of feminist NGO activism this way:

Let me start with the enormous strides that have been made by the tribunals in the development of the normative law. There has been

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(ICC) process. . . . That the ICC has come into force today and is potentially a powerful instrument for protecting women’s rights is a testament to this indefatigable activism and determination.”)

<sup>11</sup> Barkan, *supra* note 10, at 63.

<sup>12</sup> Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN’S L.J. 243, 253–54 & n.46 (1994).

<sup>13</sup> Barkan, *supra* note 10, at 63.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

substantial progressive development of humanitarian law as a consequence of the establishment of the ICTY. Of real importance are developments in the law with respect to gender offenses. From my very first week in office, from the middle of August, 1994 onwards, I began to be besieged with petitions and letters, mainly from women's groups, but also from human rights groups generally, from many European countries, the U.S. and Canada, and also from non-governmental organizations in the former Yugoslavia. Letters and petitions expressing concern and begging for attention, adequate attention, to be given to gender related crime, especially systematic rape as a war crime. *Certainly if any campaign worked, this one worked in my case . . .*<sup>16</sup>

Worked, but not always immediately or perfectly. For example, feminists working with the ICTY struggled hard to secure a prosecution and conviction of *somebody* for the repeated rape of Muslim and Croat women detained in large "camps" and schools: they wanted the Serbs who did this to be convicted of *sexual slavery*. The ICTY frustrated this goal, ultimately convicting two men, Dragoljub Kunarac and Radomir Kova, of detaining just a few women and girls in a house and an apartment, and convicting them not of *sexual* enslavement but of *enslavement simpliciter*. It made sense that the court stuck with enslavement as its grounds for liability: nowhere in its authorizing statute or any other source of authority in IHL was there authority for an IHL crime "sexual slavery." Askin bitterly mourned this loss:

The Judgment took care to emphasize that control over a person's sexual autonomy, or obliging a person to provide sexual services, may be indicia of enslavement, but such indicia are not elements of the crime. The facts of the case demonstrate that the enslavement and rape were inseparably linked and the accused enslaved the women and girls as a means to effectuate continuous rape. Since a primary, but not necessarily exclusive, motivation behind the enslavement was to hold the women and girls for sexual access at will and with ease, the crime would most appropriately be characterized as sexual slavery. Regrettably, the term "sexual slavery" was never used in the judgment.<sup>17</sup>

Feminists continued to focus on "sexual slavery," however, and it is now firmly ensconced in the Rome Statute as a war crime and a crime against

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<sup>16</sup> Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227, 231 (1997) (emphasis added).

<sup>17</sup> Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERK. J. INT'L L. 288, 340 (2003).

humanity.<sup>18</sup> And I won't go into detail, but the record strongly suggests that GF finally achieved this change by adapting to a legislative process the very same techniques they deployed in the ICTY: NGO monitoring, pressure, and rule-drafting of a very intense and sustained kind.<sup>19</sup>

In addition to these "civil society" strategies, GF has also worked hard to get its people hired by governments where they participate in the bureaucracy of power. Here we encounter feminism as an expertise. Special advisors on gender-related violence constitute one strategy. Prosecutor Goldstone created a "Legal Advisor for Gender-related Crimes" and appointed Patricia Viseur Sellers to the post in 1999.<sup>20</sup> The domain is literally scattered with Special Rapporteurs on sexual violence. And international feminist activism has been recognized as a *qualification* for sitting on the bench in the ICTY. Here's how it happened. In one important ICTY prosecution, the accused, Anton Furundžija, moved to disqualify Judge Florence Ndepele Mwachande Mumba (Zambia) on the ground that her participation in the Trial Chamber proceedings created an appearance of bias. She had been a member of the U.N. Commission on the Status of Women during the Yugoslav war and had participated in its work on allegations that mass rapes were occurring there. Moreover, the Prosecutor in *Furundžija* and three amicus authors in the case had participated in the U.N. Fourth World Conference on Women in Beijing,<sup>21</sup> where the U.N. Commission had participated in efforts to secure legal declarations that rape is be a war crime. The Appeals Chamber dismissed the idea that these feminist decision makers introduced bias.<sup>22</sup> Its reasoning, according to Mappie Veldt: "Judge Mumba's membership of the UNCSW and her general experience in the field were, by their very nature, *an integral part of her qualifications* for nomination as judge of the ICTY."<sup>23</sup> Feminism as neutrality. This is going to be hard to study.

There seems to be nothing intrinsically *international* about this style of participating in lawmaking. The same methods appear in the work of Orit Kamir, a prominent Israeli feminist who studied with Catharine A. Mac-

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<sup>18</sup> Rome Statute of the International Criminal Court, Art. 8(2)(b)(xxii), U.N. Doc. A/CONF.183/9 (July 1, 2002).

<sup>19</sup> Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 23 (1999). Feminist NGO involvement in the subsequent negotiations to establish the "elements of crimes" to guide interpretation of the statute was similarly intense. See William Pace & Jennifer Schense, *The Coalition for the International Criminal Court*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 705, 718–23 (Roy S. Lee ed., 2001).

<sup>20</sup> Engle, *Feminism and its (Dis)contents*, *supra* note \*, at n.16.

<sup>21</sup> REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN, BEIJING, SEPT. 4–15, 1995, U.N. Doc. A/CONF.177/23/Add.1 (Oct. 27, 1995).

<sup>22</sup> Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgment, ¶¶ 192–215 (July 21, 2000).

<sup>23</sup> Mappie Veldt, *Commentary*, in ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, VOL. III: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1997–1999 357, 358 (André Klip & Göran Sluiter eds., 1999) (emphasis added).

Kinnon in the United States and then returned to Israel to teach and to work for feminist legal reform. Kamir writes quite engagingly about how to adapt MacKinnon's theoretical and law reform ideas to Israeli social and legal culture: radical feminism becomes the source of ideas for law reform in a process of translation, in which the right to be free of sex discrimination becomes the right to human dignity, and the source of law shifts from litigation/adjudication to legislation.<sup>24</sup> Kamir sounds almost uncannily like Askin when she describes the process leading to the Knesset's 1998 codification of a sex harassment statute: "The new law was the product of a unique cooperation among women Knesset members, feminist activists, pro-feminist jurists at the Ministry of Justice, and feminist legal academics."<sup>25</sup> The GF question to ask now would be: will the resulting statute be understood, within Israeli society, to represent feminists' punctuated but distinctive capture of one tiny bit of the state, or as a guarantee, a certificate, of the pervasive civility of male/female gender across Israeli national life?

Similar questions will come up if governance feminists ("GFeminists") succeed in their oft-professed aim to download their international law reforms into domestic legal regimes. Feminist IHL advocacy explicitly espouses the goal of affecting national legal regimes. ICTY/ICTR Justice Louise Arbour sees feminist IHL activism as a legal vanguard for national law:

If you look at the definitions of sexual offenses that were provided in the Akayesu, Kovac, Furundzija and Foca cases, you can see that they were forming a definition of the actus reus and mens rea, bringing the international forum to the cutting edge of what is being done in most domestic departments.<sup>26</sup>

MacKinnon advocates international policing of sexual violence under IHL in part because, "[p]resumably, once they knew intervention was a real possibility, states would take steps to avoid it by moving to correct the problem."<sup>27</sup> Indeed, feminists sometimes make strategic decisions about what to seek in IHL precisely with an eye to national incorporation. When some feminists argued that there should be *no* consent defense to rape under

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<sup>24</sup> Orit Kamir, *Dignity, Respect and Equality in Israel's Sexual Harassment Law*, in CATHARINE A. MACKINNON & REVA B. SIEGEL, *DIRECTIONS IN SEXUAL HARASSMENT LAW*, 561–81 (2004).

<sup>25</sup> *Id.* at 562.

<sup>26</sup> Louise Arbour, *Crimes Against Women Under International Law*, 21 *BERK. J. INT'L L.* 196, 204 (2003). The more reportorial IHL literature also predicts such transmission. See Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 *AM. J. INT'L L.* 1, 95 (1999) (the decisions of the ICTY "will affect the future work of the ICTY, the ICTR, the permanent international criminal court, and national courts and tribunals when deciding cases in this area.").

<sup>27</sup> Catharine A. MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 *HARV. INT'L L.J.* 1, 31 (2006).

IHL, for instance, others responded that a very narrow defense of consent should be retained because the resulting rule would be “more relevant as a precedent—to other armed conflict situations and to ‘peacetime.’”<sup>28</sup> By the time any such rules are adopted domestically, finding feminist fingerprints on them will be difficult. Indeed, calling them feminist will probably seem (depending on where you stand) hubristic or paranoid. A new conception of feminism in power seems necessary if we are to be able to make these possibilities politically intelligible.

#### CHANTAL THOMAS

Any account of Governance Feminism (“GF”) first and foremost requires, to my mind, celebration of a social movement. Against very steep odds of governmental indifference and patriarchal hostility, feminism is succeeding in achieving recognition of and response to social justice claims on behalf of women everywhere. The feminist movement has proven truly international, and as such stands as an exemplar of the potential for “global governance.” Global governance describes contemporary lawmaking as the product of deep and sustained interaction between states, international organizations, and non-governmental associations. Lawmaking in this mode is characterized by substantial communication in “networked” form across national borders: networks among governmental sub-units, and networks among NGOs. Global governance is also characterized by ongoing communication between “official” actors (states and international organizations) and NGOs, in which the latter act as sources of information, guides for “agenda-setting,” and levers of political pressure.

My discussion of “GF as global governance” proceeds as follows: first, I will describe the theoretical and policy perspectives of feminists in the sex trafficking context. Feminist interventions in this discourse roughly divide into opposing approaches to the relationship between prostitution and trafficking: “structuralist” or radical approaches that endorse an abolitionist approach to prostitution, conceptualizing all prostitution as a form of “modern-day slavery” and therefore as the consequence of trafficking; and “individualist” or liberal/libertarian approaches that contemplate the possibility that some prostitution is consensual and therefore not slavery and not the result of trafficking, and consequently that are amenable to greater decriminalization or legalization.

Second, I will describe GF as it has operated in anti-trafficking law in the United Nations and in the United States, with particular attention to the definitional question of the meaning of sex trafficking and the doctrinal relationship between trafficking and prostitution. I will describe the processes that led to the establishment of laws against sex trafficking in

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<sup>28</sup> Jennifer Green, et al., *Affecting the Rules for the Prosecution of Rape*, 5 HASTINGS L.J. 171, 219 (1994).

international law and U.S. law: The 2000 United Nations “Trafficking Protocol”<sup>29</sup> and the 2000 U.S. “Victims of Trafficking and Violence Protection Act” (VTVPA).<sup>30</sup> These were “parallel efforts,” driven by actors who shared similar concerns.<sup>31</sup> Both the international and U.S. regimes exercise influence in other national context in a variety of ways, as the Sections below by Shamir and Kotiswaran indicate.

## I. GOVERNANCE FEMINISM AND SEX TRAFFICKING

Feminist involvement in the law and policy against sex trafficking importantly reflects the ascendance of what Halley calls GF: that is, feminism that seeks not only to analyze and critique the problem, but to *devise, pursue and achieve reform to address the problem in the real world*. Both domestically and internationally, many feminist organizations have devoted extraordinary effort toward shaping the text and the enforcement of

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<sup>29</sup> The United Nations Protocol to Prevent, Suppress and Punish Trafficking Against Persons defines trafficking in the following way:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

2001 Trafficking Protocol, *supra* note 2, Annex II, I, Art. 3(a), at 32.

<sup>30</sup> The United States definition of trafficking also highlights sex trafficking; it makes illegal “severe forms of trafficking in persons,” which is defined to include: “(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” Victims of Trafficking and Violence Protection Act, *supra* note 3, § 106. See also OFFICE OF THE UNDER SEC’Y FOR GLOBAL AFFAIRS, U.S. DEP’T OF STATE, PUBL’N NO. 11252, TRAFFICKING IN PERSONS REPORT, JUNE 2005, at 1 (2005), available at <http://www.state.gov/documents/organization/47255.pdf> [hereinafter U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT] (“In this modern form of slavery, known as trafficking in persons, traffickers use threats, intimidation and violence to force victims to engage in sex acts or to labor under conditions comparable to slavery for the traffickers financial gain.”).

The majority of people deemed to fit within the definition are actually in sex trafficking. *Id.* at 6 (stating that the majority of trafficking victims are involved in the sex trade). Thus the emphasis within the definition and within the surrounding discourse appear to be justified by the data—but, I will argue below, this may be less a function of accuracy than of the consistency of a conceptual flaw.

<sup>31</sup> Barbara Stolz, *Educating Policy-Makers and Setting the Criminal Justice Policy-Making Agenda: Interest Groups and the “Victims of Trafficking and Violence Act of 2000,”* 5 CRIM. JUST. 407, 413 (2005).

international law criminalizing trafficking in persons in general and sex trafficking in particular.

With respect to sex trafficking, the central definitional question is the relationship between prostitution and trafficking, and the relative significance of consent versus coercion in determining a woman's participation in prostitution. Is all prostitution necessarily coercive and a form of trafficking, or is it possible for a woman to meaningfully consent to being a prostitute?

In the debate and discourse on sex trafficking, contenders for influence fall into two broad "camps" in their approaches to understanding the problem of sex trafficking and to defining the legal response to it.<sup>32</sup>

"Structuralist" NGOs argued that prostitution necessarily constitutes a form of trafficking because it necessarily reproduces and enforces subordination of women by men. Women's engagement in prostitution manifests this dynamic of sexual subordination at its very core, reflecting and reproducing underlying larger conditions of domination.

These NGOs drew mainly from "radical" or "dominance" feminist theory pioneered by Catharine A. MacKinnon,<sup>33</sup> Andrea Dworkin,<sup>34</sup> and Kathleen Barry.<sup>35</sup> Indeed, Barry co-founded one of the most influential NGOs at the Protocol negotiations, the Coalition Against Trafficking of Women (CATW).

In *Prostitution and Civil Rights*, MacKinnon developed this argument to show that prostitution was a stark manifestation, and one culmination, of a structure that bends women at every turn toward and into sexual subservience:

Women are prostituted precisely in order to be degraded and subjected to cruel and brutal treatment without human limits; it is the opportunity to do this that is exchanged when women are bought and sold for sex. . . . [L]iberty for men . . . includes liberal access to women, including prostituted ones. So while, for men, liberty entails that women be prostituted, for women, prostitution entails loss of all that liberty means.<sup>36</sup>

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<sup>32</sup> Chantal Thomas, *International Law Against Sex-Trafficking, In Perspective*, Presentation at the Wisconsin-Harvard Workshop on International Economic Law and Transnational Regulation 53 (2004) (manuscript on file with author).

<sup>33</sup> See Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 635 (1983) ("Male and female are created through the erotization of dominance and submission.").

<sup>34</sup> See, e.g., ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1989); ANDREA DWORKIN, *INTERCOURSE* (1991).

<sup>35</sup> See, e.g., KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979); KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* (1995).

<sup>36</sup> MacKinnon, *Prostitution and Civil Rights*, *supra* note 7, at 13–14.

In her 1979 book *Female Sexual Slavery*, Kathleen Barry did much to carry this view to the international plane, to raise international awareness of the harmful effects of prostitution, and to revive the conception of it, popular in earlier eras, as a form of slavery. Barry documented physical and psychological abuse, domination and deception of prostituted women and girls in a series of countries in Latin America and Africa, showing how many of these situations “fit the most rudimentary definition of slavery.”<sup>37</sup> Barry, like many others working in this area, saw her task as naming and exposing the pervasive and fundamental nature of female domination, and thereby striking the first blow toward freedom.

“Individualist” NGOs were unified by a concern that the approach to trafficking preserve the visibility of the person as an individual. An emphasis on the primacy and importance of the individual translated into a call for an establishment of a framework of individual rights of trafficked persons. Accordingly, human rights organizations formed a central voice in the individualist camp. The Human Rights Caucus, a coalition of rights organizations, became a steady and important player in the negotiation of the Protocol. The International Human Rights Law Group, or IHRLG (now known as Global Rights), formed one of the anchors of the Human Rights Caucus. For the IHRLG, a primary concern was to ensure that the Protocol recognize the importance of protecting the human rights of the trafficked persons.<sup>38</sup> Thus, the IHRLG, the Global Alliance Against Traffic in Women (GAATW), and other participants in the Human Rights Caucus called for language in the Protocol explicitly endorsing the protection of the human rights of trafficked persons.<sup>39</sup>

In addition to calling for recognition of human rights, the individualist camp strongly opposed a definition of trafficking that failed to recognize the possibility of individual choice. To fail to recognize choice would be to obscure the primacy of the individual behind larger, structural concerns—an untenable position from the human rights perspective. The individualist NGOs were able to form coalitions with the participating governments that did not, within their own territories, aim for complete criminalization or abolition of prostitution.

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<sup>37</sup> BARRY, *FEMALE SEXUAL SLAVERY*, *supra* note 35, at 14.

<sup>38</sup> See INT’L HUMAN RIGHTS LAW GROUP, *THE ANNOTATED GUIDE TO THE COMPLETE UN TRAFFICKING PROTOCOL 2* (2002) [hereinafter IHRLG Guide] (“The Trafficking Protocol is not, unfortunately, a human rights instrument. The UN Crime Commission, which developed the Trafficking Protocol, is a law enforcement body, not a human rights body . . . . From the human rights perspective, it would have been preferable if an international instrument on trafficking had been created within a human rights body rather than in a law enforcement body.”)

<sup>39</sup> They were partially successful, although the language on human rights is aspirational, in contrast to the much stronger language relating to criminalization of trafficking. Compare Trafficking Protocol, *supra* note 2, at Art. 5 (on criminalization); *id.* Art. 6 (on protection of and assistance for victims).



Somewhat less visible and influential at the level of the negotiations, but still very much visible in the larger discourse around trafficking, was the “pro-work” view. This view proceeded from a view that prostitution, far from being the endpoint of a structure of degradation of women, was simply a form of wage labor. One justification for this view is the notion that anti-prostitution feminists simply “re-inscribe” the victimization of women by “buying into” the idea of prostitution as a form of degradation. Rather than seeing it this way, the pro-work view would seek to dismantle all the ways in which women are placed apart from men, by resisting the impulse to see kinds of work in which women are predominant as special for that reason. By seeing prostitution as simply another form of work, this view sought to emphasize the agency of the individual prostitute as someone who could choose to enter into this form of work, and for whom this work was not horribly degrading. Some within this “pro-work” camp would even see prostitution as a potentially liberating act, in which the woman casts off the shackles of patriarchy that would see prostitution as degrading, and finally takes control of her own body. Within the larger discourse, the pro-work view drives the call for decriminalization of prostitution. Examples of sex workers’ rights organizations are the Prostitutes’ Education Network (PEN) and the China-based Zi Teng.<sup>40</sup>

Competing regulatory approaches to prostitution, and by extension sex trafficking, emerged from the feminist debate—decriminalization and abolitionism. *Individualists* called for a definition of sex trafficking that explicitly described it as commercial sex involving coercion. Such a definition implied that commercial sex could potentially be uncoerced, leaving room for a decriminalized, individualist approach to regulation. *Structuralists* called for a definition that included *all* commercial sex automatically within the ambit of sex trafficking—an explicit finding of coercion would not be necessary since, according to the structuralist approach, *all* commercial sex was necessarily coercive. The structuralist proposal also called for an explicit statement disregarding any manifestation of apparent consent by the trafficking victim. Just as one cannot legally consent to one’s own enslavement, consent could not be a basis for validating commercial sex since it was “female sexual slavery.” In doing so, structuralists call for the *abolition* of prostitution so that all third party involvement is criminalized (pimps and johns), while the prostitute’s act of prostitution itself is not criminalized. Both positions are united regarding the need to combat coerced sex work and coerced migration for the purpose of sex work (trafficking).

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<sup>40</sup> See also *infra* the analyses by Hila Shamir and Prabha Kotiswaran of similar movements in specific national contexts.

## II. GOVERNANCE FEMINISM AND SEX TRAFFICKING IN THE UNITED NATIONS AND UNITED STATES CONTEXTS

The outcomes of a quarter-century of mobilization by feminist NGOs depended on many dynamics: first, existing principles in international law that could become a basis for activism (such as the 1949 U.N. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others); second, the willingness of official actors (states and international organizations) to receive and act on the information provided by the NGOs (in the international sphere, this point of receptivity was the Working Group on Slavery, and in the national sphere, it was the Clinton Administration as advised by Hillary Clinton); and third, the ability of these groups to link up with other actors to increase their effectiveness (in the international sphere, these actors were governments that sought to combat transnational crime and to secure their borders against transnational crime and illegal migrants; in the national sphere, these goals of the U.S. government were a factor, and religious groups were another important factor). Part of the current project is to urge a greater awareness of these factors, both contingent and structural.

### A. *The International Stage*

Twenty-five years ago, it was possible to state with certainty that the international human rights framework did not recognize that “women’s rights are human rights.”<sup>41</sup> The U.N. Economic and Social Council was not “authorized”—that is, not instructed by the General Assembly—to address women’s rights until the early 1980s.<sup>42</sup> An initial turning point was the declaration of the 1980s as the Decade for Women. The Beijing Conference for Women and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) followed, as milestones at moving women’s rights to the center of the U.N. agenda. This movement could not have occurred without tireless efforts by NGOs.

The story of the treatment of sex trafficking cannot be understood without reference to the larger women’s movement and human rights movement. These movements provided both the language and theoretical grounding for action, as well as the source of organizational energy. The indifference to women’s rights was felt to be particularly acute with respect to the prostitution of women and the fact that prostitution could occur under highly coercive circumstances.

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<sup>41</sup> Fran P. Hosken, *Toward a Definition of Women’s Human Rights*, 3 HUM. RTS. Q. 1, 1 (1981) (“[W]omen’s rights in international human rights are almost invisible.”).

<sup>42</sup> Margaret E. Galey, *International Enforcement of Women’s Rights*, 6 HUM. RTS. Q. 463, 463 (1984).

Barry documented the widespread abuses that occurred in prostitution in Latin America and Africa. In a 1981 article entitled “Female Sexual Slavery: Understanding the International Dimensions of Women’s Oppression,” she described the burgeoning efforts of the feminist movement, and particularly of radical feminists who viewed prostitution through a structural theoretical lens. Barry’s account of feminist mobilizing is a compelling account of activist determination:

At the 1980 conference in Copenhagen, in the nongovernmental forum, hundreds of feminists from around the world met to discuss this issue which some official delegates began the work of trying to bring forth a resolution to include the issue in the World Plan of Action. The move for a resolution was reinforced by women from the forum lobbying their official delegates. This effort resulted in official adoption of a resolution which asks the Secretary-General of the United Nations to report to the next session of the General Assembly on the traffic of women and to take action against international networks of traffickers and procurers. This international attention to female sexual slavery will now enable channels to be opened which will provide an opportunity for women to report crimes and seek remedies.<sup>43</sup>

Gradually, the issue began to be incorporated in conferences on women’s issues and preparatory sessions.<sup>44</sup> Kathryn Zoglin points out that this effort largely originated in the global North and largely focused on the global South.<sup>45</sup> This pattern arose probably not because of any conscious imperialist bias<sup>46</sup>—Barry was as outraged by prostitution in Paris as in Nairobi<sup>47</sup>—but because the South, accessible through the language of international human rights law, presented a theater of opportunity at a time when the radical feminist project in the North was embattled by opposition from the status quo as well as liberal and libertarian feminists.<sup>48</sup>

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<sup>43</sup> Kathleen Barry, *Female Sexual Slavery: Understanding the International Dimensions of Women’s Oppression*, 3 HUM. RTS. Q. 44, 44–45 (1981); see also generally CYNTHIA ENLOE, *BANANAS, BEACHES AND BASES—MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS* (1990).

<sup>44</sup> See Kathryn Zoglin, *United Nations Action Against Slavery: A Critical Evaluation*, 8 HUM. RTS. Q. 306 (1986).

<sup>45</sup> *Id.* at 315 (“The significant impetus provided by the NGOs has come from largely Western organizations. In contrast, the majority of topics under consideration has focused on slavery-like practices in the Third World.”).

<sup>46</sup> There is, of course, a strong tradition of postcolonial critique of latent imperialist bias within international human rights law. See, e.g., Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 (2001).

<sup>47</sup> Barry, *supra* note 43, at 44.

<sup>48</sup> In addition to the resistance on behalf of the status quo, the U.S.-based structuralist movement met with opposition not only from traditional liberal groups but also from the

In the international frame, this kind of opposition was initially much less forthcoming. In part, this may have been because the issue was so marginal. The women's human rights movement was as yet inchoate, and no internal frontier of opposition had formed. Moreover, the U.N. body charged with responsibility for eradicating slavery—the Working Group on Slavery—was at the “bottom of the UN human rights hierarchy” and likely fairly unthreatening to the status quo.<sup>49</sup>

Thus, relatively early on, radical feminists were able to achieve victory in terms of bare recognition and framing of the issue—a 1981 U.N. Conference in Nice released the statement that “all prostitution is forced prostitution.”<sup>50</sup> The initial wave of information and argumentation was not followed by any immediate impact on U.N. or state behavior. Thus, Barry lamented, “it is not that international authorities do not know about these practices which violate the human rights of women, but that they refuse to act against those violations or expose them.”<sup>51</sup>

However, the groups were buttressed by an important source of international law—the 1949 U.N. Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others. Article 1 of the 1949 Convention requires member states to “punish any person who, to gratify the passions of another: (1) procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person” or “(2) exploits the prostitution of another person, even with the consent of that person.”<sup>52</sup> The language of the 1949 Convention harkens back to another era, the turn from the nineteenth to the twentieth century during which social panic about the “white slave trade”<sup>53</sup> ran high and the seduction of women was a crime in and of itself.<sup>54</sup> These features of the 1949 Convention would seem to contradict the self-conception of radical feminists. Nevertheless, although it might have used questionable language, the 1949 Convention reached the right conclusion: it made prostitution illegal regardless of any showing of consent by the prostituted person.

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alternative radicalism of “sex-positive” or libertarian groups like COYOTE. A debate raged within U.S. feminism throughout this whole period over questions like whether pornography and prostitution were tolerable from a feminist perspective. *See, e.g.,* Anne McClintock, *Sex Workers and Sex Work: Introduction*, 37 *SOCIAL TEXT* 1 (1993).

<sup>49</sup> Zoglin, *supra* note 44, at 328.

<sup>50</sup> *Report of the Special Rapporteur on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*, U.N. Doc. E/1983/7 and Corr. 1–2 at 8 (1983).

<sup>51</sup> Barry, *supra* note 43, at 44.

<sup>52</sup> The 1949 Convention thus sees all prostitution as trafficking and all trafficking as prostitution, leaving room neither for prostitution that is not a form of trafficking, nor for trafficking that does not involve prostitution.

<sup>53</sup> *See* International Convention for the Suppression of White Slave Traffic, May 4, 1910, 3 L.N.T.S. 278.

<sup>54</sup> *See* PAMELA HAAG, *CONSENT: SEXUAL RIGHTS AND THE TRANSFORMATION OF AMERICAN LIBERALISM* 43–53 (1999) (discussing the law of seduction and the seduction trials of the late nineteenth century).

In addition to the 1949 Convention, the U.N. also provided an organizational opportunity to mobilize and to press their cause—the U.N. Working Group on Slavery. Accounts of the U.N. Working Group agree that it was uniquely open to NGO input during this period. To begin with, the Working Group was a forum for action on women’s rights issues at a time when most other U.N. bodies were indifferent to the idea. The mandate of the Working Group was noticeably open-ended, creating the opportunity for “creative interpretation.”<sup>55</sup> The Working Group also featured an unusual level of procedural flexibility: any NGO with consultative status could submit written materials to it and could appear before it.<sup>56</sup> CATW and many other abolitionist NGOs, together with Anti-Slavery International, consistently attended the Working Group sessions throughout the 1980s and 1990s.<sup>57</sup> Thus, NGOs exerted in the Working Group “stronger influence than [in] almost any other comparable human rights body.”<sup>58</sup>

The U.N. Working Group requested an annual report by the Secretary-General on the number of ratifications of the 1949 Convention and sought to establish a Special Rapporteur.<sup>59</sup> Thus, the movement had succeeded in making the issue visible and putting it on the agenda of official actors.<sup>60</sup> It was stalled, however, by the fact that many governments did not want to ratify the 1949 Convention because the prohibitionist stance would have required them to alter their domestic legal systems.<sup>61</sup>

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<sup>55</sup> Zoglin, *supra* note 44, at 317 (the mandate, “to review developments in the field of slavery,” is “neither narrow nor excessively well-defined. Thus the Working Group has always enjoyed considerable scope for action.”).

<sup>56</sup> *Id.* at 319.

<sup>57</sup> Among the many other groups participating were the International Abolitionist Federation and the International Federation of Women Lawyers. *See, e.g., Report of the Working Group on Slavery on the Meeting of its Eighth Session*, U.N. Doc. E/CN.4/Sub.2/1982/21 (1982).

<sup>58</sup> Zoglin, *supra* note 44, at 321. There were some critiques of this openness. For instance, because direct testimony was rare and indirect information of a kind rejected by other human rights fact-finding bodies was routinely submitted, some said the data received was imprecise. *Id.* at 321, 327.

<sup>59</sup> *E.g., The Secretary-General, Inquiry on the Status of Combating of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, U.N. Doc. E/CN.4/Sub.2/AC.2/1982/13 (1982); *Note by Mr. Asbjorn Eide, Special Rapporteur of the UN Economic and Social Council*, U.N. Doc. E/CN.4/Sub.2/AC.2/1988/5 (1988).

<sup>60</sup> In 1995 these efforts culminated in the establishment of a Programme of Action. *Report of the Working Group on Contemporary Forms of Slavery on its Twentieth Session: Draft Programme of Action on the Traffic in Persons and the Exploitation of the Prostitution of Others*, U.N. Doc. E/CN.4/Sub.2/1995/28/Add.1 (June 13, 1995). NGOs’ communications to the Working Group made clear that they were concerned not only about the low number of ratifications of the 1949 Convention, but also about the fact that the Convention did not include any mechanism for monitoring and implementation. Various NGOs proposed the development of such mechanisms to strengthen the 1949 Convention. *See, e.g., Report of the Working Group on Contemporary Forms of Slavery on its Twenty-Second Session*, U.N. Doc. E/CN.4/Sub.2/1997/13, ¶¶ 21, 22 (July 11, 1997).

<sup>61</sup> *See, e.g., Remarks of the United Kingdom, Report of the Working Group on Contemporary Forms of Slavery on its Twenty-First Session*, U.N. Doc. E/CN.4/Sub.2/1996/24 (July 19, 1996).

It was not until intergovernmental talks began to establish a Convention on Transnational Organized Crime that trafficking would be made more central to international crime-fighting efforts of official actors.<sup>62</sup>

*B. The United States Stage*

The original impetus to establish a Convention on Transnational Organized Crime came out of a joint effort by the U.S. and European governments when they were cooperating on other fronts to combat money-laundering and drug trafficking. The Clinton Administration made transnational organized crime a priority.<sup>63</sup> Within that, combating illegal immigration was a big objective. The issue of sex trafficking appears to have been incorporated into these intergovernmental efforts after Hillary Clinton attended the Beijing Women's Conference and met with NGOs such as the Global Survival Network.<sup>64</sup> Coupled with the awareness of trafficking that had already developed among White House staff during the 1990s, Hillary Clinton's involvement led to the establishment of the President's Interagency Council on Women (PICW) with Secretary of State Madeleine Albright as its chair and Hillary Clinton herself as honorary co-chair.<sup>65</sup> The PICW mobilized to place trafficking on the agenda of the emerging intergovernmental initiative to establish an international convention to strengthen efforts to combat crime and illegal migration.

The Clinton Administration's perspective was decidedly "liberal."<sup>66</sup> As we've seen, this view conceptualized prostitution and trafficking as distinct; envisioned the possibility of noncoerced prostitution; it also emphasized the centrality of human rights. Conceptually, these positions were of a piece. The idea of human rights privileged the classical liberal individual, and this necessitated the idea of the right to choose. It also necessitated the possibility of a defense for the defendant under liberal conceptions of criminal justice. Within this framework, punishment of trafficking would proceed according to a familiar process of balancing competing rights in a liberal-legal frame.

In setting this agenda, PICW faced opposition from feminist groups that wanted prostitution to be made illegal. National Organization for Women (NOW) and the Planned Parenthood Federation of America both protested the "Clinton Administration's effort to weaken international laws

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<sup>62</sup> U.N. G.A. Res. 53/111, U.N. Doc. A/RES/53/111 (Dec. 9, 1998) and G.A. Res. 53/114, U.N. Doc. A/RES/53/114 (Dec. 9, 1998). The move for implementation machinery in the Working Group may have been in anticipation of this event.

<sup>63</sup> *The Threat to US Trade and Finance from Drug Trafficking and International Organized Crime: Hearings Before the Senate Caucus on International Narcotics Control, Senate Finance Committee Subcommittee on Trade*, 104th Congress (1996) (testimony of Deputy Assistant Secretary Winer).

<sup>64</sup> Stolz, *supra* note 31, at 413.

<sup>65</sup> *Id.* at 413.

<sup>66</sup> *Id.* at 415.

against the trafficking of women and children for prostitution.”<sup>67</sup> These groups, in other words, allied with their international counterparts active in the U.N. Working Group on Slavery in calling for the reinforcement of the abolitionist approach of the 1949 Convention. Indeed, CATW was visible in the domestic as well as international area.<sup>68</sup>

These domestic feminist organizations also allied with conservative and religious organizations: the Heritage Foundation, the Campus Crusade for Christ, the Ethics and Religious Liberty Commission, the Institute on Religion and Democracy, and others.<sup>69</sup> The abolitionist feminist NGOs and these religious organizations generated noticeable publicity criticizing the Clinton Administration’s liberal position.<sup>70</sup> The *New York Post* dubbed the PICW a “Hooker Panel”; the *Wall Street Journal* accused the “Clintons” of “shrugging” at sex trafficking.<sup>71</sup>

Despite this fierce criticism, the Clinton Administration’s position held fast. This was probably due to several factors. First, the liberal approach was the more pragmatic one from the perspective of securing widespread intergovernmental agreement, since it was more consistent with a wider range of legal regimes. Second, the liberal approach found support in another and more prestigious branch of U.N. human rights machinery, the U.N. High Commissioner for Human Rights. Commissioner Mary Robinson had appointed a Special Rapporteur on Violence Against Women, who had carefully endorsed a human rights position that recognized the possibility of non-coercive prostitution and the definitional centrality of consent.<sup>72</sup> Although opposed by those NGOs most active in the U.N. Working Group on Slavery,<sup>73</sup> the UNHCHR’s liberal, pro-human rights position, reflected also in the position of U.S. groups such as the IHRIG, ultimately reinforced the approach of the PICW and the Clinton Administration.

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<sup>67</sup> *Id.* at 418.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (Religious conservatives “Richard Land, Ethics and Religious Liberty Commission; Bill Bright, Campus Crusade for Christ; Mary Ann Glendon, Harvard University law professor; Kay Cole James, Heritage Foundation; and Diane Knippers, Institute on Religion and Democracy sent a letter articulating their concerns about the protocol and prostitution to Hillary Clinton, as co-chair of PICW.”).

<sup>70</sup> Brian Blomquist, *Hooker Panel Puts First Lady on the Spot*, N.Y. POST, Jan. 8, 2000.

<sup>71</sup> William J. Bennett & Charles W. Colson, *The Clintons Shrug at Sex Trafficking*, WALL ST. J., Jan. 10, 2000.

<sup>72</sup> Radhika Coomaraswamy, *Integration of the Human Rights of Women and the Gender Perspective: Report Of The Special Rapporteur On Violence Against Women, Its Causes And Consequences*, ¶¶ 12–17, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000).

<sup>73</sup> *Report of the Working Group on Contemporary Forms of Slavery on its Twenty-Fifth Session*, ¶¶ 84, 85, U.N. Doc. E/CN.4/Sub.2/2000/23 (July 21, 2000) (“Speakers . . . expressed their anxiety at the content of the report submitted by the Special Rapporteur on violence against women to the fifty-sixth session of the Commission on Human Rights. They claimed that the report dealt only with trafficking based solely on coercion, that it criticized the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and that it assimilated prostitution to work. Above all, the attention of the Working Group was drawn to the fact that the report placed consent at the heart of the definition of traffic.”).

*C. The Outcomes and the Aftermath*

Ultimately the Clinton Administration's liberal view prevailed in the VTVPA, which contained a narrower definition of trafficking than that in the Trafficking Protocol.

Despite the influence and practicality of the liberal approach in the Protocol negotiations, structuralist NGOs were able to counter and limit the influence of the liberal view. This is undoubtedly due to their preexisting influence with the Working Group on Slavery and their experience with the U.N. framework. The definitional debate played out around the scope of the actions that constituted trafficking and the question whether consent could be a defense or not. Ultimately, both liberal and abolitionist approaches made their imprints visible in the final definition. That definition reads as follows:

Art. 3. (a): "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;  
 (b): The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

The Trafficking Protocol's definition of the crime of trafficking can be compared with that in the United States. VTVPA, which criminalizes only "severe forms of trafficking":

SEVERE FORMS OF TRAFFICKING IN PERSONS.—The term "severe forms of trafficking in persons" means—  
 (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion,<sup>74</sup> or in which the person induced to perform such act has not attained 18 years of age; or

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<sup>74</sup>

COERCION.—The term "coercion" means—  
 (A) threats of serious harm to or physical restraint against any person;  
 (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or



(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>75</sup>

The influence of the abolitionist position at the international level can be deduced by contrasting the U.N. and the U.S. definitions. First, the U.N. definition is broader, criminalizing not only those acts named in the U.S. law, but also “the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”<sup>76</sup> This addition affirms the structuralist belief that women’s personal relationships and other circumstances may give rise to fully coercive dynamics. Second, the U.N. definition includes a subparagraph which establishes that “consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant.”<sup>77</sup> Here, a central structuralist feminist tenet is written into law.

The sub-paragraph on consent should not, however, be confused with the all-encompassing position of the 1949 U.N. Convention. The Protocol’s travaux préparatoires make clear that the Protocol was without prejudice to national legal systems on prostitution.<sup>78</sup> Liberal NGOs have made this clear as well. For example, in 2002 IHRLG (now Global Rights) published an “Annotated Guide” to the Protocol explaining that this provision “merely” restated the “logic” that “once the elements of the crime of trafficking are proven, any allegation that the trafficked persons ‘consented’ is irrelevant.”<sup>79</sup> The Annotated Guide carefully distinguished between the Protocol’s definition and the Convention’s, pointing out that under the Protocol’s definition prostitution could occur without being a form of trafficking: “For example, a woman can consent to migrate to work in prostitution in a particular city, at a particular brothel, for a certain sum of money. However, if the defendant intended actually to hold the woman in forced or coerced sex work, then there is no consent because everything the defendant trafficker told the woman is a lie.”<sup>80</sup>

Though the abolitionist movement conceded major definitional territory in 2000, their point of view would soon become ascendant. The Administration of George W. Bush, who succeeded Clinton, has taken the pro-

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(C) the abuse or threatened abuse of the legal process.

<sup>75</sup> Victims of Trafficking and Violence Protection Act, *supra* note 3.

<sup>76</sup> 2001 Protocol, *supra* note 2, Art. 3(a).

<sup>77</sup> *Id.* Art. 3(b).

<sup>78</sup> See *Interpretative Notes for the Official Record of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, ¶ 64, Travaux Préparatoire, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000).

<sup>79</sup> IHRLG Guide, *supra* note \*, at 7.

<sup>80</sup> *Id.*

hibitionist view. The Bush Administration devoted increased resources to the elements of the VTVPA that placed trafficking on the U.S. government's foreign policy agenda, such as the requirement of the State Department to submit Annual Reports monitoring the anti-trafficking efforts of foreign governments who received U.S. aid. In doing so, they were primarily influenced by religious groups, who had overtaken feminists in their influence in the current Administration.<sup>81</sup> The Administration also added restrictions to funding based on whether a recipient state legalizes prostitution<sup>82</sup>—a victory for the structuralist feminists that was in turn decried by the liberal/human rights feminists.<sup>83</sup>

In both contexts, feminist NGOs worked with existing opportunities. An important part of their function was providing information to, and a big part of their power was in setting the agenda for, official actors in law-making initiatives. Both liberal and structuralist feminists worked with non-feminist groups and interests to obtain their goals. For the liberal feminists, their ultimate relative victory in the VTVPA was made possible by the fact that their position did not threaten existing approaches to prostitution. When the Administration changed parties, the relative shift to the structuralist point of view was made possible by the intense support from the religious right.

#### HILA SHAMIR

For me, mapping feminism's governance mode and its consequences is both a delightful and an unsettling task. It is delightful because it focuses on the power that feminists, of various stripes, have gained and are gaining in international and national settings. As a feminist I am happy to see feminism desiring power and achieving actual power; I believe this power, wherever it appears, has the potential to better the life of women. In the contexts discussed in this Article, and in many other contexts, feminists insist and succeed in making the interests of women heard and in influencing policy decisions. Thus, for me, the term "Governance Feminism" ("GF") is normatively empty: it signifies a certain form of power—which in itself is not *necessarily* bad, but the fact that it is feminist does not make it *necessarily* good either. I see no inherent problem with femi-

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<sup>81</sup> Elizabeth Bumiller, *Evangelicals Sway White House on Human Rights Issues Abroad*, N.Y. TIMES, Oct. 26, 2003, at A1.

<sup>82</sup> See TVPA Reauthorization Act of 2003, H.R. 2620, 108th Cong. § 7 (2003) (providing that "no funds" authorized for anti-trafficking purposes can be used to "promote, support or advocate the legalization or practice of prostitution"; and requiring organizations that apply for anti-trafficking funding to state in their grant documentation that they do not promote, support, or advocate same).

<sup>83</sup> See Letter from the AIDS Law Project, Centre for Applied Legal Studies, Wits University et al., to George W. Bush, President, United States of America (May 18, 2005), *available at* <http://www.iwhc.org/document.cfm?documentID=231>.

nist power, and I am pleased to see feminists among the elites making feminist decisions.

But this mapping is also unsettling. Through my research I came to realize that the current form of GF tends to deny its own power, and consequently *systematically* overlooks the shifts in bargaining power, distributive consequences, and production of winners and losers yielded by feminist legislative reforms. This internal critique of feminism draws on insights from “new legal realism.” The legal realist tools are helpful in mapping the distributive consequences (losses and gains) of proposed and implemented policies and in developing more consequence-conscious feminist reforms.

In this Part, I will focus on *how* feminists operate in governance mode, and how they came to inhabit this mode, by providing a snapshot of their institutional operation in the regulation of sex work and sex trafficking in national contexts—mainly that of Israel. In my answer to the second question, I will focus on *what* feminists are doing with this gained power in Israel, the Netherlands, and Sweden.

Feminism has proved to be a powerful actor in regulating sex work and combating trafficking in human beings for the purpose of sex work. This is true, as Thomas suggests above, on an international level, but is also the case in many national contexts. My research looks at the feminist legal regimes of sex work and trafficking that developed in the Netherlands, Sweden, and Israel, where the phenomenon of trafficking increased at the end of the Cold War, changing the “sex industries” of these countries dramatically, and leading to reforms in their regulation.

The end of the Cold War opened new routes of trade and migration between the former Soviet Union and the west.<sup>84</sup> The struggling economies of the former Soviet Union and the “promise” of the rich west led to increased trade and migration, thereby creating new prospects gainful employment in unskilled labor upon migration. The established formal routes of trade and migration were accompanied by the development of informal shadow markets of cross border trade in goods and labor. This included the development of a market in illegal migration for the purpose of sex work and sex trafficking. For example, it is estimated that 10,000 women were trafficked or migrated from countries of the former Soviet Union (namely Moldova, Russia, Ukraine) to work in Israel’s sex industry in the early 1990s, when transnational crime networks took advantage of the increased migration of soviet Jews to Israel.<sup>85</sup> The legal migration from the former Soviet Union into Israel created a transnational link between

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<sup>84</sup> Trade between the east and the west existed during the period of the Cold War despite the (American-led) sanctions but it was limited, disrupted and distorted. See *generally* EAST-WEST TRADE AND THE COLD WAR (Jari Eloranta & Jari Ojala eds., 2005).

<sup>85</sup> Donna M. Hughes, *The “Natasha” Trade: The Transnational Shadow Market of Trafficking in Women*, 53 J. INT’L AFF. 625, 632 (2000).

Eastern European organized crime rings and willing collaborators in Israel.<sup>86</sup> This link enabled the creation of a sophisticated apparatus for smuggling persons and sex trafficking that expanded in the last decade and took over the Israeli sex industry.<sup>87</sup> With the increase of sex trafficking and sex workers' migration, feminists entered this zone of post-war, newly established (formal and informal) trade relationships, seeking to regulate or altogether abolish sex trafficking and sex workers' migration.

Two classic examples of feminist reforms in the regulation of sex work can be found in the laws of Sweden and the Netherlands. There, the "purest" manifestation to date of the feminist legal regimes of abolitionism and legalization can be found. In 1999, buying sex became illegal in Sweden. In the Netherlands in 2000, the general ban on brothels was lifted, and it became legal to employ sex workers and manage a sex business.<sup>88</sup>

Changes in both countries were, in the clearest of ways, the result of feminist struggles and were shaped by feminist agendas.<sup>89</sup> But, as is well known, GF is not as successful in all national contexts, and not everywhere is the link between feminism and adopted reforms so straightforward. The case of Israel might be a more common example of the operation of GF on the national level.

In Israel, early legislation regarding prostitution was not shaped by Israeli feminists, and the 2000 Penal Code amendment that criminalized sex trafficking was legislated in a rush due to American and international pressures, and therefore without much input from Israeli feminists.<sup>90</sup> Although feminists have tried to raise awareness to sex trafficking since 1997,<sup>91</sup> the voices of feminist organizations in Israel, in the context of sex work and sex trafficking, began to be heard only after American feminists succeeded (as Thomas details above) in inducing the U.S. government to enact the Victims of Trafficking and Violence Protection Act of 2000

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<sup>86</sup> *Id.* at 629.

<sup>87</sup> Apparently this is not unique to Israel. See Saskia Sassen, *Is This the Way to Go?—Handling Immigration in a Global Era*, 4 STAN. AGORA (2003), <http://agora.stanford.edu/agora/volume4> ("According to the International Organization for Migration data, the number of migrant women prostitutes in many EU countries is far higher than that for nationals: 75% in Germany, 80% in the case of Milan in Italy, etc.").

<sup>88</sup> Bureau NRM, The Hague, *Trafficking in Human Beings: Third Report of the Dutch National Rapporteur* 13 (2005).

<sup>89</sup> The reforms were done through the cooperation of feminists in power positions in the state (public officials, legislators, and ministers) with feminist NGOs. See Gunilla Ekberg, *The Swedish Law that Prohibits the Purchase of Sexual Services*, 10 VIOLENCE AGAINST WOMEN, 1187, 1191–92 (2004); see also *Trafficking in Human Beings: Third Report of the Dutch National Rapporteur*, *supra* note 88, at 12.

<sup>90</sup> Penal Code 203A-D (amendment no. 56), 5760–2000, 1746 S.H. 226 (2000) (Isr.). One of the signs for the legislative rush to pass the amendment is the fact that during the legislative process the issue of sex trafficking was hardly researched and was not put in broader context. Rather, in a knee jerk reaction, trafficking was defined narrowly to include only trafficking for the purpose of prostitution, leaving wide practices of trafficking in persons for other purposes legally unattended.

<sup>91</sup> MARTINA VANDENBERG, ISRAEL'S WOMEN'S NETWORK (SHDULAT HANASHIM), *TRAFICKING OF WOMEN INTO ISRAEL AND FORCED PROSTITUTION* (1997).

(“VTVPA”). It is safe to assume, more generally, that a changing approach to trafficking in Israel—from an ignored topic to an important and dynamic issue on the legislators’ agenda<sup>92</sup>—is not based on a deep commitment to the dignity of victims of trafficking, or the various relevant U.N. conventions Israel signed or ratified,<sup>93</sup> but rather to the transnational footprint of U.S. law (and U.S. feminists) on the Israeli state.<sup>94</sup>

To ensure compliance, the VTVPA places a set of financial sanctions on countries that do not comply with a certain minimum standard for the elimination of trafficking. The VTVPA stipulates that a country that receives a non-complying assessment (tier three) risks withholding of non-humanitarian, non-trade-related foreign assistance.<sup>95</sup> In the 2001 report, Israel was placed in tier three.<sup>96</sup> Taking to heart the economic consequences, the Israeli government began to treat the phenomenon of trafficking more seriously. The efforts bore fruit: in the 2002 report, Israel was upgraded to the second tier.<sup>97</sup>

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<sup>92</sup> The main landmarks in this process are the following: In 2000 the Israeli legislature criminalized trafficking in women by amending the Penal Code and adding section 203A-D (Penal Code 203A-D, *supra* note 90). Since 2000 the situation of victims of trafficking who agree to testify as prosecution witnesses has improved and when caught, they were no longer immediately deported, but were given the option to testify against their traffickers. Further, several court rulings in 2000 held that prosecution witnesses should not be detained while waiting to testify, and that the police should ensure that the women’s basic needs for food and accommodation are fulfilled. Following these rulings, the police stopped holding victims of trafficking in prisons and began providing accommodation for witnesses in hostels, paid by the police. In 2004 a secured shelter for victims of trafficking was established by the Ministry of Welfare. The shelter provides both health care and mental care for the victims. Since 2004 the Ministry of Interior Affairs provides victims of trafficking with visas and working permits in exchange for their testimony against the traffickers. *See* ENTRY INTO ISRAEL ORDER, EXEMPTION FROM NEED OF APPROVAL TO PERMITS FOR A FOREIGN WORKER (2004) (Isr.). In July 2004 the Minister of Interior participated in a meeting of the Parliamentary Committee on Trafficking in Women, in which he declared his willingness to extend work permits and visas for one more year after the woman gave her testimony. The protocol of the meeting is available at <http://www.knesset.gov.il/protocols/data/html/sachar/2004-07-06.html> (last visited Apr. 25, 2006).

<sup>93</sup> Israel signed and ratified the U.N. Convention for the Suppression of Trafficking in Persons and the Exploitation of the Prostitution of Others, 1949, and the Convention on the Elimination of all Forms of Discrimination Against Women, 1979; Israel also signed but did not ratify the most recent and up-to-date international counter-trafficking instrument, the 2001 U.N. Trafficking Protocol.

<sup>94</sup> The VTVPA also had great effect on legislation and policy in sending countries categorized as tier three in the U.S. State Department Trafficking in Persons Report. *See* Alexandra V. Orlova, *From Social Dislocation to Human Trafficking*, 51(6) PROBLEMS OF POST-COMMUNISM 14, 21–22 (2004); *see also* COUNTER TRAFFICKING IN EASTERN EUROPE AND CENTRAL ASIA, IOM RESEARCH REPORT 8 (2003).

<sup>95</sup> Victims of Trafficking and Violence Protection Act, *supra* note 3, § 110.

<sup>96</sup> OFFICE OF THE UNDER SEC’Y FOR GLOBAL AFFAIRS, U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, at 88 (2001), available at <http://www.state.gov/documents/organization/10815.pdf>.

<sup>97</sup> OFFICE OF THE UNDER SEC’Y FOR GLOBAL AFFAIRS, U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, at 63 (2002), available at <http://www.state.gov/documents/organization/4107.pdf>.

Only when the 2001 U.S. State Department's Victim of Trafficking report placed Israel in tier three did an Israeli GF element become possible and visible. One aspect of the effort to be "promoted" within the tiers was the establishment of a Parliamentary Committee on Trafficking in Women in 2000 ("the committee"). The committee was initiated by (feminist) parliament member Zehava Gal-On, who has chaired it since.<sup>98</sup> A special relationship evolved between this committee and feminist organizations. First, invited as experts describing their experience from the field, feminists began to be vigorous participants and "repeat players" in the committee's meetings. They partook in formulating the committees' agenda and in shaping its proposed legislation. Protocols of the meetings reveal that at times the committee meetings were held mainly in the presence of the committee's chairwoman and the representatives of feminist organizations and NGOs that represent illegal migrant workers.<sup>99</sup>

The feminist organizations involved in the committee adhere to strong abolitionist impulses: all can be characterized as structuralists and as influenced by a form of American radical feminism. The participants in the committee did not include sex workers' organizations, simply since there are no such organizations in Israel. This is presumably because the majority of sex workers in Israel are victims of trafficking and migrant sex workers, who for various reasons—such as their harsh working conditions, transitory migration, or disempowerment as illegal residents—did not join the global trend of sex workers organizations.<sup>100</sup> The feminist politics of the Hotline for Migrant Workers—not a per se feminist organization—were harder to characterize. This organization deals with a wide range of issues concerning undocumented migrant workers and includes feminist lawyers and activists. It can be described as holding a more complex (or pragmatic) approach to sex work, and in any case has a weaker abolitionist impulse.<sup>101</sup>

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<sup>98</sup> The committee handed in its final report in 2005. It then changed its title to a Permanent Subcommittee (to the Constitution, Law, and Justice Committee) for the War Against Trade in Human Beings.

<sup>99</sup> Repeat feminist players in these meetings are Woman to Woman (Isha Le-Isha), Atzumi Association, Consciousness Institution (Machon Todaa), and Israel's women's network (Shdulat Hanashim). An organization that regularly attends the meetings and represents other non-state interests is the Hotline for Migrant Workers. Another actor is the "Coalition Against Trafficking in Women," a coalition that includes (or at some point included) all of these organizations, as well as many other women's and human rights organizations (some of its members are: the association of legal rights in Israel, Amnesty International, The Center for Jewish Pluralism, The Center for Victims of Sexual Assaults, and The Movement for New Manliness). The coalition was established in 1997 and until recently acted mainly as a platform of communication for the various member organizations.

<sup>100</sup> For a discussion of the global trend of sex workers organizations, see Kamala Kempadoo, *Introduction: Globalizing Sex Workers Rights*, in *GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 1* (Kamala Kempadoo & Jo Doezema eds., 1998). For a discussion of the reasons that inhibit migrant sex workers' organization, see Laura Agustín, *Migrants in the Mistress's House: Other Voices in the "Trafficking" Debate*, 12 *SOC. POL.* 96, 110–11 (2005).

<sup>101</sup> See, e.g., NOMI LEVENKRON & HANI BEN ISRAEL, REPORT ON THE CLIENTS OF WOMEN TRAFFICKED IN THE ISRAELI SEX INDUSTRY 33 (2005) (recommending not to adopt

But since the Hotline is mainly concerned with the rights of victims of sex trafficking, and not with general concerns of the harms of prostitution (that is, it focused its effort around developing protection programs for victims of trafficking and lobbying for increased prosecution of traffickers), it often shares the same rhetoric and stances of the structural feminists from the abolitionist organizations. Accordingly, all the participating NGOs often appear relatively unified when expressing their opinions and demands in the committee.

It is primarily in this zone—in which direct and unmediated interactions between civil society organizations and the state takes place—that Israeli feminists shaped their governance mode of operation and engaged in the regulation of sex work and sex trafficking in Israel.

Beyond operation in governance mode, feminists also used traditional, non-governance channels of operation; namely, they turned to the courts. Through litigation, feminists successfully pleaded to interpret generously the consideration requirement in the trafficking section of the penal code by lowering the evidentiary level for the proof of consideration to require circumstantial evidence alone.<sup>102</sup> And they successfully petitioned to establish rights for out-of-prison accommodation and police protection for victims of trafficking who agreed to serve as prosecution witnesses (in the latter case feminists and NGOs working with migrant workers filed *amicus* briefs).<sup>103</sup> Although petitions to courts played an important strategy in voicing the feminist perspective, this, I believe, is not a form of GF. While GF is about feminists joining formal political power apparatuses—cooperating with them and operating within them—the courts serve as a venue for those who “lost” the political game or did not have meaningful access to political processes in the first place. Moreover, the adjudication procedure leaves the power in the hands of traditional decision makers—judges—where feminists are relatively passive actors.

The involvement of non-state organizations in legislative processes and policy formation is not exclusive to the issue of trafficking in persons, though in Israel this might be one of the clearest manifestations of this growing trend. Furthermore, though feminists became meaningful actors, it is not clear how much power feminist and other civil society organiza-

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the Swedish regime that criminalizes clients, because of its possible adverse effects on sex workers).

<sup>102</sup> CrimA 1609/03 Borisov v. State of Israel, [2003] 58(1) P.D. 55. Section 203A(a) of the penal code says: “Selling or purchasing of a person in order to engage him in prostitution or serving as a middleman in the selling or purchasing of a person for this purpose is punishable by a term of imprisonment of 16 years; for the purposes of this paragraph, ‘selling’ or ‘purchasing’ includes consideration in the form of money, value, services or any other interests.” Informal translation by attorney Rachel Gershony, legal advisor in the Ministry of Justice, as quoted in NOMI LEVENKRON ET AL., NATIONAL NGOS’ REPORT TO THE ANNUAL UN COMMISSION ON HUMAN RIGHTS: EVALUATION OF NATIONAL AUTHORITIES’ ACTIVITIES AND ACTUAL FACTS ON THE TRAFFICKING IN PERSONS FOR THE PURPOSE OF PROSTITUTION IN ISRAEL 9 (2003).

<sup>103</sup> HCJ 1119/01 Zaritskaya v. The Ministry of Interior (unpublished).

tions manage to exert through such interaction. It is clear that feminists, as well as other NGOs, have more opportunities to influence policy and legislation since the discourse of rights and the concept of dignity became more central in Israeli adjudication—with the passage of what is known as Israel's partial Bill of Rights, the Basic Law: Freedom of Occupation, and the Basic Law: Human Dignity and Liberty in 1992—and since non-state organizations gained direct access to parliamentary processes around a decade later. It is also certain that in these political struggles they don't and won't always win.

Although feminist and other NGOs became important actors in the Parliamentary Committee on Trafficking in Women, the power of the committee itself can be questioned. First, it should be noted that structurally the powers of such a parliamentary committee are much more limited than those of Congressional committee in the United States.<sup>104</sup> Second, in its years of operation, the committee proposed and passed several important rules and legislative amendments,<sup>105</sup> but many other proposals failed to pass.<sup>106</sup> Third, even when a proposal was enacted, its implementation by the executive branch or the judiciary branch is, at times, only partial. One example is the committee's generated "Limitation of Use of Property for the Prevention of Crime Act—2005" (where crime is defined as pimping, sex trafficking, and owning or renting a place for the purpose of prostitution). The act allows the police, after it received a court restriction order, to shut down a brothel. This legislation was likely unofficially aimed to circumvent the attorney general's directive, guiding the police not to investigate prostitution-related offences unless there is suspicion of sex trafficking or other aggravated offences.<sup>107</sup> Officially it was meant to give the police legal tools to close down brothels so that the police would not be able to use its lack of legal power to justify its lack of activity.<sup>108</sup> The act passed in March 2005, yet the police report to the committee implies that

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<sup>104</sup> For the operation of parliamentary Knesset committees, see [http://www.knesset.gov.il/committees/eng/permanent\\_committees\\_eng.asp](http://www.knesset.gov.il/committees/eng/permanent_committees_eng.asp) (last visited Apr. 25, 2006).

<sup>105</sup> The following rules and amendments proposed by the committee passed: Minimum punishment for traffickers; at the request of the complainant, victim's testimony in trafficking cases can be conducted when the defendant is not present; in order to allow the complainant to return to her origin country, courts can take early testimony of victims of trafficking in trafficking cases; territorial expansion of the Israeli law to apply on Israeli citizens who commit trafficking outside of Israel; and special authority for courts to limit use of property when it is suspected that criminal offences are taking place there, namely in cases of sex establishments. See PARLIAMENTARY COMMISSION ON TRAFFICKING IN PERSONS—FINAL REPORT Ch. 12, at 2–3 (2005).

<sup>106</sup> *Id.* at 4–6.

<sup>107</sup> Investigation and Prosecution Policy in Offences of Prostitution and Trafficking in Persons for the Purpose of Prostitution, 2.2 Att'y Gen. (amended 2002) (Isr.), available at <http://www.justice.gov.il/MOJHeb/HanchayotSahar>. The directive is expected to be amended again in 2006. Current drafts of the amended directive do not change this aspect of the directive.

<sup>108</sup> As Knesset member Zehava Gal-On said in the legislation process. See Knesset Protocol 94 (Mar. 30, 2005).



it was not used once in the four months following its passage.<sup>109</sup> As far as the NGOs are informed, it has been used only once in the year following its enactment (and then only partially). It therefore seems that feminist and other NGOs turned into powerful *political* actors in this new form of politics, and as such, like all other stakeholders in these struggles, they win some and they lose some.

One such possible triumph might be the proposal of the Act for The Prohibition of Trafficking in Persons that passed its first legislative stage in November 2005.<sup>110</sup> The Parliamentary Committee on Trafficking in Women and the Constitution Law and Justice Committee jointly drafted the bill, and feminist organizations commented on it extensively during its drafting. At least at its current preliminary stage, the proposal looks like a (structuralist) feminist victory.<sup>111</sup> However, the proposed act also reflects an attempt of Israeli authorities to comply with the 2001 Protocol, which, as Thomas and others<sup>112</sup> suggest, is often understood as an international feminist achievement. Israel signed the 2001 Protocol but cannot ratify it<sup>113</sup> until its national legislation is in line with the requirements laid down by the Protocol. The proposed bill complies with the Protocol's requirement of enacting a trafficking prohibition that would include a broader range of circumstances besides prostitution, namely situations of forced labor and organ removal. Sweden and the Netherlands both went through similar processes of widening statutory definitions of trafficking to comply with the international standard and ratified the Protocol promptly after passage of new legislation (in July 2004 and July 2005, respectively). For these three countries—and probably for many others—the 2001 Protocol did *not* serve a feminist purpose *per se*, but a general purpose of recognizing more types of harms (and less gender specific harms) as warranting national sanction. It seems then that it is mostly the VTVPA, with the power it endowed certain groups of Israeli feminists, that shaped the measures taken by the Israeli government against sex trafficking.

I depicted here in detail a specific aspect of the operation of GF at the national level hoping to exemplify the complexity and indeterminacy of its operation in this context. Here feminism often works its way into power through interaction with state actors in a complex and nuanced way and with

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<sup>109</sup> Protocol of the War Against the Trade in Human Beings Committee (July 13, 2005) (regarding the implementation of the *Limitation of Use of Property for the Prevention of Crime Act: Meeting of the War Against the Trade in Human Being Comm.*).

<sup>110</sup> Act for the Prohibition of Trafficking in Persons, Proposal P/1291 (as passed in first vote out of three, Nov. 15, 2005).

<sup>111</sup> In the definition of trafficking the proposal emphasizes that the victim's consent, no matter when it is received, is irrelevant to a trafficking crime. This was the case at the 2000 penal code amendment as well, but the language and rhetoric of the proposed legislation is much stronger.

<sup>112</sup> Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137, 141–74 (2004).

<sup>113</sup> Ratification might be crucial to ascend another tier in the U.S. State Department Victims of Trafficking Report.

unpredictable consequences. The success of any particular GF campaign, at least at this stage in history and research, is far from clear; and, for feminists, the rare victories feminist organizations achieve are still exhilarating. Admittedly, there were some astonishing triumphs of structural feminism in Israel in the last decade—namely Orit Kamir's success in passing the Act for the Prevention of Sexual Harassment in 1998—but these were and still are considered uncharacteristic and surprising occasions in the history of Israeli feminism. The common characteristics of state-adopted feminist reforms, and the conditions required for a feminist reform proposal to be successful, are yet to be thoroughly studied.

For me, the institutional story of the operation of GF in this context is an interesting and important one, but one in which feminism is merely an example of a general trend of the effect of globalization on national politics, of the increasing role of NGOs in government, and of the changing structure of sovereign power. What is particular to feminism, and what as a feminist I find to be a more important part of the discussion on GF, is our discussion in Part Two—and particularly GF's tendency to avoid assessment of the consequences of its legal regimes in a pragmatic, distribution-oriented way.

PRABHA KOTISWARAN

*Governance Feminism and the Postcolonial Predicament*

In December 1891, two American women, Katherine Bushnell and Elizabeth Andrew of the World Women's Christian Temperance Union, visited British military brothels in ten Indian cities. Their experiences were recorded in *The Queen's Daughters in India*, published in 1899 with prefatory letters by well-known British abolitionists Josephine Butler and Henry Wilson. The Contagious Diseases Act of 1868<sup>114</sup> had been repealed in Britain in 1886. Soon after, a dizzying array of actors, including British feminists, members of the British Parliament, and Indian nationalists, joined hands in a bid to repeal the statute in India. In 1888 the British House of Commons passed a resolution requiring its repeal. When Bushnell and Andrew undertook their extensive travels in 1891, they were testing whether this formal change in the law had made any difference on the ground. From talking with British military personnel, medical practitioners, and the subordinate judiciary, they learned of the continued medical testing of sex workers under Cantonment laws applicable to areas where British soldiers were stationed.

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<sup>114</sup> The Contagious Diseases Act of 1868 called for the compulsory registration of all sex workers and the compulsory examination and treatment of sex workers in lock hospitals set up by the colonial government. Failure to comply with these requirements invited criminal sanctions including the payment of fines and imprisonment.

As Bushnell and Andrew relate their own conversations with sex workers, the sex workers reported on their earlier encounter with another Western woman in the following way:

Then the lady went home to England and talked to the Queen. She spoke with wonderful power on behalf of the poor women of India. She said to the Queen that she (the Queen) was a woman, and these in India were women, and their shame was the Queen's shame, and for them to be outraged as though she (the Queen) was outraged, that it was a shame for women to be treated so when a woman was Queen. Then the Queen ordered it to be stopped. But the officers still carry it on . . . They [the sex workers] blessed and thanked us over and over. We told them, "We are your sisters;" they replied, "*We are your slaves.*"<sup>115</sup>

Were Bushnell and Andrew governance feminists ("GFeminists")? Is Governance Feminism ("GF"), as Halley suggests, "an underrecognized but important fact of governance more generally in the early twenty-first century?" To be sure, there are significant differences between the current ascendance of GF in the international legal domain, outlined by Halley and Thomas, and the feminist interventions that I describe from more than a century ago. Feminist NGOs in the late nineteenth century were probably only beginning to intervene in policy-making at the domestic and international levels. Unlike the present-day GF that Halley discusses, their installation in "actual legal-institutional power" was improbable, as was the likelihood of their being hired by bureaucracies. They certainly had no favorable body of international law to draw on, or institutional spaces in processes of international law-making, or political opportunities of the sort that Thomas lists as contributing to the success of GF in drafting the U.N. Protocol. Yet the prohibitionist impulse of feminism, manifested in a strictly legal project in the international realm and informed by an imagined global sisterhood thought to overshadow the larger politics of colonial rule, bears an uncanny resemblance to present-day GF. Interesting also is the fact that the international social purity movement in the 1920s and 1930s later found its most enthusiastic constituents amongst elite nationalist men and women eager to use limited self-rule to pass anti-trafficking legislation.<sup>116</sup> This was, after all, the nationalist resolution of the women's question,<sup>117</sup> whereby Indians who could not challenge British rule in the public, material sphere, sought to challenge it in the spiritual, private sphere by fashioning an ideal femininity for the Indian woman

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<sup>115</sup> ANDREW, *supra* note 7, at 61–62.

<sup>116</sup> Heather S. Dell, *Hierarchies of Femininity: Sex Workers, Feminists and the Nation 72* (1999) (unpublished Ph.D. dissertation, Duke University) (on file with author).

<sup>117</sup> See PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POST-COLONIAL HISTORIES* (1993).

in juxtaposition to the coarse common woman of whom sex workers were emblematic. The similarities of such abolitionist efforts should perhaps come as no surprise because, as postcolonial scholars have observed, techniques of governmentality were introduced and perfected in the colonies before they were exported to the metropole.<sup>118</sup> In other words, colonial subjects had recourse only to civil society as an arena in which to question the policies of the colonial government. It is in the context of this troubled history of a predecessor of GF that I present an account of the ascendance of present-day Indian GF in relation to anti-sex work laws.

Shamir has already demonstrated the dramatic impact of the U.N. Protocol and the VTVPA on the Israeli domestic law relating to sex work and trafficking. Whether the Indian example echoes this experience depends to some extent on the temporal dimensions of the analysis. If we confine ourselves to the present juncture as an end-point of almost twenty years of debates over the reform of the Indian anti-sex work law (namely the Immoral Traffic Prevention Act, 1956),<sup>119</sup> the handiwork of Indian GF in conjunction with the sanctions under the current U.S. led prohibitionist agenda will become immediately apparent. However, I extend the timeline analysis precisely to problematize a linear process of causation between domestic law reform, on the one hand, and international or domestic GF, on the other. The most significant factor in this respect is a set of dynamics, parallel to the international prohibitionist agenda itself, operating through modes of international governance that many would explicitly identify as new governance and employing techniques of governmentality,<sup>120</sup> and this relates to the tension between the politics of pandemic control and the international projects of GF.

This is not to underestimate the chilling effect that the prohibitionist agenda has had on the public discourse around sex work. It has indeed created a Cold War sensibility, where sharp lines are drawn between those who want to abolish sex work and sex trafficking and those who are more ambivalent about such an absolutist stance. There is anecdotal evidence to suggest that individuals and groups participating in discussions on sex work and sex trafficking must respect zones of unspeakability for fear of being known publicly as supporters of the legalization of sex work. After all, NGOs perceived to advocate the legalization of sex work have been visited with swift sanctions through the loss of international funding.<sup>121</sup> All

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<sup>118</sup> PARTHA CHATTERJEE, *THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD* 36 (2004).

<sup>119</sup> See G. B. REDDY, *PREVENTION OF IMMORAL TRAFFIC AND LAW* (2004).

<sup>120</sup> Swati Ghosh, *Surveillance in Decolonized Social Space: The Case of Sex Workers in Bengal*, 23(2)(83) *SOC. TEXT* 55 (2005).

<sup>121</sup> Rema Nagarajan, *US Accuses NGO of "Trafficking,"* HINDUSTAN TIMES, Sept. 29, 2005, available at [http://www.hindustantimes.com/news/181\\_1504660,00050001.htm](http://www.hindustantimes.com/news/181_1504660,00050001.htm); other reports suggest that the concerned NGO, SANGRAM, declined to accept USAID funding once it found out that funding required that it take the "prostitution loyalty oath" as it has begun to be called in NGO circles; see <http://www.genderhealth.org/loyaltyoath.php> (last

this has the real potential for irreversibly shifting the balance of power at the national level, where on the one hand, sex worker organizations are being starved of their already limited funds, while domestic organizations towing an abolitionist feminist line and international outposts of U.S. church-based organizations are flush with funds to ostensibly counter sex trafficking and rescue sex workers from sex work.

With a slightly longer presence in India than the prohibitionist agenda, international efforts to prevent the spread of HIV/AIDS have led to the increased circulation of services and capital and to the establishment of a nation-state/foreign donor/civil society complex. This complex is remarkable for its innovation of public-private partnerships, so that there is a blurring of boundaries between the state and civil society. Note the difference from the prohibitionist agenda, which seeks to increase police powers exclusively wielded by the state. Informed by the liberal attitudes of the medical profession, the sensibility of this complex is one of tolerance for varied sexual practices, including sex work. However, its support of sexually marginalized groups is related to a different mode of bureaucratic rationality, namely, a utilitarian calculus that allows room for interventions amongst groups like sex workers and their consequent mobilization. But even this happens only to the extent necessary to prevent the spread of HIV to the general population, really, “innocent” wives and children in heterosexual marital families. As such, this complex has no legal agenda of its own. So, on the one hand, while the exigencies of pandemic control would be a slippery slope on which to base a campaign for the decriminalization or legalization of sex work, it counteracts the prohibitionist project, which altogether refuses to countenance the existence of sex work or sex workers.<sup>122</sup> Ironically then, the public discourse surrounding HIV/AIDS offers the most valuable space for discussions around sex work in India today. This is indeed the point of departure for my analysis of the ascendance of GF in relation to anti-sex work laws.

Soon after the discovery of the HIV virus in a sex worker in the city of Chennai in 1986, the Indian government proposed to pass the AIDS Prevention Bill, 1989,<sup>123</sup> which provided health authorities with invasive policing powers in the form of forcible testing, isolation of members of high-risk groups (including sex workers) and coercive tracing. It was only after a sustained campaign against this patently unconstitutional law by civil society organizations that the government withdrew it. This was replaced by a more considered process of policy formulation.

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visited Apr. 25, 2006) for further details.

<sup>122</sup> This is not unlike the role of the medical profession in the case of abortion, where much of the public and major organization support for the repeal of restrictive abortion laws came from elite professionals, particularly doctors. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 261–62 (1991).

<sup>123</sup> See Siddhartha Gautam, *The AIDS Prevention Bill, 1989: Protection or Prosecution?*, *LAWYERS*, Oct. 1989, at 7 (providing details of the Bill) (on file with author).

The early 1990s presented a window of opportunity during which both projects for regulatory reform and sociological studies of the sex industry had an open-ended quality to them. For example, when the Ministry of Human Resources Development commissioned a law school to draft legislative proposals for law reform, the effort yielded at least four drafts for discussion, all of which reflected complex combinations of partial decriminalization and legalization, especially in the mode of workers' rights supplemented by anti-discrimination measures for sex workers and their children.<sup>124</sup> Similarly, studies of sex industries carried out by sociologists<sup>125</sup> during this phase built upon the academic scholarship on sex work,<sup>126</sup> which had produced highly nuanced understandings of the sex industry especially on the choice/consent spectrum that leads women into sex work. None of this made it into feminist and regulatory debates on sex work in any meaningful way. There has, after all, always been in the discursive realm a sharp split, especially along disciplinary lines, on how to "make sense" of sex work and how to regulate it.<sup>127</sup> Ultimately, the experimental space for regulatory reform also soon came to be severely curtailed.

In January 1992, the Indian federal government established the National Commission for Women (NCW) as a specialist body, consisting of political appointees, to advise the federal government on issues relating to women. From 1996 onwards, the NCW began to examine seriously the question of sex work and trafficking. In the process, the NCW and corresponding state commissions for women at the provincial level commissioned a plethora of regional and national studies, typically carried out by NGOs. These were not necessarily feminist NGOs, but they invariably produced a fixed institutional narrative of the sex industry focused almost exclusively on brothel-based sex work in big cities, as well as of the most exploitative and violent mode of organization of sex work, where a trafficked sex worker was forced and beaten into sex work under conditions of bondage.<sup>128</sup> At the regulatory level, the NCW played an active role in seeking both domestic and regional law reform. The NCW called for the adoption of a regional treaty against trafficking in 1997. In January 2002, member nations of the South Asian Association for Regional Cooperation adopted

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<sup>124</sup> See Prabha Kotiswaran, *Preparing for Civil Disobedience: Indian Sex Workers and the Law*, 21 B.C. THIRD WORLD L.J. 161, 182–95 (2001) for a discussion of these alternatives.

<sup>125</sup> In particular, I have in mind studies like the one compiled by K. K. Mukherjee & Deepa Das. K. K. MUKHERJEE & DEEPA DAS, CTR. SOC. WELFARE BD., NEW DELHI, PROSTITUTION IN SIX MAJOR METROPOLITAN CITIES OF INDIA 119 (1996).

<sup>126</sup> See S. D. PUNEKAR & KAMALA RAO, A STUDY OF PROSTITUTES IN BOMBAY, WITH REFERENCE TO FAMILY BACKGROUND (2d ed. 1967); B. R. JOARDAR, PROSTITUTION IN HISTORICAL AND MODERN PERSPECTIVES (1984).

<sup>127</sup> This split needs to be acknowledged notwithstanding Shamir's caution against empirical work as capable of solving the intractable normative debates around sex work.

<sup>128</sup> The latest such report is from the National Human Rights Commission; SANKAR SEN & P. M. NAIR, NAT'L HUMAN RIGHTS COMM'N, UNIFEM, INST. OF SOC. SCI., A REPORT ON TRAFFICKING IN WOMEN AND CHILDREN IN INDIA 2002–2003 (2004) [hereinafter NHRC REPORT].

the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, which, interestingly, did not track the definition of trafficking in the U.N. Protocol.<sup>129</sup>

Meanwhile, at the national level, at a 1997 workshop organized by the NCW and a women's NGO, The Joint Women's Programme, the NCW claimed to adopt a human rights perspective which considered prostitution as a "violation of human rights, a hindrance to women's freedom, equality and struggle against exploitation and oppression."<sup>130</sup> This signified a major, visible shift in the state's understanding of this important "women's issue." Feminists had acknowledged all along that the ITPA and its predecessor, the Suppression of Immoral Traffic Act, 1956, embodied a politics of toleration of sex work following the general approach of the 1949 U.N. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, whereby sex workers or sex work were not sought to be abolished. The Convention and the 1956 Act were thought to target only trafficking, brothel-keeping, pimping, and procuring and did not intend to criminalize the activities of sex workers, although most countries did in fact penalize the sex worker as well.<sup>131</sup> Yet in light of the implementation of the SITA and ITPA, it became clear to Indian feminists that what was meant to be toleration of the sex worker had in fact turned out to be a toleration of customers under laws that did not explicitly punish the customer while punishing sex workers disproportionately and more drastically when compared to other stakeholders in the sex industry. This discriminatory impact of the law exposed the hypocrisy of the patriarchal state, suggesting its belief in a functionalist explanation for sex work, where sex work was viewed in hydraulic terms, as a safety valve for irrepressible male sexuality (which is why men were protected by the law) and to which sex workers took as a matter of choice (which is why she was often punished). The human rights approach of the NCW in this context was, for these feminists, a welcome change, articulating, as it did, a feminist politics understood as having only the interests of sex workers at heart while also enabling the formation of a distinctly Indian feminist voice in its repeated articulation of postcolonial difference in how the poverty of Indian women when compared to Western women warranted a different vocabulary for law reform. In the process, however, the NCW's human rights approach also supported the modes of argumentation of radical feminism more generally by viewing third

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<sup>129</sup> SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, <http://www.december18.net/traffickingconventionsSAARC2002.pdf> (last visited Apr. 25, 2006).

<sup>130</sup> Jyotsna Chatterji, *Introduction* to MADHU D. JOSHI, *WOMEN AND CHILDREN IN PROSTITUTION: HUMAN RIGHTS PERSPECTIVES (REPORT OF THE NATIONAL WORKSHOP)* i, vii (1997) [hereinafter *WOMEN AND CHILDREN IN PROSTITUTION*].

<sup>131</sup> JEAN D'CUNHA, *THE LEGALIZATION OF PROSTITUTION: A SOCIOLOGICAL INQUIRY INTO THE LAWS RELATING TO PROSTITUTION IN INDIA AND THE WEST* 42 (1991).

world women and children in sex work as sex slaves, forced as they were (presumably unlike Western women) into sex work via coercion, poverty, and abuse.

In terms of law reform therefore, the NCW reproduced concrete policy proposals for partial decriminalization suggested by a prominent radical feminist at the 1997 workshop<sup>132</sup> over that of complete decriminalization made by a sex radical feminist present at the workshop, but which the NCW understood as equivalent to legalization.<sup>133</sup> More specifically, this meant the criminalization of customers and changes to, but not the repeal of, those sections which were used the most against female sex workers, such as Sections 7(1) (prostitution in a public place), 8 (soliciting), and 20 (removal by Magistrate of prostitute from any place within his jurisdiction in the general interest of the public).<sup>134</sup> Thus, despite the general and self-admitted indifference of the Indian women's movement and feminist NGOs to the issue of sex work and to sex workers as a constituency,<sup>135</sup> when sex work did become a live policy issue for feminist debate, notwithstanding the presence of countervailing feminist voices, a certain version of feminist politics rose to governance mode when it found a foothold in an influential state body.

The NCW had set the tone for the federal government in several of its subsequent policy statements, replicating within them notions of the power of patriarchy, false consciousness, and the irreparable harms of sex work, collapsing all sex work into sexual servitude and slavery, assuming the impossibility of any sex worker consent, however circumscribed, given Indian women's poverty, and a refusal to distinguish between child prostitution and adult prostitution and between sex work and trafficking.

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<sup>132</sup> WOMEN AND CHILDREN IN PROSTITUTION, *supra* note 130, at 114. However, the exact nature of the changes was not elaborated on, although the radical feminist whose recommendations the NCW relied on proposed the deletion of Sections 7(1) and 8(b) and the removal of the discretionary powers of the Magistrate under Section 20 at the workshop. *Id.* at 47.

<sup>133</sup> For details of the workshop proceedings, see Kotiswaran, *supra* note 124, at 194.

<sup>134</sup> Section 7(1) penalizes both any individual who carries on prostitution, as well as the person with whom prostitution is carried on, in the vicinity of public places. Section 8(b) punishes anyone who solicits for the purpose of prostitution. Section 20(1) is a vaguely worded provision which allows a Magistrate to order the removal of a prostitute from any place within his jurisdiction, if he deems it necessary to the general interest of the public. The text of these sections can be found in G. B. REDDY, *supra* note 119, at 49 (section 7(1)), 56 (section 8(b)) and 88 (section 20(1)).

<sup>135</sup> CTR. FOR WOMEN AND DEV. STUDIES (NEW DELHI) & HUMANISTIC INST. FOR CO-OPERATION WITH DEVELOPING COUNTRIES (BANGALORE), WOMEN IN INDIA: REFLECTING ON OUR HISTORY SHAPING OUR FUTURE, 22–23 (Jamuna Ramakrishna ed., 1993) (proceedings of a Consultation on Gender and Development jointly organized by the Center for Women and Development Studies, New Delhi and the Humanistic Institute for Co-operation with Developing Countries, Bangalore) (on file with author). Of course, not all feminists agree; some feminists argue that it is the contemporary feminist movement alone that is claiming political rights and security at work for sex workers. Janaki Nair & Mary E. John, *Introduction to A QUESTION OF SILENCE? THE SEXUAL ECONOMIES OF MODERN INDIA* 1, 15 (Janaki Nair & Mary E. John eds., 1998).



As a result, by the mid- to late 1990s, with the NCW's influence on the very terms of the debates surrounding sex work, the range of regulatory options up for discussion became drastically limited, and, in response, the state typically oscillated between the *status quo* and partial decriminalization. In 1998, for instance, during the rule of the Hindu nationalist party, the federal Department of Women and Child Welfare formulated the Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children<sup>136</sup> (the "Plan of Action"), which recommended that the ITPA be reviewed to ensure that sex workers were not re-victimized by the law, but that customers, traffickers, pimps, brothel-keepers, parents/guardians, and others who colluded with them be made liable. The Plan of Action, however, stopped short of calling for the partial decriminalization of sex work, namely calling for the repeal of sections of the ITPA used the most against sex workers. Instead, using the powerful image of Indian sex workers as victims provided by Indian GF, the state expressed an unarticulated distinction between "victims of commercial sexual exploitation" who were willing to be rehabilitated, and therefore deserving of state help, and those victims who were not—thus reinforcing the conservative codes for female sexuality that GF were targeting to begin with. This victimization also became the basis for other egregious violations of sex worker rights proposed in the Plan of Action, such as the forced institutionalization of child victims and children of sex workers and the isolation of HIV-positive sex workers in the terminal stages of AIDS in separate shelter homes.<sup>137</sup>

In another instance, an amendment to the ITPA was posted on the website of the Ministry of Human Resource Development in 2003<sup>138</sup> proposing the deletion of Section 8, in addition to expanding the definition of "trafficking" to track word for word the definition in the U.N. Protocol, while increasing penalties against brothel-keepers and traffickers. Also, a 2004 study conducted by the National Human Rights Commission and supported by UNIFEM recommended that Section 8 of the ITPA should not be used to re-victimize "victims" but did not call for its deletion.<sup>139</sup> The most recent proposal, The Immoral Traffic (Prevention) Amendment Bill, 2005, reportedly approved by the Indian cabinet and set to be presented at the current session of the Indian parliament proposes the deletion of Sections 8 and 20 of the ITPA, substantially conforms the definition of trafficking to that in the U.N. Protocol, and criminalizes customers.<sup>140</sup> The amendment is rumored to be aimed at elevating India out of the Tier 2 watch

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<sup>136</sup> DEP'T OF WOMEN AND CHILD DEV., MINISTRY OF HUMAN RES. DEV., GOV'T OF INDIA, PLAN OF ACTION TO COMBAT TRAFFICKING AND COMMERCIAL SEXUAL EXPLOITATION OF WOMEN AND CHILDREN (1998) (published by Sanlaap, Kolkata as a pocket edition).

<sup>137</sup> *Id.* at 37.

<sup>138</sup> Amendment Proposed in Immoral Traffic (Prevention) Act, 1956, <http://wcd.nic.in/proamendment.htm> (last visited Apr. 25, 2006).

<sup>139</sup> NHRC Report, *supra* note 128, at 9 of the Executive Summary.

<sup>140</sup> The Immoral Traffic (Prevention) Amendment Bill (2005) (on file with author).

list of the U.S. Department of State where it has been for the second year in a row.<sup>141</sup> Thus, it is clear that unlike the early 1990s, with the advent of the NCW and the strands of feminism that it propelled into governance mode from the mid-1990s onwards, the options for legal reform on the table have become rather limited culminating in a proposal that now reconnects with the international and U.S. legal regime that American GFeminists have had so much to do with.

In this Section, I complicate the analysis of GF on two primary fronts. First, I problematize the claim of newness of GF's international projects in light of the colonial legal history of Indian laws on sex work. Second, I chart out a brief history of legislative debates in India over the regulation of sex work in the past twenty years, arguing that while the changes in the international political and legal realm have hastened the impulse for domestic legislative reform and shaped the final form of the proposed 2005 amendment, the claim of a causal link between them requires considerable qualification. Qualification is warranted on at least three fronts—the first is by highlighting the coexistence of at least two international regulatory projects, namely that of pandemic control, which is in deep tension with the other international regulatory project of GF.

The second qualification is that the receptivity of the Indian state to international law achieved through the efforts of American GF was enhanced by the rise in the domestic context of Indian GF. In other words, while acknowledging the importance of the international for the national, its power must not be overstated. Hence, while the international effects an enormous shift in the bargaining power of stakeholders at the national level, at some point, international mandates and international law become ensnared in a web of multiple legal regimes operative at the national and local levels that effectively lead the international to become just one more tool in the hands of the most powerful player in that context, typically the nation-state backed by Indian GF. The international is thus not determinative in any sense and, in its constant interactions with the national, alternates between the foreground and background.

The third qualification is that, in highlighting the role of Indian GF in this interplay, I do not want to overstate the political power that either the NCW, or the GFeminists that they heed, wield. This is because the NCW is, ultimately, an advisory body, and there are instances where their moral authority as spokespersons of women's interests is just that. For instance, despite a prolonged ongoing litigation and directions from the National Human Rights Commission, the Goa State Commission for Women, and the National Commission for Women to protect the rights of "commercial sex victims," in the Baina beach red-light area of Goa, the provincial government in Goa razed 800 to 1200 cubicles and shacks there, 400

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<sup>141</sup> See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT, *supra* note 30, available at <http://www.state.gov/g/tip/rls/tiprpt/2005/46610.htm>.

of which were being used for sex work.<sup>142</sup> Further, although new governance is usually associated with open deliberative modes of lawmaking, the political culture of the Indian state fosters little accountability and transparency. For example, despite the far-reaching effects of The Immoral Traffic (Prevention) Amendment Bill, 2005, a text of the amendment is not publicly available for debate, unlike earlier proposals to amend the ITPA. Instead, it was only after sex worker organizations read a news report wherein government officials claimed that sex worker groups had endorsed proposed amendments to the ITPA, that the groups could bring pressure on the concerned department to divulge the text of the amendment. Under such circumstances, GF cannot be said to be literally influential—but then perhaps they do not need to be. After years of shaping the “hearts and minds” of policy-makers, GFeminists could sit back to allow international and foreign laws to do their work.<sup>143</sup>

PART TWO: DEVELOPING METHODS FOR STUDYING  
GOVERNANCE FEMINISM

JANET HALLEY

As we have seen, participants in the ICTY process included governance feminists (“GFeminists”) eager to claim credit for achieving change in the law, and official participants eager to acknowledge feminist influence. A deep archive, marshalled and analyzed by Karen Engle, shows how a long-running debate about rape within feminism arrived at the ICTY and reached a temporary resolution there. Is wartime rape a specially gruesome feature of male domination, or is it paradigmatic of women’s subordination generally? Tracking this division, some feminist activists saw rape in the Yugoslav war not only as genocide, but as *Serbian* genocide, and indeed saw Serbian genocide as primarily rape (a “war against women”); while others saw “rape on all sides” of the Yugoslav conflict, some indeed seeing it as genocidal “on all sides,” as a heightened, intensified instance of “everyday rape” and male domination generally (and thus, again, as a “war against women”).<sup>144</sup> Engle has carefully mapped out the ways in which the ICTY statute, rules of evidence, charging practices, indictments and prosecutions, and Trial Chamber and Appeals Chamber decisions did and did not register an acceptance of feminist influence generally; she shows that feminist rule preferences sometimes made it into the new regime, and that, where they did not, it is often fair to see the ICTY as *mediating* between the two feminist camps in

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<sup>142</sup> Ravi Sharma, *Crackdown on a Beach*, FRONTLINE, July 17–30, 2004, available at <http://www.hinduonnet.com/fline/fl2115/stories/20040730005511300.htm>.

<sup>143</sup> For Halley’s discussion of such normative achievements of GF, see *infra* Conclusion.

<sup>144</sup> Engle, *Feminism and its (Dis)contents*, *supra* note \*, at 787.

its decisions. In my own work on the ICTY rules about rape and sexual violence, I draw gratefully from Engle's analysis and from our discussions.

My own contribution is an attempt to articulate a consequentialist reading of the new ICTY rules. To get there, I have paid particular attention to an interesting paradox in the feminist victories: many new rules that can be attributed at least in part to GFeminist legal activism increase the sovereigntist character of the rule structure, while others are patently managerial. Thus we see feminists taking victories in the form of strong, almost irrefutable presumptions, *per se* inferences, and satisfaction of the prosecutor's burden of proof on one essential element of a crime by her proof of another; but also in the form of rules that require searching trials of the facts, elaborate display of circumstances, and judicial consideration of many uncertainly decisive factors before liability can be attributed.

I am interested in these outcomes because they are part of the *legal instrumentality* of rape in humanitarian law now and because they may well have very different *effects in the world* than anticipated, I think, by the feminists who promoted them.

I am trying to get away from the view of IHL as a set of high-level announcements of the proper norms for warriors to obey. This model of prohibition presumes that it brings moral force as well as deterrent suasion to bear on the world and thus effectively reduces the incidence of the prohibited conduct—and does not do much else. Instead I assume that we will have, at least sometimes, some of the following: Holmes' rule-abiding bad man; chronic and empirically uncorrectable overenforcement (false-positive convictions and unintended deterrents) and underenforcement ("the tolerated residuum of abuse"); permissions springing into existence wherever prohibitions run out; thus legitimation of conduct falling outside the scope of prohibition; and moral denunciation of innocent (or "least detrimental") conduct falling within it.<sup>145</sup> I assume also that we are faced with a legal regime that is anxious to the point of paranoia about its legitimacy, cut off from any actual instruments of police-style enforcement,

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<sup>145</sup> Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 61, 457 (1897) (asking us to understand *as law*, the law as it would be seen by a "bad man . . . who cares nothing for an ethical rule which is believed and practiced by his neighbors [but] is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can"); KENNEDY, *supra* note 4, at 140–47 (analyzing the actual distributive effects of rules governing sexual abuse by taking into account "The Cost of Precautions Versus the Burden of Excess Enforcement," including "Costs to Women" and "Benefits to Men," and assessing them all in light of the "Bargaining [of men and women] in the Shadow of Sexual Abuse Law"; see Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL'Y 7, 36–38 (2004) for my argument that Kennedy's analysis falls short to the extent that it underplays the importance of benefits to women and costs to men); Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–44 (1913–1914) (mapping the "jural opposites" in which, for instance, "rights" produce "no-rights"—that is, one man's right produces another's no-right and one man's "privilege" generates another's "duty"—and "jural correlatives" in which one man's "immunity" generates another's "disability"); and Thomas, "Legitimation Critique," *infra*.

and doomed to operate *ex post*, long after the violence it would govern has ceased, and always in the wake of ideological shifts produced in part by that very violence.<sup>146</sup> How might the particular arrangement of sovereigntist and managerial feminist rule victories actually play out in a world envisioned to include these dynamics?

Here is a highly encapsulated version of the problematics I'd like to expose. Let's imagine that the sovereigntist legal imaginaire, within feminism, wanted to make rape easier to prove and to mandate the conclusion that, where it occurs between a combatant on one side and a civilian on the other in armed conflict, it violates existing humanitarian law. We all know that criminal systems heavily dependent on per se rules (in this they resemble civil strict liability regimes) provide a spectacular conversion between positive law and moral denunciation, facilitating moral judgment at the moment of rule announcement; they also make it easier to convict whoever is accused. But the resulting codification can be technical, chilly, and managerial: precisely *not* the hot moral message the sovereigntist imaginaire sought. Plus, it's easier to get false positive convictions, and thus for ideologically motivated players to challenge the legitimacy of the process. Paradoxically, then, "expertization" and the political opportunities offered by the actuality or danger of false-positive convictions can be deployed to sap normative energy from the rule. The moral clarity of sovereigntist rules comes at a price.

But the same can be said of managerial rules requiring lavish displays of all the facts, careful balancing of all the circumstances, and painstaking assignment of just the right liability to just the right defendant. Systems like that require highly individualized and particular assignments of liability for spectacular harm and fault and apply intense moral judgment when conviction is achieved. But in the meantime they also make it harder to convict people. Trials take longer, there will be fewer of them, and they will be ideologically more salient. The focus on individual guilt permits the actual defendants (not just ideologically motivated bystanders) to challenge the legitimacy of the forum. If they are convicted, they may look like scapegoats; if they are not, the due-process legitimacy of the forum scores a gain at the expense of the feminist norm. Feminism operating in this managerial mode can expect to propagate its power, again, only through the noisy paradoxicalities of the legal system it is using.

With an eye to opening analysis up to the possible "unintended consequences" of GFeminist rule victories in the ICTY, I am going to look briefly at a the trilogy of GF victories, *Čelebić*, *Furundžija* and *Kunarac* (often designated the "Foča case" because the crimes all occurred in that

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<sup>146</sup> For an elegant statement of these constitutive contradictions within and between IHL procedure and IHL normativity, see Martti Koskenniemi, *Between Impunity and Show Trials*, in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, VOLUME 6, at 1–35 (J. A. Frowien & R. Wolfrum eds., 2002).

region), specifically at their holdings recognizing that rape can be the actus reus of various higher-level crimes in humanitarian law, specifically here crimes against humanity and torture, and that enslavement with a sexual component is similarly a violation of IHL.<sup>147</sup>

*Rape.* To prove rape, the prosecutor must show that there was penetration, nonconsent (not force, coercion, or failed resistance), combatant status of the accused, and intent (that is, intent to penetrate).<sup>148</sup> Though the earlier ICTY cases required evidence of a rape victim's nonconsent, and after several cases had to be dismissed because the victims ultimately declined to testify, *Kunarac* inferred nonconsent from the "coercive circumstances" of armed conflict in the Foča region and presumed coercion on the basis of the victims' detention.<sup>149</sup> It's very possible that this holding will be understood just as it is written: detention in large camps constitutes coercive circumstances sufficient to negate the victim's consent. But *none* of the rapes charged in *Kunarac* happened in the large detention centers: *all* of them involved victims taken from such places (and possibly elsewhere) to apartments and homes in the region and raped there.<sup>150</sup> *Kunarac* was convicted, on one of his many counts, of raping D.B., whom he had removed from Partizan Sports Hall and taken to a civilian residence, over his objection that she initiated sexual contact with him. The coercive circumstances relied on by the Trial Court on this count were found entirely on the fact of "Muslim girls and women detained in Partizan and elsewhere in the Foča region."<sup>151</sup> And feminist advocacy in the Rome Statute's process may well have squared this precedential circle: the Elements of Crimes document provides that nonconsent can be established by—among other findings like "threat of force or coercion"—"detention . . . or taking advantage of a coercive environment."<sup>152</sup>

Do we see here the imprint of structural or even radical feminism? Feminists in these traditions have long argued that, in rape trials, force, resistance, and consent/nonconsent are the wrong issues because of coercive circumstances. Individualist feminism has opposed this view. It seems

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<sup>147</sup> Prosecutor v. Delalić (*Čelebić Trial Chamber Judgment*), Case No. IT-96-21-T, Judgment (Nov. 16, 1998) (commonly referred to as *Čelebić* case); Prosecutor v. Delalić (*Čelebić Appeals Chamber Judgment*), Case No. IT-96-21-A, Judgment (Feb. 20, 2001); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1991); Prosecutor v. Kunarac (*Kunarac Trial Chamber Judgment*), Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001); Prosecutor v. Kunarac (*Kunarac Appeals Chamber Judgment*), Case Nos. IT-96-23 & IT-96-23/1-A (June 12, 2002).

<sup>148</sup> *Kunarac Appeals Chamber Judgment*, Case Nos. IT-96-23 & IT-96-23/1-A ¶¶ 438, 442.

<sup>149</sup> *Id.* at ¶¶ 129–32, 218. For an astute discussion, see Engle, *Feminism and its (Dis)contents*, *supra* note \*, at 804–05.

<sup>150</sup> Prosecutor v. Kunarac, Case No. IT-96-23-PT, Second Amended Indictment (Oct. 15, 1999).

<sup>151</sup> *Kunarac Trial Chamber Judgment*, Case Nos. IT-96-23-T & IT-96-23/1-T ¶ 646.

<sup>152</sup> Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., Art. 7(1)(g)-1, Art. 8(2)(b)(xxii)-1, ICC Doc. No. ICC-Asp/1/3 and Corr.1 (2002) (emphasis added).

right to conclude that structural feminism will score a victory if it indeed makes nonconsent inferable from the coercive circumstances of armed conflict.<sup>153</sup>

But will that be good or bad for the expansion and legitimacy of feminist normativity? Will it help to reduce the amount of rape inside and outside of war? It depends.

First, note that the rule would allow conviction of men who could prove consent. It invites overenforcement. That is what sovereigntist rules like this are *designed* to do. Structural feminism almost by definition does not care about this possibility, but many other feminisms, especially individualist and sex-positive feminisms, care very much. Men—guilty ones, sure, but innocent ones too—are likely to object. Indeed, women who want to sleep with men involved in armed conflict—armed conflict which they may well oppose and in which they find themselves, against their will, on an “opposite” side—would also object. Nor is this a remote or speculative possibility: *Kunarac* held that an intrastate “armed conflict” governed by IHL extends through the “whole territory under the control of a party to the conflict, whether or not actual combat takes place there. . . . A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place.”<sup>154</sup> In an intrastate ethnic conflict affecting an entire region, the possibility of conflict spans the conflict zone. I will return to this problem shortly when considering the new rules of torture.

Note that the victory is not complete: for structural/radical feminism the relevant coercive circumstance was *male dominance*. Here, it is *national conflict*. What might this mean? By evacuating “meaningful consent” from the war zone—indeed from the entire region under internal dispute—humanitarian law carrying this rule might render it the normative rule for sex everywhere else and implicitly confirm the possibility of “meaningful consent” in most non-war (and non-prison) settings. Structural/radical feminism would then have won a battle but lost the war. Alternatively, IHL could become the vanguard for local law, which could adopt it or adapt it. Kotiswaran tells a story of the local intensification of radical feminist policy transferred from international to Indian law through international trafficking law; it could happen again. Radical feminism would then actually get the prohibition it wants—thus defeating other forms of feminism, and male interests, highly hostile to the overenforcement this rule might produce.

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<sup>153</sup> The ICTY and ICTR produced a range of holdings on the force/coercion/consent/nonconsent in the essential elements of rape. See ANNE MARIE L. M. DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 103–37 (2005). I’m tracing the possibilities of one rule advocated very intently by structuralist GFeminists working on both sides of the controversy detailed by Engle.

<sup>154</sup> *Kunarac Appeals Chamber Judgment*, Case Nos. IT-96-23 & IT-96-23/1-A ¶ 57.

There are also some pretty distressing consequences attaching highly *national* consequences to women supposedly protected by the rules that GFeminists are seeking. If consent is part of the legitimization of the sex that women have with men, it is important inside feminism that this rule requires criminal enforcement to presume that *women in the situation of these women can never consent*. Feminism has helped to construct a legal domain in which consent is crucial to personhood and in which (some) women are legally incapable of it. Moreover, the actual trials conducted under this rule need not require women's testimony about their lack of consent: proof from other witnesses of the fact of intercourse and the fact that the region houses armed conflict might suffice. I will look to another subrule, this one about torture, to spell out some of the consequences of that shift in the shape of the legal spectacle.

*Torture.* To be liable for committing an act of torture under the ICTY Statute and, through it, the Torture Convention,<sup>155</sup> the cases I am studying held that the accused must have done an act that caused intense suffering; intentionally; and in his or her official capacity for one or more of a list of purposes, which include punishment, coercion, discrimination, and intimidation.

Rape was prosecuted as the underlying act constituting torture in several of the ICTY cases. And there are several sovereigntist moves here. First, a holding that rape of a woman by a man per se causes her intense suffering.<sup>156</sup> And second, a holding that a combatant who has raped a civilian affiliated with the opposed entity would almost always be held to have acted for one of the prohibited purposes. Third, a finding that the impermissible purpose element of torture had been satisfied by the fact that rape was discrimination *based on sex*—which, if elevated to a rule, would allow a virtual per se finding of impermissible purpose in *all* male/female rape-as-torture cases.<sup>157</sup>

At the outmost reach of the GFeminist rules I am tracing here, liability for torture based on rape could be achieved on a showing of armed conflict in the region, combatant status of the accused, civilian status of the victim, intent to penetrate, the coercive circumstances of the armed conflict itself, and penetration, *punkt*.

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<sup>155</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

<sup>156</sup> *Kunarac Appeals Chamber Judgment*, Case Nos. IT-96-23 & IT-96-23/1-A ¶¶ 150–51; *Čelebić Trial Chamber Judgment*, Case No. IT-96-21-T ¶ 495.

<sup>157</sup> The court sets up what reads like a very-difficult-to-rebut presumption to this effect: “[I]t is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, on some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber it is inherent in situations of armed conflict.” *Čelebić Trial Chamber Judgment*, Case No. IT-96-21-T ¶ 495. The *Čelebić* Trial Chamber did find that Hazin Delić's rapes were forcible and had actually caused intense suffering, but, under the Chamber's rule, subsequent prosecutions could forgo proof on both elements. *Id.* ¶¶ 940, 941, 963, 964.



What might this mean in action? Let's consider the possible effects of making rape per se the cause of "intense suffering." This rule means that women need not testify to their intense suffering. It is possible to have trials, and convictions, without this testimony. This is a huge victory for some feminists—a full-bore legitimation of the idea that rape always causes intense suffering—at the expense of others, once quite numerous but now very hard to find, who think that this is not right.<sup>158</sup>

It also means that the actual women who suffered need not be consulted about what caused their suffering. Engle emphasizes the political gravity of this preclusion, and rightly so, I think. The risk that they might say that what caused them to suffer was not primarily their rapes but the death and disappearance of their lovers, husbands, fathers, brothers, sons, and friends; the destruction of their worlds; the emergence of a series of racist cultural orders coterminous with legitimated states—this risk need not be run. Feminism speaks for women on the ground.

At the same time, the per se rule could *increase* the value of rape as a weapon of war. If humanitarian law ratifies the idea that rape intrinsically causes intense suffering, it may lend legitimacy to the intense suffering that it causes. Even if it does not, the ideological game of war now has another way of punishing, intimidating, and coercing civilian populations: rape the women. We could get more rapes.

But wait! Remember that it is a *legal* rule and its per se form could also work the other way. The historical fact of intense suffering becomes legally "true" now through an act of bureaucratic management. This truth is produced not in an I/Thou encounter, but by a clerk in a back office staring into the bright blue screen of his computer. The centrality and urgency of the idea that rape causes intense suffering may be eroded, not fortified, by its installation in a per se rule.

And both of those effects could register in distinct locations: the urgency with which rape is understood to cause intense suffering could relax in Geneva, the Hague, the Security Council; while combatants far away come to see rape as a *more* valuable tool against their enemies, not only because they can exploit any rapes that happen to "their" women to demonize their enemies and consolidate their control over their own "side," but also because the rape, far from being disabled, has instead been weaponized.

Finally, let's look back over the rule structure generally, and consider the cascade of sovereigntist rules making it easier to convict combatant men of torture for the sex they have with civilian women on the "other side" of the conflict. It is a little surprising, but seems right: if the judge is willing to infer a lack of consent from the circumstances of armed conflict, and if evidence of penetration is available, we could see convictions for rape as

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<sup>158</sup> Pamela Haag, "Putting your Body on the Line": *The Question of Violence, Victims, and the Legacy of Second-Wave Feminism*, 8 DIFFERENCES 23 (1996).

torture on nothing more than intended sexual intercourse involving a civilian on one side of an armed conflict and a man who is an armed combatant on the other. Imagine that, now, in a case like that of the Yugoslav ethnic conflict: the rules contemplate convictions for rape as torture based on *sex* between male combatants and women in ethnically opposed groups. Recall that this nationalist conflict involved “ethnic cleansing” of what had been a cosmopolitan population, one characterized by a high degree of ethnic intermarriage and ethnic mixing; the poignancy of the example is sharp. The rule could end up ostensibly *requiring* cosmopolitan populations being swamped into nationalist wars which they oppose to *ethnically cleanse themselves*.

It is an astonishing convergence of the sovereigntist feminist prohibition impulse merging fully with nationalism. It bears a striking resemblance, if only coincidental, to the border-control-ratification effect of structuralist feminist success in international trafficking law apparent in Thomas’s contribution below. As Engle shows, however, the rules I have been describing were advocated not only by the “wartime rape” feminists but by the “everyday rape” feminists too.<sup>159</sup> Feminist advocacy across the board sought the most intense sovereigntist prohibition they could get. The possibility that they were ratifying ethnic differentiation, and providing a legal means to intensify it, does not seem to have occurred to them.

Nor did they evince concern that their sovereigntist rules could end up circulating in IHL not as an avenging sword, but as cool, technocratic management—as Foucaultian governance. Wars fought in full compliance with the new rape rules—wars without rape—might nevertheless be utterly violent. As Engle puts it, “In Omarska, . . . women were raped, but the lives of most were spared. Men were killed.”<sup>160</sup> Feminist ratification of the *special* status of women in war could easily be assimilated into a “women and children first” civility that remands men to intensified violence—or, just perhaps, could fully integrate women into that violence.

*Enslavement.* I am currently working on an equally intense focus of GFeminist activism in the ICTY and the Rome Statute negotiations: the effort to establish *sexual slavery* as a violation of the IHL. Here, it is striking that feminists persistently sought a multifactorial standard that would, in actual litigation, require lavish, detailed testimony about and adjudication of complex circumstances. This was precisely the opposite strategy to the one they adopted in rape and rape-as-torture, where they usually sought to establish conclusive rules. Clearly GFeminism makes no fetish of rules or standards. But it is clear that the maximum sovereigntist prohibition motivated GFeminists both times. And the debates as I understand them so far are just as indifferent as the rape effort to the multiple and complex ways in which the enslavement standard might operate in an IHL regime

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<sup>159</sup> See Engle, *Feminism and its (Dis)contents*, *supra* note \*, at 813.

<sup>160</sup> *Id.* at 814.

understood in legal realist terms. The possibility that sexual liaisons that women actually wanted will be held to be slavery leads to the possibility that IHL, having prohibited sexual enslavement in armed conflict, will—through its sheer ineffectiveness—intensify or rechannel the violence of war.

#### CHANTAL THOMAS

In this Section, I will introduce some concerns relating to initiatives in “global feminism” as “global governance.” Here, I note the tremendous gains that non-state actors have made, and at the same time, I note the concerns expressed by some commentators that non-state participants in governance remain insufficiently self-aware with respect to the potential problems arising out of their lack of accountability and their disproportionate influence over less influential local actors. This lack of self-awareness could be viewed a form of the insufficient acknowledgement of actual power and of the will to power that Halley describes.

#### I. GOVERNANCE FEMINISM AS “GLOBAL GOVERNANCE”

As Halley notes, the participation of the feminist movement in establishing war crime tribunals and combating sex trafficking marks feminism as a major participant in the phenomenon of “new governance.” A host of scholars have observed the rise of “new governance” as an important trend away from “top-down regulation” in which the state is the only player and toward a more fluid interaction between state actors and non-state actors in the formulation and enforcement of norms.

Global governance literature, like “new governance” literature, highlights the participation of non-state actors in formulating laws and policies.<sup>161</sup> Non-governmental organizations have achieved sweeping increases in both formal and substantive contributions to international law. The United Nations, for example, has formally recognized the right of NGOs to participate in a variety of lawmaking and administrative contexts.<sup>162</sup> The U.N. has also explicitly identified NGO participation as an important criterion of decision making under its auspices.<sup>163</sup> Other international bodies, such as the World Trade Organization, have proven less welcoming

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<sup>161</sup> See, e.g., Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997); Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. REV. 1335 (1999).

<sup>162</sup> See Charnovitz, *supra* note 161, at 266–67 (describing processes for establishing “consultation status” of NGOs to U.N. bodies).

<sup>163</sup> See INDEP. WORKING GROUP ON THE FUTURE OF THE UNITED NATIONS, THE UNITED NATIONS IN ITS SECOND HALF-CENTURY 36 (1995), available at <http://www.library.yale.edu/un/un1e3co.htm>.

of NGOs, but still grant at least limited access to negotiations and dispute resolution.<sup>164</sup>

In addition to recording this fundamental shift in regulatory style, governance literature is also quite often normative. Social theorists Jürgen Habermas and Richard Held have argued that participation by non-state actors in international lawmaking contributes importantly to preserving democratic politics from the corrosion of globalization.<sup>165</sup> James Rosenau, a founder of the “global governance” perspective, has denoted “glocalization”—the fragmentation and recombination of political movements and alliances—as presenting crucial opportunities for the enhancement of democratic participation in the increasingly turbulent plane of international affairs.<sup>166</sup>

There is much to support the argument that increased participation of NGOs has in fact improved the accountability, efficacy, and justice of international law and policy. In public health, for example, NGOs have been instrumental in transmitting crucial information and in lobbying for important changes in policy such as access to patented pharmaceuticals. In international finance, NGOs have played an important role in pressing for the forgiveness of debt owed by developing countries. The international human rights and environmental movements arguably would not exist without NGOs.

Feminists have acquired a central role in the operation of NGOs. They have succeeded in bringing issues to the table that likely would never have obtained a hearing otherwise. These changes are desirable. As a part of global governance, GF has played an important and often, in my view, beneficial role.

Amidst all of the enthusiasm for the “governance model,” however, some commentators have called for a reexamination of the role of non-state actors in global regulation. Against the view that NGO participation enhances democratic accountability in international law, these commentators question the democratic accountability of NGOs. NGO activity, the argument goes, can have the effect of “skewing” international debates toward the concerns of affluent, Western groups that can absorb the costs of effective organization at the international level.<sup>167</sup> This skewing effect arises

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<sup>164</sup> The WTO has allowed NGOs to submit amicus briefs to dispute resolution processes (although this process is strictly limited in practice); and also grants limited access to NGOs to observe plenary negotiations.

<sup>165</sup> JÜRGEN HABERMAS, *LEGITIMATION CRISIS* (1973); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (1998); DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995).

<sup>166</sup> *E.g.*, JAMES N. ROSENAU, *ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLAINING GOVERNANCE IN A TURBULENT WORLD* (1997); James N. Rosenau, *Governance in the Twenty-First Century*, 1 *GLOBAL GOVERNANCE* 13 (1995).

<sup>167</sup> William F. Fisher, *Doing Good? The Politics and Antipolitics of NGO Practices*, 26 *ANN. REV. ANTHROPOLOGY* 439 (1997).

in part because local groups recharacterize their own struggles in order to conform to the expectations and terms of influential NGOs.<sup>168</sup>

Other scholars have suggested that the problem with NGOs goes further than a lack of democratic accountability, touching on a deeper complicity between NGOs and the status quo they purport to reform. Cox, for example, has argued that NGO participation has arisen in the midst of a neoliberal *nebuleuse*—an atmosphere of market-oriented policy that has led to the dominance of market-liberalizing forces globally.<sup>169</sup> “Critical” social constructivists such as John Boli and George Thomas have further asserted that the connection between NGOs and market dominance is deeply embedded in a conceptual framework of liberalism that provides the normative support for both trends.<sup>170</sup> Because these scholars eschew neoliberalism as insufficiently attentive to distributive justice, they question the justice of this potential legitimation effect of NGOs.

Particularly in a global context, against a backdrop of increasing economic globalization and increasing global economic inequality, ongoing assessment of the consequences of GF seems critically important to the long-term success of feminist efforts. This Section ventures a methodology for assessing the consequences of feminist efforts in sex trafficking law and policy.<sup>171</sup> A legal realist assessment of GF highlights the importance

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<sup>168</sup> Clifford Bob, *Merchants of Morality*, 129 FOREIGN POL’Y 36, 37–38 (Mar.–Apr. 2002):

In a context where marketing trumps justice, local challengers—whether environmental groups, labor rights activists, or independence-minded separatists—face long odds. Not only do they jostle for attention among dozens of equally worthy competitors, but they also confront the pervasive indifference of international audiences. In addition, they contend against well-heeled opponents (including repressive governments, multinational corporations, and international financial institutions) backed by the world’s top public relations machines. Under pressure to sell their causes to the rest of the world, local leaders may end up undermining their original goals or alienating the domestic constituencies they ostensibly represent. Moreover, the most democratic and participatory local movements may garner the least assistance, since Western NGOs are less likely to support groups showing internal strife and more inclined to help a group led by a strong, charismatic leader. Perhaps most troubling of all, the perpetuation of the myth of an equitable and beneficent global civil society breeds apathy and self-satisfaction among the industrialized nations, resulting in the neglect of worthy causes around the globe.

<sup>169</sup> ROBERT COX, *Structural Issues of Global Governance*, in APPROACHES TO WORLD ORDER 237 (1996).

<sup>170</sup> JOHN BOLI & GEORGE THOMAS, *CONSTRUCTING WORLD CULTURE: INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS SINCE 1875* (1999).

<sup>171</sup> Max Weber, *Politics as a Vocation*, in THE VOCATION LECTURES, 32, 83 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004):

[A]ll ethically oriented action can be guided by either of two fundamentally different . . . maxims: . . . an “ethics of conviction” or an “ethics of responsibility.” . . . In the former case, this means, to put it in religious terms, “A Christian does what is right and leaves the outcome to God,” while in the latter you must answer for the (foreseeable) *consequences* of your actions. (internal citation omitted).

of identifying the *background conditions* and *distributive consequences* of the legal rules that have emerged from anti-trafficking efforts.

## II. DISTRIBUTIONAL CONSEQUENCES

In exercising their influence within the global governance of sex trafficking, governance feminists (“GFeminists”) may not be paying enough attention to the background rules and conditions, and the resulting distributional consequences, of the laws and administrative practices they condone.

In the area of sex trafficking, important unintended consequences of maintaining the status quo are three. First, the contribution of anti-trafficking efforts to the border control agendas of states—particularly rich states—at the expense of delivering actual aid to victims of trafficking, may actually harm the very people GFeminists intended to help; second, the focus of anti-trafficking efforts on certain narrowly defined harmful practices, all relating to sex work/prostitution, to the exclusion of other labor practices affecting migratory workers, may serve implicitly to legitimate the conditions of non-sex-based migrant labor; and third, abolition produces black and gray markets which may be *more* harmful to some workers; reformers, who have been quite indifferent to these consequences, may actually have exacerbated them.

Men are victims of trafficking, usually not, however, of *sex* trafficking. But even if we focus only on non-sex-based migrant work, we are not faced with a question of whether to carry a brief for F rather than M:<sup>172</sup> because women are disproportionately poor and vulnerable, these harmful practices probably disproportionately affect women. Thus, even for those committed to carrying a brief for F specifically, these non-sex-based harmful practices should, I think, get just as much attention as sex trafficking. Certainly feminists should be concerned about ways in which their reforms may generate more vulnerability for women in sex trafficking.

*Border control.* The legal instruments aimed against trafficking in persons, at both the international and the U.S. national levels, devote significant attention to shoring up territorial boundaries of “receiving” states. Characteristically, the U.N. Trafficking Protocol *requires* the repatriation of victims<sup>173</sup> but only *encourages* support services for those victims.<sup>174</sup>

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<sup>172</sup> JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

<sup>173</sup> 2001 Trafficking Protocol, *supra* note 2, Art. 8(1) (“The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.”).

<sup>174</sup> *Id.* Art. 7(3) (“Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons.”).

Within the United States, the VTVPA repatriates victims unless they qualify for “nonimmigrant” legal residence under the VTVPA’s “T visa” provision.<sup>175</sup> The VTVPA, however, only provides for 5000 such visas.<sup>176</sup> If 50,000 or more are trafficked, as the VTVPA itself estimates,<sup>177</sup> this does not seem to be a proportional response. Moreover, the provision of the T visa is contingent on the victim’s obtaining a certification of cooperation with law enforcement<sup>178</sup> to prosecute the trafficker. Congress itself has explicitly recognized that victims were having difficulty attaining even those T visas that have been authorized.<sup>179</sup>

The U.S. government’s oft-voiced concern about trafficking victims’ suffering is belied by the indifference that those victims face on the ground. The paltry response to helping victims of trafficking could be viewed as indirect evidence that victim assistance does not, in fact, take priority from the government’s perspective. The energetic response to prosecution of traffickers who bring these victims into the United States, coupled with the repatriation of the victims themselves, indicates that border control vastly trumped victim assistance as a policy priority.

In the process of participating in the formulation of U.S. and international anti-trafficking law, GFeminists might not have fully anticipated the importance of border control measures for victims of trafficking. It is possible that a relative inattention to the background conditions of displacement and migration generated a concomitant relative inattention to the status of these women as *migrants*. Here is how I reconstruct the story. The battle among GFeminist groups over consent probably not only distracted signifi-

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<sup>175</sup> Victims of Trafficking and Violence Protection Act, *supra* note 3, § 107. Section 107 allows for nonimmigrant status on “T visa” or “continued presence” grounds, which can be adjusted to permanent residence status if the victim is adjudged to be likely to suffer severe harm on removal from the United States.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* § 102(b)(1) (“Findings” stating that “approximately 50,000 women and children are trafficked into the United States each year”).

<sup>178</sup> *Id.* § 107 (conditioning “protection and assistance” of trafficking victims, *inter alia*, on certification by the Secretary of Health and Human Services after consultation with the Attorney General and the Secretary of Homeland Security, that they have shown themselves to be “willing to assist in every reasonable way in the investigation and prosecution” of trafficking, and defining “investigation and prosecution” to include assisting in the identification, location, apprehension of traffickers and testimony against them).

<sup>179</sup> TVPA Reauthorization Act of 2003, H.R. 2620, 108th Cong. § 2 (2003) (“Findings” stating that “victims of trafficking have faced unintended obstacles in the process of securing needed assistance” provided for under the TVPA); *id.* § 4 (authorizing immigration authorities to consider statements from local and state for certification requirement); *id.* § 6 (requiring the attorney general to submit to Congress regular reports on the number of trafficking provisions who have received visas and related assistance authorized by the TVPA).

On June 3, 2005, the U.S. State Department’s Office to Monitor and Combat Trafficking in Persons reported that, in fiscal year 2004, the Department of Homeland Security’s Vermont Service Center received 520 applications for T non-immigrant status, approved 136, denied 292, and held over 92 for further consideration. See <http://www.state.gov/g/tip/rls/tiprpt/2005/46618.htm> (last visited Apr. 25, 2006). Assuming the Vermont Service Center is where all this processing is concentrated (the report does not indicate any other processing center), T visas were clearly not reaching their target population.

cantly from advocacy for strong commitments to concrete protections for sex laborers and other trafficked persons, but also obscured from view the strong political push to strengthen border control until it was too late. Elsewhere I have rendered this dynamic as follows:

TABLE 1: DYNAMICS AND OUTCOMES IN THE TRAFFICKING  
PROTOCOL NEGOTIATIONS

<i>Position</i>	<i>Border Control / Repatriation</i>	<i>Voluntary Adult Sexual Labor</i>
Sovereignist	Strong Yes	Unclear
Structuralist	Weak No	Strong No
Individualist	Weak No	Strong Yes
Result	Yes	Unclear

In this rather grim account, the NGOs involved in reform of the Protocol and in the drafting of the VTPA were so busy fighting over discursive control of women's bodies that they forgot or did not see that one of the primary effects of these instruments will be to increase the control of the state over the location of those bodies.

*Legitimation Critique.* By focusing on sex trafficking, the anti-trafficking discourse runs the risk of legitimating by implication other practices. For example, non-sexual trafficking, although definitionally contemplated, remains out of focus in many of the implementation efforts under anti-trafficking law.<sup>180</sup> The U.S. State Department has explained that this imbalance stems in part from the greater difficulty in tracking non-sexual trafficking.<sup>181</sup> However, there are numerous international organizations and non-governmental organizations whose purpose is to do precisely that,<sup>182</sup> and their greater involvement could help to minimize this difficulty in measuring this vast set of additional phenomena.

In addition to non-sex trafficking, "non-trafficking" migrant labor may too often escape the attention of governments and advocates.<sup>183</sup> The U.S.

<sup>180</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT, *supra* note 30, at 243 (noting that in fiscal year 2004, the Department of Justice initiated prosecutions against fifty-nine traffickers, and all of those cases involved sexual exploitation).

<sup>181</sup> *Id.* at 6 (noting that labor exploitation within territories can be "hard to track").

<sup>182</sup> *E.g.*, the International Labor Organization.

<sup>183</sup> Although the United Nations established a Protocol on Migrant Smuggling, for example, much less appears to be devoted toward the institutionalization of that protocol and the development of surrounding discourse. For example, the U.N. Office on Drugs and Crime (UNDOC) has established a *Global Programme Against Trafficking in Human Beings* in furtherance of the Trafficking Protocol; a *Global Programme Against Corruption* in furtherance of the U.N. Convention Against Corruption; and a *Global Programme Against Transnational Organized Crime* for the Convention Against Transnational Organized Crime. No



State Department's definition of trafficking, already narrower than the U.N. version, excludes some of the most egregious abuses of migrant workers. For example, in Central Texas, migrant advocacy groups have devoted increasing energy to representing "undocumented" migrant workers who go intentionally uncompensated by their employers.<sup>184</sup> These advocates describe such practices as enslavement because workers are not compensated for their labor. Moreover, employers take advantage of the vulnerability these workers suffer as a result of their undocumented status.

So far, under State Department rules, if the employer simply chooses not to pay workers without threatening to turn them into immigration authorities, he is not considered to be "trafficking." Although the "coercion" is defined in the relevant texts to include either physical coercion or abuse of the law or legal process,<sup>185</sup> the State Department has stated that the latter category includes only "active" abuse,<sup>186</sup> such as explicit threats.<sup>187</sup> Practices such as these allow the employers to exploit the background rules shaping the worker-employer relationship, without directly engaging in legally cognizable coercion.

Thus, the definition of coercion in anti-trafficking law may perform a legitimating role for "non-trafficking," but nevertheless abusive, migrant labor practices in much the way that the definition of duress in contract law can permit and thus implicitly legitimate opportunistic or abusive employment practices that fall short of the definition.<sup>188</sup>

*Exacerbation of the problem.* Paradoxically, making prostitution illegal may tend to ensure that it is coercive in fact, by increasing the vulnerability of women who are prostitutes, and of entrenching the institutions of trafficking in part because of their intensified vulnerability.<sup>189</sup>

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equivalent program has been established, however, for the Migrant Smuggling Protocol. *See, e.g.*, U.N. Office on Drugs and Crime, *Crime Programme*, [http://www.unodc.org/unodc/en/crime\\_cicp.html](http://www.unodc.org/unodc/en/crime_cicp.html) (describing various programmatic efforts of the UNODC).

<sup>184</sup> *E.g.*, the work done by the Transnational Worker Rights Clinic of the University of Texas Law School (co-directed by Professors Sarah Cleveland and Bill Beardall, working with the Central Texas Immigrant Worker Rights Center and the Equal Justice Center (EJC) in Austin).

<sup>185</sup> The U.N. Trafficking Protocol defines trafficking to include the "the abuse of power or of a position of vulnerability"; the United States defines it to include the "abuse or threatened abuse" of law. *See* 2001 Trafficking Protocol, *supra* note 2. *See also* Victims of Trafficking and Violence Protection Act, *supra* note 3, § 103(2) (defining coercion to include "the abuse or threatened abuse of the legal process"); *id.* § 112 (defining "forced labor" to include the "abuse or threatened abuse of law or the legal process").

<sup>186</sup> U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT*, *supra* note 30 (explicitly excluding such practices).

<sup>187</sup> "Threatening to turn migrants into [sic] the authorities for immigration violations" is an explicit example in the State Department literature of a potentially "fear-inducing form of coerci[on]." *Id.* at 15.

<sup>188</sup> *E.g.*, Jay Feinman & Peter Gable, *Contract Law as Ideology*, in *THE POLITICS OF LAW* 373 (David Kairys ed., 1990). The legitimation function also delegitimizes commercial sex, definitionally or in implementation, as conceptually illegitimate. *See* Chantal Thomas, *International Law Against Sex-Trafficking*, in *Perspective*, *supra* note 32, at 28–29.

<sup>189</sup> *See supra* Introduction.

Economistic literature tends to show that abolition of illicit products and services can have the effect of exacerbating the harms they cause. Prohibition can increase the market equilibrium price, which increases the incentives for some suppliers (rather than deterring them).<sup>190</sup> Although the prospect of criminal punishment does deter some suppliers, it can also have the effect of shifting rather than reducing supply from small-scale or decentralized suppliers to highly organized ones that can take advantage of economies of scale to absorb the costs of deterrence and benefit from the black market price premium.<sup>191</sup>

The U.S. Congress has produced official “Findings” stating that “[t]rafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises.”<sup>192</sup> It is unclear, however, whether lawmakers have recognized the probable causal connection between prohibition and organized crime. The effect of shifting supply into organized crime not only means that the intended effect of deterrence is thwarted, but also that the harms associated with trafficking may be exacerbated. Organized crime may be more violent and more coercive than smaller-scale operatives.

The fact that prostitution is illegal in many countries—a status not required by the Protocol or the VTVPA itself but effectuated through supporting documents such as funding criteria maintained by the U.S. government both for other states and for NGOs<sup>193</sup>—can further exacerbate the vulnerability of potential trafficking victims.<sup>194</sup> “Threatening to turn migrants into the authorities for immigration violations” is an explicit example in the State Department literature of a potentially “fear-inducing form of coerci[on].”<sup>195</sup> By this logic, threatening to turn prostitutes in to authorities is also a form of coercion, but U.S. authorities seem not to have contemplated that this coercive dynamic might exacerbate the harms of trafficking that the VTVPA and related efforts seek to reduce.<sup>196</sup>

In addition to this active form of coercion, which would appear to meet even the formal requirements of the definition, there is the more diffuse but perhaps equally harmful possibility of “passive” coercion. I am thinking here of the space opened for many players—parents, husbands, customers, pimps, landlords, police, prison guards—to benefit from a legal sys-

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<sup>190</sup> Chantal Thomas, *Illegal Markets and International Trade*, FORDHAM INT’L L.J. (forthcoming 2006).

<sup>191</sup> *Id.*; see also Curtis Milhaupt, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41 (2000).

<sup>192</sup> Victims of Trafficking and Violence Protection Act, *supra* note 3, § 102(b)(8) (“Findings”).

<sup>193</sup> See *supra* Halley Part One.

<sup>194</sup> See the work of Hila Shamir and Prabha Kotiswaran, *infra*, for further discussion of this point.

<sup>195</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, *supra* note 30.

<sup>196</sup> One solution that is consistent with the abolitionist approach but cognitive of this danger is to criminalize the procurement of prostitution while decriminalizing its supply, so that “johns” and “pimps” are criminally liable but prostitutes themselves are not. For a discussion and case study of this approach, see *infra* Shamir Part Two.

tem that makes prostitutes vulnerable without the need for explicit threats by traffickers. This passive coercion, in which many different players but especially employers take advantage of the coercion inherent in the background rules, resembles and extends the exploitation of vulnerable workers more generally as discussed in the preceding Section.<sup>197</sup>

### III. BY WAY OF CONCLUSION

The discursive and practical formulation in much of GF too readily associates the incidence of coercion with commercial sex—whether to endorse (as with structuralists) or to oppose (as with individualists) that association. As the foregoing has tried to demonstrate, coercion in commercial life affects women in many varied and subtle ways, many of which are simply not captured in the existing discourse. The defense of specialization, here, seems insufficient: if we are carrying a brief for F, attention to the impact of background conditions, distributional effects and unintended consequences of the contemporary anti-trafficking legal framework should ensue. GF analytically precludes itself from noticing many unintended consequences of its favored reforms.

How to redress the rules to minimize these unintended consequences? One way would be to insist on the discursive formulation of “trade *by* women” as a legitimate category of commercial sex. It might actually help if we insisted on maintaining conceptual space for the possibility of voluntary commercial sex. While this space is created in the most recent legal definitions, it has been effectively expunged in much of the practical administration of anti-trafficking initiatives.<sup>198</sup> Legalizing prostitution is repugnant to many—some because they believe in the inherent degradation of it (on either “old” patriarchal or “new” feminist grounds); others because they believe that the distributional consequences will actually be worse for women under legalized prostitution. But if prostitution is not to be legalized, then anti-trafficking initiatives must address the background rules and conditions much more than they are doing already, to ensure that the intention of reducing trafficked prostitution and of protecting vulnerable workers bears out in practice.

The background rules and conditions could also be redressed in another way, which is to pay more attention to non-sex trafficking and to non-trafficking labor abuses. If there is too much overlap between “commercial sex” and “sex trafficking,” there is not enough with respect to “trafficking” and non-sex employment abuses. Here, the “critical” move might be to shift directions again, this time away from conceptual dichotomy back to conceptual overlap. Non-sexual commerce can be coercive, and it can be coercive in ways that are not necessarily contemplated in GFeminist defini-

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<sup>197</sup> See *supra* Introduction.

<sup>198</sup> See *supra* Halley Part One.

tions of coercion. For those concerned with combating actual harms, this is a problem that has to be addressed.

These recommendations are both moot and a tall order. They are moot because the current legal definitions actually recognize both of these points. But they are a tall order because the practical application of those definitions often ignores them, and because actually getting the practical application to do so will require a significant broadening of effort and a real rethinking of possibilities.

#### HILA SHAMIR

I have been studying the cases of regulation of sex work and sex trafficking in three national contexts: the Netherlands, Sweden, and Israel. My research proposes that each of the two *feminist* legislative approaches to sex work that were at work in these national cases—abolitionism on the one hand and legalization on the other—lead to some gains to some groups, but also to harmful unintended consequences to other stakeholders. The close look at these very different legal regimes in these national contexts suggests that Governance Feminism (“GF”)—well-intentioned as it may be—is pre-loaded with a strong tendency to overlook or underplay the costs it might cause to some and to fix its gaze on the benefits gained by others. An analysis of the feminist positions leads me to argue not that feminism inevitably or inherently ignores these costs, but that overlooking these costs has played an important part in traditions of feminist discourse.

In my research, I argue for the tremendous value of an inclusive distributional analysis to policy formation, one that encompasses the variety of affected interests and explores costs as well as benefits to all stakeholders. Yet, naturally, one cannot presume to foresee all the unintended consequences of a certain legal regime—reality often proves to be more complex than imagined, and many results are extremely hard to predict. But I would argue that some consequences are foreseeable and that it is thus crucial to invest energy in predicting and anticipating the distributive effects of a particular regime as much as we can. Instead of focusing on the benefits of a suggested policy to one group, we should attempt to engage in a wider analysis of a policy’s effects—negative and positive—on various groups and allow these pragmatic insights to influence our policy proposal.

Accordingly, my research is, methodologically, a distributional analysis of the three aforementioned national regimes of sex work. In such an analysis I map out the various stakeholders who are impacted by the legal regime: not only local and migrant sex workers, but also women who stopped working as sex workers due to a changing legal regime, men who buy sex services and men who do not, the women who live with the men who buy sex services and those who do not, and the ripple effects caused by women entering or exiting the sex industry on other labor markets. I sketch the effect of a certain legal regime on the interests of various stakeholders in-

volved, using a bargaining model to extract possible changes in the actors' market power. Many questions that are often left unexplored in feminist literature become significant in such an analysis: this analysis not only foregrounds the well-being of different groups of men and women, but also focuses on the effect of regulation on structure of markets, fluctuating prices, and employment alternatives—all crucial elements in understanding the welfare of different stakeholders.

In the following pages I will conduct a narrower distributional analysis, focusing particularly on the effect of various legal regimes of sex work on the well-being of sex workers, local and migrant. Rather than examining a wider range of stakeholders who are often outside the scope of feminist explorations, I will focus on women sex workers, a group that is at the center of the traditional concern of feminist policy makers who engage with the regulation of commercial sex. Thus, the distributional analysis I will attempt to briefly perform in this Section does not aim to take into account *all* relevant stakeholders, but to realize the full effect of feminist reforms on sex workers themselves, exploring the costs as well as the benefits of the different regulatory regimes.

### I. THREE REGULATORY REGIMES OF COMMERCIAL SEX

Sweden and the Netherlands are usually viewed as two countries in which the implemented legal regimes—abolitionism in Sweden and legalization in the Netherlands—most closely adhere to feminist agendas. My analysis of these regimes offers the proposition that each creates a different distribution of power among social actors; each offers significant gains to some, but also has some chronic downsides for others, gains and downsides that are *typical* of prohibitive and permissive approaches. This analysis does not assume that the Swedish and Dutch legal regimes have a unilateral effect on social realities and markets, but, as our introduction suggests, that various degrees of intensity of enforcement are exhibited by different authorities in each national context. While in my study of the Israeli “hybrid” regime below I pay more attention to these mediating factors, the possibility of regulative “inconsistency” should be kept in mind in my less detailed discussion of the “purer” regulative regimes of Sweden and the Netherlands. Nonetheless, these two regimes are highly committed both in theory and practice toward enforcement of their proclaimed feminist policies, and thus the study of these two opposite feminist regimes provides an opportunity to observe how GF, operating in very different ways, reaches similar unintended results. The following are some aspects of my research that led me to this observation.

A. *Abolitionism—The Swedish Model*

Since 1999, purchasing or attempting to purchase sexual services has been an offense in Sweden.<sup>199</sup> Sweden is the first country in the world to criminalize demand for prostitution and is celebrated by structuralists<sup>200</sup> for its commitment to the abolition of prostitution and, consequently, the elimination of sex trafficking.<sup>201</sup> Seeing prostitution and sex trafficking as one and the same delayed the treatment of trafficking as a separate phenomenon that requires special efforts and resources. Trafficking for the purpose of prostitution was criminalized as late as July 2002, and only in 2004 was a legislative amendment passed extending limited rights (residence permits, limited to the length of the trial, that include health care and some welfare rights) to trafficking victims willing to testify against their traffickers.

Swedish authorities proclaim that the new legislation led to a significant decrease in prostitution.<sup>202</sup> Moreover, the authors of various studies propose that Sweden became an undesirable trafficking destination because of the high risk for customers and traffickers.<sup>203</sup> However, there is no conclusive evidence that trafficking has actually decreased.<sup>204</sup>

Individualists in Sweden are highly critical of the outcomes of the reform.<sup>205</sup> They argue that sex work and trafficking did not disappear but rather went deeper underground and merely changed form.<sup>206</sup> The effect of this, individualists claim, is worse working conditions, lower pay, greater dependence on pimps, and higher health risks to sex workers.<sup>207</sup>

<sup>199</sup> Lag om förbud mot köp av sexuella (Svensk forfattningssamling [SFS] 1999: 408) (Swed.). For an unofficial translation of the act, see *Act Prohibiting the Purchase of Sexual Services* (1999: 408), available at <http://www.sweden.gov.se/content/1/c6/02/56/31/e0d64374.pdf>. For detailed information about the bill, see *Fact Sheet about the 1999 Swedish Law on Prostitution*, <http://www.prostitutionresearch.com/swedish.html> (last visited Apr. 25, 2006).

<sup>200</sup> I refer to “individualists” and “structuralists” in the sense Chantal Thomas uses these terms in Part One of this discussion. See *supra*.

<sup>201</sup> Janice Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand to Prostitution*, in PROSTITUTION, TRAFFICKING AND TRAUMATIC STRESS 315, 326–27 (Melissa Farley ed., 2003); Gunilla Ekberg, *The Swedish Law that Prohibits the Purchase of Sexual Services*, 10 VIOLENCE AGAINST WOMEN 1187, 1191 (2004).

<sup>202</sup> Raymond, *supra* note 201, at 327.

<sup>203</sup> See *id.*; Melissa Farley, PROSTITUTION, TRAFFICKING AND TRAUMATIC STRESS xi, xvi (2003); Ekberg, *supra* note 201, at 1200–01.

<sup>204</sup> Ekberg, *supra* note 201, at 1200. On the problem with evidence proving the decrease in prostitution in Sweden, see MINISTRY OF JUSTICE AND THE POLICE (NORWAY), LEGAL REGULATION OF THE PURCHASE OF SEXUAL SERVICES 18–19 (2004), available at [http://odin.dep.no/filarkiv/232216/Purchasing\\_Sexual\\_Services\\_in\\_Sweden\\_and\\_The\\_Nederlands.pdf](http://odin.dep.no/filarkiv/232216/Purchasing_Sexual_Services_in_Sweden_and_The_Nederlands.pdf).

<sup>205</sup> Press Release from the First Nordic Conference for Sex Workers in Oslo (Oct. 27–28, 2004), <http://www.bayswan.org/swed/nordicpros.html>.

<sup>206</sup> Petra Ostergren, *Sexworker’s Critique of Swedish Prostitution Policy* (posted Feb. 6, 2004), [http://www.swop-usa.org/news/Swedish\\_critique\\_world\\_news.html](http://www.swop-usa.org/news/Swedish_critique_world_news.html).

<sup>207</sup> *Id.*; see also Rosinha Sambo, Address by Rosinha Sambo to the Taipei Sex Worker Conference 2001 on the Situation of Sex Workers in Sweden, <http://www.bayswan.org/swed/rosswed.html> (last visited Apr. 25, 2006).

The Swedish regime is seen by structuralists as an ideal feminist regime and the legal *solution* to the problems of prostitution and trafficking, assuming that it will manage to eliminate both phenomena.<sup>208</sup> But prostitution and trafficking have not disappeared, and it is not certain that the Swedish policy will eventually lead to their successful elimination. It might be true that the sex market shrank as a result of the new regime and that some women left the sex industry. There is not enough available data about the fate of ex-sex workers (local and migrant), their new social status, economic position, and working conditions to determine the full positive or negative effects of the legal regime on their well-being. Even under the assumption that their situations have greatly improved, for the time being it is clear that the reform made the life of the remaining sex workers (local and migrant) much harder.<sup>209</sup>

Moreover, Sweden's approach to prostitution overlooks the special needs of trafficked women. Sweden has low rates of convictions in trafficking<sup>210</sup> and takes very little responsibility for the well-being, rehabilitation, and reintegration of victims of trafficking. The U.S. Trafficking in Persons Report points to an improvement in Sweden's victim assistance between 2004 and 2005. However, this report also notes that while in 2004 ten to fifteen victims of sex trafficking received shelter and assistance, in 2005 there was an incredibly small increase in the number of women assisted—a total of twenty women received government assistance.<sup>211</sup> This

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<sup>208</sup> Raymond, *supra* note 201, at 327; Marie De Santis, *Sweden's Prostitution Solution: Why Hasn't Anyone Tried it Before?*, WOMEN'S JUSTICE CENTER, [http://www.justicewomen.com/cj\\_sweden.html](http://www.justicewomen.com/cj_sweden.html) (last visited Apr. 25, 2006).

<sup>209</sup> An administrative report from 2001 about prostitution in the city of Malmo (Sweden) says "Those prostitutes who are still working in street prostitution experience a tougher existence . . . prostitutes lower their prices, are prepared to take more clients, and are prepared to give the service without protection. The health authorities express a fear of a dramatic development in a negative direction for the health of the prostitutes and the spread of venereal disease." This report, and others that confirm this assessment, are quoted in MINISTRY OF JUSTICE AND THE POLICE (NORWAY), *supra* note 204, at 13–14.

<sup>210</sup> Sweden's low conviction rate in crimes of trafficking illustrates that a discrepancy between the law in the books and the law in action can be found in the Swedish regime as well. Although the regime is motivated by a structuralist feminist position, according to which there can be no meaningful consent to prostitution, judges often view a woman's consent to sex work as canceling the "improper means" requirement that must be proven to achieve a trafficking conviction. See U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT*, *supra* note 30, at 205 ("Although initial consent would appear to be irrelevant under the anti-trafficking law, in practice, judicial interpretation of the "improper means" criteria makes it difficult to obtain convictions under the law.").

This is yet another example that pure abolitionist regimes are rare, and that even the "purest" of intention leads to unintended consequence when the feminist regime is implemented and interpreted by various state agencies following agendas that might be disharmonious with the feminist one.

<sup>211</sup> *Id.* at 206. The low numbers of assisted women cannot be explained solely by low numbers of migrant sex workers in Sweden. Though the numbers are significantly lower than in the Netherlands, in 2000 Swedish police gave a moderate estimate of 400 foreign women in prostitution in Sweden, while some sex workers' organizations estimate that the real number is several times higher.

approach might change under a new national action program that is underway.<sup>212</sup> Until then, Sweden can be characterized as promoting a sovereigntist agenda: tightening border control and enhancing police activity.<sup>213</sup> The strict abolitionist regime protects some women but exposes others to the harms that accompany illegality, including marginalization and stigmatization.

### B. Legalization—The Dutch Model

In 2000, the general ban on brothels was lifted in the Netherlands so that “operating a commercial organization of (voluntary) adult prostitution was decriminalized.”<sup>214</sup> As a result, in the legalized segment of the sex industry, sex workers have access to pension schemes, social security benefits, and state organized health care. Sex workers also gained the right to sue in courts for violations of their employment or service contracts. The legality of sex work also introduced various “interventionist” obligations on sex workers, such as the duty to carry identification documents that until 2005 did not apply to the population at large.<sup>215</sup>

The Dutch sex work regime takes a decentralized administrative approach, based on municipal licensing of sex establishments. In virtually all municipalities, sex work is allowed only in licensed businesses. Regulation of sex establishments is achieved through various local authorities in addition to the police, such as the fire department, the building control department, municipal medical and health services, and the tax and customs administration.<sup>216</sup> Licensing requirements impose various restrictions on the operation of sex establishments by regulating the location and hours of operation, determining who can be employed, prohibiting abuse and coercion, and so on. Violation of these restrictions can lead to various penalties, ranging from fines to withdrawal of the business license. Among other restrictions, sex work employers are not allowed to employ non-EU nationals.<sup>217</sup> If a migrant sex worker is thought to be a victim of trafficking,

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<sup>212</sup> The national action program aims to formulate proposals for further measures to combat prostitution and trafficking, proposals to increase protection and aid to victims of prostitution and trafficking, to conduct a survey of penal measures and of the relevant developments within the justice system, police and social services, and propose special measures to counteract the demand for sex work. For a description of the program, see <http://www.sweden.gov.se/sb/d/4096/a/26488> (last visited Apr. 25, 2006).

<sup>213</sup> For a discussion of the sovereigntist agenda, see Thomas, *supra* note 32, at 57–58.

<sup>214</sup> See *Trafficking in Human Beings: Third Report of the Dutch National Rapporteur*, *supra* note 88, at 13.

<sup>215</sup> See Compulsory Identification, [http://minbuza.nl/default.asp?CMS\\_ITEM=29564267E75D4C2588CEDCD140433EA9X3X48030X2](http://minbuza.nl/default.asp?CMS_ITEM=29564267E75D4C2588CEDCD140433EA9X3X48030X2) (describing the Dutch *Compulsory Identification (Extended Scope) Act*, which began being enforced on January 1, 2005) (last visited Apr. 25, 2006). Since the passage of this act, the duty to carry identification documents applies to the population at large.

<sup>216</sup> See *Trafficking in Human Beings: Third Report of the Dutch National Rapporteur*, *supra* note 88, at 13.

<sup>217</sup> It should be noted that EU citizens may work in the Netherlands (in any type of work) without a special work permit. However, there is no recognized way for a non-EU citizen



she receives a three-month visa to consider whether to testify against her traffickers. If she decides to testify, she is granted a limited residency permit (including the right to work and eligibility for various benefits such as accommodation, medical care, and legal assistance) that can be prolonged until the end of the trial, at which stage she is deported.<sup>218</sup> In 2002, 147 women received this status, and there have been moderate annual increases since then.<sup>219</sup>

Individualists generally support the direction of the Dutch regime, though some criticize it for the harm it inflicts on non-EU migrant sex workers, making them “second class” workers within the underclass of sex workers,<sup>220</sup> or for the excess regulation sex workers have to endure. The harshest criticism of the legalization regime in the Netherlands naturally comes from structuralists. Structuralists claim that the Dutch case proves that legalization does not lead to the empowerment of prostitutes but merely to the expansion of their exploitation, making the Netherlands a safe and lucrative destination for traffickers.<sup>221</sup>

Although the Dutch case is the closest existing example of the implementation of the individualist regime, it is far from realizing the individualist ideal, either due to disharmonious implementation by different agencies within the different municipalities, a lack of collaboration between administrative authorities and sex businesses,<sup>222</sup> or the on-going exclusion and marginalization of many sex workers.<sup>223</sup> The Dutch regime manifests an important individualist failings: harm to (non-EU) migrant sex workers. Given that legalization will always exclude some workers (i.e., will always maintain an illegal sector), the Dutch case helps to clarify the fact that

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to obtain a working permit to work as a sex worker in the Netherlands.

<sup>218</sup> See U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT*, *supra* note 30, at 164 (describing section B-9 of the Aliens Act Implementation Guidelines as well as regulations enacted in April 2005 that allow B-9 permit holders the right to work).

<sup>219</sup> See *Trafficking in Human Beings: Third Report of the Dutch National Rapporteur*, *supra* note 88, at 61.

<sup>220</sup> Jo Bindman & Jo Doezema, *Redefining Prostitution as Sex Work on the International Agenda* (1997), available at <http://www.walnet.org/csis/papers/redefining.html#3d>.

<sup>221</sup> Raymond, *supra* note 201, at 317. The Dutch government denied these claims. The Rapporteur’s 2005 report accepts that there was an increase in prostitution since the ban was removed, but not an increase in trafficking. *Trafficking in Human Beings: Third Report of the Dutch National Rapporteur*, *supra* note 88, at 83, 91.

<sup>222</sup> The regulatory role of the various administrative bodies within the municipalities sometimes leads to disharmony in standard setting and enforcement that in turn leads to diverging working conditions for sex workers. Further, some municipalities gained the trust of prostitution businesses and sex workers but some did not. Municipalities that failed in gaining this trust are generally less successful in implementing the licensing system, leading to worse working conditions of many sex workers in the municipality. See MINISTRY OF JUSTICE AND THE POLICE (NORWAY), *supra* note 204, at 31–32, 42–44. These failures illustrate the difficulty in reaching regulative consistency in a decentralized regime, and once again proves the difficulty of any feminist (or other) regulative regime to live up to its proclaimed normative agenda when it comes in touch with social and legal realities.

<sup>223</sup> Bindman & Doezema, *supra* note 220 (“stigma, and with it marginalization and exclusion from human rights protection, continues to be a significant aspect of the lives of sex workers in the Netherlands.”).

the challenge such regulation faces is really one of distribution between differently situated groups of sex workers. The Dutch case shows that even after legalization, an illegal sector remains, and those who work in it suffer the harms of working in an underground, unregulated market.

This close look at the two legal regimes suggests that, although each regime influences sex work and trafficking differently, both are flawed in similar ways. The Swedish abolitionist regime is paternalistic and harmful to sex workers, exposing them to further marginalization and exploitative working conditions since the industry is pushed underground.<sup>224</sup> The Dutch legalization regime leads to excessive regulation of sex workers and further marginalization of migrant sex workers, creating an underclass within the already stigmatized and vulnerable class of sex workers, and possibly increases sex trafficking. It seems that both feminist regimes carry costs as well as benefits; neither is *necessarily* beneficial to women and definitely not to *all* women.

One cannot expect policy makers to be able to foretell all possible distributive results. For example, it could have been hard to anticipate that the Dutch law would lead to a “take-over” by a few sex businesses in Amsterdam’s red-light area, leading to consolidation of the industry. But other results could have been more easily predicted, such as the micro-regulation of the sex industry in the Netherlands,<sup>225</sup> or the retreat of the illegal parts of the sex industry (in both countries) to underground operation. It is true that, since the harms became evident, there have been attempts to provide some help for the sex workers who bear the costs. In the Netherlands, besides the relatively generous B-9 regulation, the government initiated a wide-reaching information campaign informing migrant sex workers and trafficked women of their rights and options, offered Dutch language lessons for former migrant sex workers, and funded various programs in sending countries. Sweden also funded information campaigns and somewhat improved its protection of victims of trafficking.<sup>226</sup> But these efforts are not as coherent and effective as a reform that accounted for these costs in ad-

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<sup>224</sup> Some might argue that pushing the regime underground might not necessarily be harmful to all sex workers, and that some might benefit from it, due to, for example, higher prices for their services. While it is possible that some sex workers find benefits in this situation, research tends to show otherwise: when pushed underground, the industry tends to be dominated by criminal networks; more intermediaries are involved and sex workers tend to receive less of the profits; there seems to be an “adverse selection” toward more violent clients; working conditions tend to worsen due to constant change of locations and the increased use of less convenient or comfortable locations; and finally, some research suggests that the social stigma attached to prostitution intensifies.

<sup>225</sup> For some of the problems posed by micro-regulation, see MINISTRY OF JUSTICE AND THE POLICE (NORWAY), *supra* note 204, at 30–32. For a general discussion of hyper-regulation of individualist permissive approaches, see Nathaniel Berman’s contribution to *Subversive Legacies: Learning From History/Constructing The Future: Round Table Discussion: Subversive Legal Moments?*, 12 TEX. J. WOMEN & L. 197, 216–17 (2003).

<sup>226</sup> See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, *supra* note 30, at 164–65, 205–06.

vance would be. These after-the-fact reforms can be seen as insufficient or superficial when the state is simultaneously causing the harms through its policies while trying to remedy them by providing only partial, temporary rights, and limited information to victims of trafficking. Acknowledging that legal regulation reshuffles the power structure to the benefit of some and at the cost of others could possibly lead feminist policy makers to formulate proposals that do not merely remedy harms ex-post, but rather ex-ante limit (or avoid, if possible, altogether) some of the tradeoffs.

### C. A Hybrid Regime—Israel

Israel presents an interesting hybrid of regimes of sex work. On the one hand, the Israeli legislature is committed to an abolitionist approach that criminalizes procurers and traffickers and prohibits brothel operation and ownership.<sup>227</sup> On the other hand, prostitution is unofficially institutionalized and regulated in Israel.<sup>228</sup> As the discussion of the Swedish and Dutch regimes illustrates, a gap may open up between the legislative intent and the legal reality, even in the “purer” regimes. Yet the case of Israel provides an opportunity to study a context in which hybridization does not merely occur by a disharmony between branches of the state, but rather is heavily institutionalized, visible, intended, and pervasive. Although prostitution in Israel is not fully decriminalized or legalized, it is widely tolerated. This toleration is institutionally manifested in a variety of ways, including an attorney general’s directive asserting that police will not investigate “regular” prostitution unless there is suspicion of aggravating circumstances (such as trafficking);<sup>229</sup> court decisions recognizing the pimp/prostitute relationship as an employment relationship;<sup>230</sup> National Insurance Institute recognition of victims of trafficking as “workers” for the purpose of receiving worker’s injury compensation;<sup>231</sup> and the operation of a generally un-intruded-upon yet unofficial “red-light” district. Each of these “deviations” from the penal code’s abolitionist position can produce complex sets of effects on sex markets. One cannot assume that this de facto decriminalization translates to straightforward normalization of the sex industry. As my analysis aims to illustrate, depending on various factors, these insti-

<sup>227</sup> Penal Code 199-203, 5737-1977, 864 S.H. 226 (1977).

<sup>228</sup> Tehila Sagy, *The Invisible Regulation of Prostitution in Israel*, in *INQUIRIES IN LAW, GENDER AND FEMINISM* (Dafna Barak Erez et al. eds.) (forthcoming 2006) (manuscript on file with author).

<sup>229</sup> Investigation and Prosecution Policy in Offences of Prostitution and Trafficking in Persons for the Purpose of Prostitution, 2.2 Att’y Gen. Directive, *supra* note 107.

<sup>230</sup> NLC 56/180-3 Eli Ben-Ami Mechon Classa v. Rachel Glitzcensky, 31 PDA 389 (1998) [hereinafter *Ben-Ami*]. Employment protections are of universal application in Israel and can be extended to undocumented migrant workers.

<sup>231</sup> In one case, a migrant sex worker who was injured when the brothel she worked in was set on fire was found to be eligible for worker’s accident compensation by the national insurance institution. This case was presented by the worker’s lawyer, Ahuva Zaltsberg, at the Oppression-Compensation Conference held at Tel-Aviv University in July 2004.

tutional divergences can lead to intensification or relaxation of restrictions on the sex industry, and, consequently, to different costs and benefits to relevant stakeholders.<sup>232</sup>

From the point of view of GF, the Israeli regime embodies discursive and material ambiguity. On the symbolic level the state acknowledges the harms of prostitution and calls for its abolition. On the material level state institutions attempt to ensure minimum employment law protections and other welfare protections for workers of this illegal industry. Structuralists see this situation as deeply hypocritical—the state fails women by not following its promise to protect them from the violence of prostitution through abolition. Individualists see this regime as problematic since it marginalizes sex workers and prevents their full inclusion under social legislation.

In my research elsewhere, I articulate and assess the costs and benefits of the Israeli regime with regard to four groups of stakeholders—men, women who do not engage in sex work, local sex workers, and migrant sex workers. Here, to exemplify how such an analysis might be elaborated, I will briefly perform this thought experiment, only this time regarding the interests of migrant sex workers alone. To do this, one first must assume that migrant sex work involves not only costs, but also, at times, benefits to the women involved. Beyond the well-documented and disturbing costs induced by migrant and trafficked women's vulnerability upon migration and the widespread occurrences of exploitation and violence in such cases, some individualist researchers have suggested that migrant sex workers can reap benefits from this experience “in terms of assets (social, cultural, financial) they acquire as migrants that enables them to affect change through both personal and community empowerment.”<sup>233</sup> The question a cost-benefit analysis will present is therefore not only what role the regu-

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<sup>232</sup> One example of the potential such institutionalized toleration has for both harmful and beneficial consequences for sex workers can be found in the attorney general's directive. The fact police (and prosecutors) are directed not to investigate and prosecute sex establishments in the absence of aggravating circumstances leads, in Israel, to a generally non-interventionist status-quo under which the red-light areas thrive. This can be seen as a benefit to sex workers since the sex industry is above ground and thus safer. But it can also be seen to produce costs, such as tolerated violence of clients toward sex workers, or instances when police use their discretionary power of investigation to extort pimps and sex workers (either demanding bribes or sexual favors), thus making use of the bargaining chip a *de jure* abolitionist regime endows them with. Particularly vulnerable to such extortions are migrant sex workers and trafficked women and their employers (because of their illegal status), as well as those who work on the streets (who are often drug addicts). Yet it should be noted that in the Israeli case, since the whole system shifted in the direction of non-enforcement—that is, non-enforcement is generally not negotiated the level of the individual corrupt policeman, but is rather mandated by explicit prosecution policy—this happens mainly in the margins, and particularly when the police is in touch with vulnerable groups such as street prostitutes and workers who are illegal residents. For discussion of such police corruption in relation to trafficked women, see NOMI LEVENKRON & YOSI DAHAN, *TRAFFICKING IN WOMEN IN ISRAEL—NGO REPORT* 40–42 (2003).

<sup>233</sup> Agustin, *supra* note 100, at 111 (quoting Katherine Gibson et al., *Beyond Heroes and Victims*, 3(3) INT'L FEMINIST J. POL. 365–86 (2001)).

lative regime plays in enabling or preventing the costs, but also what role it plays in enabling or preventing migrant sex workers from obtaining benefits. I believe a cost-benefit analysis is a particularly useful tool in such a policy analysis because it allows recognition of the harms caused by various social practices and regulatory regimes while portraying women as strategic agents rather than as helpless victims.<sup>234</sup>

When treating sex work migration as part of the wider phenomenon of worker migration, and under the assumption that most “trafficked” women in Israel knew that they were to work as sex workers (even if they often were not aware of the exploitative working conditions),<sup>235</sup> the Israeli legal regime might seem *relatively* beneficial for migrant sex workers, in comparison to the “purer” feminist regimes explored above in the contexts of Sweden and the Netherlands. While migrant sex workers are vulnerable to deportation since they are illegal residents, due to weak enforcement, the actual risk of deportation is relatively low. The women are not eligible for health insurance since they are not residents, but they can receive social security benefits in case of work-related injury since that entitlement does not depend on a person’s residential status. Migrant sex workers are also theoretically protected by existing workers rights due to their universal application.<sup>236</sup>

Since neither the penal code nor the courts view consent as a factor in the anti-trafficking provision, a migrant sex worker is presumed to be a victim when picked up by police. This has the potential cost, mentioned above by Halley, of precluding women from the process of defining their experiences, their harms (if there are any), and the causes of those harms. But at the moment of confrontation with the Israeli authorities, this can be a strategic benefit. As a victim of trafficking, a woman is eligible for shelter, counseling, health insurance, and a small allowance, benefits that other undocumented workers, even those who have been severely exploited, do not have. When women do not agree to testify, their situation more strongly resembles that of other undocumented migrants—i.e., they will be promptly deported—yet it is still somewhat improved due to the *a priori* assumption of victimhood, the relatively wide awareness of their possible exploitation, and an improved institutional reaction to their migratory situation.

However, migrant sex workers are still a highly disempowered group in Israel. As illegal migrants, working in a stigmatized industry, they often have a low sense of entitlement and few resources to mobilize as a

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<sup>234</sup> The merits of such a methodological approach will be further developed in the next Section.

<sup>235</sup> Israeli NGOs estimate that 70% of women trafficked into Israel know they are being recruited for sex work. NOMI LEVENKRON ET AL., *supra* note 102, at 6.

<sup>236</sup> CA (BS) DM 1040/01 Eric Tomsanga v. Ambassador Hotel, [2001] IsrDC ¶ 46 (unpublished). See also workers’ rights pamphlet distributed by Kav Laoved, an Israeli NGO that provides legal aid to migrant workers, *available at* <http://www.kavlaoved.org.il/word/zchuton060904.html> (last visited Apr. 25, 2006).

group. The situation of migrant sex workers is often transitory or perceived as such by the workers themselves. Thus, they lack a group identity that might enable organization.<sup>237</sup> Further, any attempt to organize sex workers in Israel will most likely exclude “illegal” migrants since their illegal status hampers many governmental entitlements and weakens any claim for institutional recognition as anything other than victims. As the case of the Netherlands proves, when the sex industry is regulated, the situation of migrant workers generally worsens.

Both the structuralist/abolitionist and the individualist/regulative approaches fail to provide a solution to the vulnerable position of migrant sex workers. Both are unsuccessful on this front since neither calling migrant sex workers victims nor normalizing sex work can overcome migrant sex workers’ basic illegal status.<sup>238</sup> Given that a purely abolitionist regime, like the Swedish one, drives sex work underground and renders sex workers, particularly migrant sex workers, more vulnerable, and that the legalization regime tends to further exclude migrant sex workers, the Israeli regime seems to be an improvement upon both. Migrant sex workers are entitled to limited worker and social rights, workers’ chances of being immediately deported are relatively low, and there is an institutional mechanism to aid them in case of exploitation. Also, since the sex industry is partially institutionalized, the industry is run “above-ground” and is therefore less dangerous. Although the wide zone of toleration is problematic in that it tolerates high levels of abuse and exploitation, given that migrant sex workers are a particularly vulnerable group, it seems that, in a migratory (non-trafficking) situation, it still might have relative benefits in relation to the implemented paradigmatic feminist regimes in Sweden and the Netherlands.

The Israeli regime—although from a feminist point of view not necessarily “well-motivated”—appears to have a complex set of costs and benefits that cannot be recognized using the relatively static and somewhat simplified prohibitionist (structuralist abolitionism) or permissive (individualist legalization) conception of law and its effects held by governance feminists (“GFeminists”). As the analysis above suggests, relaxing the *traditional* feminist assumptions and focusing on the costs and benefits of the regimes to different groups of sex workers reveals the costs feminist legal regimes cause to (migrant and local) women working in the illegal economy. Further, through closer attention to the harms caused by the exclusion inherent to a state of illegality, such an analysis allows the exploration of possible regulative alternatives that attempt to soften the selective protection offered by strict legal regimes.

The Israeli sex work regime is highly problematic in that it generates uncertainty, tolerates violence, abuse, and exploitation of women and in-

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<sup>237</sup> See Agustin, *supra* note 100, at 110.

<sup>238</sup> See *id.* at 112.

duces stigmatization of sex work. Yet it also enables moments of humane treatment of sex workers while not “buying in” to the liberal discourse of free choice. This hybrid regime is at once both structuralist and individualist and is therefore neither. To be thoroughly understood it calls for the use of a different set of analytical tools. It provokes a more intricate analysis that examines the costs and benefits to different groups from the law in the books *and* from the law in action. This brief cost-benefit analysis suggests that the Israeli hybrid regime, although constructed inadvertently and with little feminist input, might be as beneficial (or more beneficial) to many sex workers as the two pure feminist regimes are.

## II. METHODOLOGY—DISTRIBUTIVE (COST-BENEFIT) ANALYSIS

In my research, I try to develop a cost-benefit analysis of the legal regimes of sex work. I believe that this analytical tool has two main strengths: it manages to avoid the problems raised by contradictory empirical data, and it allows a more complex, multi-dimensional understanding of the motives and interests of various actors and a more accurate assessment of the effects of legal reform. I will briefly expand on both qualities.

### A. *The Empirical Problem*

One problem often mentioned by policy makers in shaping legal regimes of sex work and sex trafficking is the lack of reliable empirical data.<sup>239</sup> It is difficult to obtain accurate data about sex work and trafficking because of the underground nature, transitory patterns, and stigma that often accompany it. Using empirical data, both structuralists and individualists in the feminist debate over commercial sex claim to reflect and channel the authentic, sex worker/prostitute voice. Yet the facts the opposing positions rely on mirror two very different realities of prostitution/sex work. The same problem appears in the area of sex trafficking, where consolidated data is limited and often biased.<sup>240</sup> The different realities reflected by research are utilized to justify the different legal regimes developed and the disregard for the costs they produce. The contradictory data leads to constant calls for more and better research.<sup>241</sup>

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<sup>239</sup> The problem of empirical data has distinct characteristics in the context of sex work and sex trafficking but it is not unique to these contexts. Similar problems can be found in other fields of legal policymaking. *See, e.g.,* Martha Fineman & Anne Opie, *Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 108 (1987).

<sup>240</sup> STAT. COMM'N & UN ECON. COMM'N FOR EUR., CHURNING OUT NUMBERS—TRAFFICKING AND STATISTICS (U.N. Econ. Comm'n for Eur. Working Paper No. 16, Nov. 30, 2004), available at <http://www.unecce.org/stats/documents/2004/10/gender/wp.16.e.pdf>.

<sup>241</sup> For a call for more research in the sex work debate, see Wendy McElroy, *Prostitution: Reconsidering Research*, SPINTECH, Nov. 12, 1999, available at <http://www.wendymcelroy.com/articles/spin1199.html> (last visited Apr. 25, 2006); Sylvia Law, *Commercial*

But it is not immediately clear that more or better information is actually attainable. The contradictory descriptions of the realities of sex work and trafficking—as inherently harmful and victimizing or as possibly empowering and liberating—are evidently not purely information driven; rather they are influenced by ideology and morality. In these debates it often seems that facts do not necessitate one position or another, but are produced by these positions. If this is the case, the positional gap will not likely be bridged by more information. The data collected and interpreted is no more than a discursive tool in the debate and should accordingly be understood first and foremost as political, ideological, symbolic, and strategic. All this is not to suggest that further research is not needed or that current research is dispensable. Policy reforms should draw on data about the practices of sex work and sex trafficking. Nonetheless the biases inherent in the existing data should be taken into consideration. Thus, the debate must be informed by research, but is unlikely to be resolved by it.

It is at this point that I find the cost-benefit analysis methodologically helpful. Cost-benefit analysis manages to “dodge” the empirical trap by providing an analysis that is based on speculative modeling. The distributive outcomes of the regime are mapped through the elaboration of possible scenarios that derive from empirical data, but do not rely on data alone. Such models take into account not only what “really” happens (as it is described according to certain empirical research), but also what might possibly happen: the realities that researchers, all or some, might be unable or unwilling to detect. Cost-benefit modeling therefore presents a way to stay close to what we (empirically) know, but allow for the possibility that what might not be widely empirically proven (because of the impediments suggested above) could still influence and enrich policy formation.

*B. Assessing Legal Reforms—Beyond the Prohibitive/ Permissive Vision of Law of Governance Feminism*

Using a cost-benefit analysis can be problematic in this sensitive context because it attempts to find benefits in situations that many see as inherently harmful and costs in what is seen as possibly redemptive. Accordingly GFeminists can argue against this method, saying that even if, for example, migrants’ sex work leads to some limited benefits to the women involved, these should be disregarded as illegitimate or negligible or strategically harmful even to mention. I disagree. I believe that look-

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*Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 534 (2000). In the sex trafficking debate see INTERNATIONAL ORGANIZATION FOR MIGRATION, COUNTER-TRAFFICKING IN EASTERN EUROPE AND CENTRAL ASIA 7 (2003); *Distortions and Difficulties in Data For Trafficking*, 363 LANCET 556, 556 (2004); THERESE BLANCHET, BEYOND BOUNDARIES: A CRITICAL LOOK AT WOMEN LABOUR MIGRATION AND THE TRAFFICKING WITHIN (2002), available at <http://www.walnet.org/csis/papers/BEYOND.DOC>.



ing at the distributive effects for a wider range of stakeholders and in a wider scope of human contexts does not legitimate any benefit produced by women's work when it is exploitative. On the contrary, this approach allows the wide range of incentives (including those of the women themselves) to come into view. Far from being harmful to feminist goals, it is crucial to revitalizing (and to an extent disrupting) the current paths of GF. As a methodology, such an analysis can supply a fresh new realist and pragmatic vision of the regulation of sex work; it can induce GFeminists to break away from the limited view of law as capable of either prohibition or permission (a view dictated by the current commitments of many GFeminists) and enable a complex, nuanced perception of choice, agency, and consent.

The power of the cost-benefit analysis comes from its refusal to reduce any of the actors involved to mere victims, or to imagine them as the liberal paradigm of an actor surrounded by endless unconstrained choices. It views social and economic interaction as a zone in which all actors have some power—sometimes limited by personal or structural constraints and always limited by background rules—since each has a set of strategic moves from which she can choose. Thus it allows us to relax the structuralist assumption of an all-encompassing male domination in which women are nothing more than passive victims, and at the same time avoids the romantic (in this context) individualist assumption of a freely choosing individual in a world of endless market possibilities.

An influential GFeminist argument against cost-benefit analysis lies in the analysis' association with Law and Economics and the goal of efficiency.<sup>242</sup> I find this feminist rejection of cost-benefit analysis unjustified. First, as I have explained and illustrated above, by breaking the consent/coercion dichotomy, the cost-benefit methodology does important work for policy makers before they reach the moment of decision concerning a particular policy, and thus allows a richer view of the operation of power in markets. Second, cost-benefit analysis does not *necessitate* the turn to an efficiency criterion to determine the "best" policy. After mapping out the affected interests, we do not have to opt for the most efficient solution, but can decide to shape our policy according to a different standard, such as a distributional consideration. For example, we are not barred from choosing a solution that is best for the party who bears the most cost under the current legal regime. Admittedly, now when we choose a protective criterion, we will be compelled to realize that such a protectionist view might not itself be harmless to other actors or even to the "protected" woman herself. A cost-benefit analysis inevitably creates awareness of both negative and positive effects of regulation for a wide set of interests. Finally, the legal feminist rejection of law and economics in general, and efficiency analysis in particular—seeing it as contradictory in its methodology to core prem-

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<sup>242</sup> ROBIN WEST, *CARING FOR JUSTICE* 169–73 (1997).

ises of feminism—can itself be challenged, although elaborating this critique is beyond the scope of this piece.<sup>243</sup>

A new set of revealing questions emerges when we assume that the legal system distributes and redistributes bargaining chips among actors. In such an analysis we might ask: under a certain regime what tactics do local sex workers have vis-à-vis exploitative johns and customers? And what possibilities do migrant sex workers have against the same exploitation? How does the regime affect the operation of the sex industry and how does that in turn affect the working conditions of the women involved? What moves do migrant workers exploited in other “unskilled” gendered sectors, such as domestic work, have against their employers, and how do these workers fare in relation to exploited local domestic workers, migrant sex workers, and trafficked women? How does the existence of an accessible (or alternatively underground) sex industry affect women who are not sex workers? And how does it affect men? Such questions, partly de-legitimated by the current mode of GF, are an essential part of a distributive analysis. These questions create room to examine the conflict of interests between men and women and between different groups of women, conflicts that greatly affect the operation of legal regimes, and yet are often overlooked or denied by the “language of horror,”<sup>244</sup> so frequently used in discussing commercial sex, migrant sex work, and trafficking.

As the set of questions above illustrates, through a distributive analysis one can see the strategic moves available to women within the system and assess how various women fare under different legal regimes. Acknowledging that power (albeit in different degrees) resides in all actors and that potential strategies of resistance are always already available, the researcher can evaluate how a regulative regime limits, eliminates, or perpetuates acts of resistance and compliance. This distributive analytical lens—looking at winners and losers, costs and benefits of various stakeholders—allows not only a more realist description of the operation of actors in markets and in the shadow of legal regimes, but also enables what might be a more deeply transformative view of the operation of gender as a system of power. These richer assessments of women’s experiences will then, hopefully, be able to find their expression in novel forms of feminist legal regimes that will be focused on distribution, aware of their con-

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<sup>243</sup> For a critical engagement with feminist suspicion of law and economics and the concept of efficiency, see Janet Halley, *The Politics of Injury*, 1 UNBOUND 65 (2005), available at <http://www.law.harvard.edu/students/orgs/unbound/articles/1UNB065-Halley.pdf> (reviewing ROBIN WEST, *CARING FOR JUSTICE* (1997)); Philomila Tsoukala, Gary Becker, Legal Feminism and the Costs of Moralizing Care (unpublished working paper) (copy on file with author) (mapping the feminist debate over the issue of women’s unpaid work as homemakers, with a focus on the relationship of legal feminists to economic thought, and critiquing the feminist rejection of the standard of rationality and the use of the language of costs and benefits, in an attempt to rehabilitate the idea of economic methodology as a legitimate and necessary feminist endeavor for feminist projects within the legal field).

<sup>244</sup> KENNEDY, *supra* note 4, 129–30.

sequences, and responsive to the intricate operation of power of all actors, so as to improve the well-being of women inside and outside markets of commercial sex.

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Thomas and Shamir have already demonstrated in the context of international law and national legal regimes the radically different appetites that the two major feminist camps, namely, the structuralists and individualists, have for the criminalization of sex work and trafficking. Furthermore, these preferences for regulation can be traced back to fractious feminist normative debates around sex work and trafficking.<sup>245</sup>

Structuralist feminists are against the commodification of sex; they view sex work as coercion, violence, and bad sex and view sex workers as victims who lack agency and are slaves to institutionalized violence. Individualist feminists, on the other hand, are agnostic to the commodification of sex; they understand sex work in terms of choice and work and view sex workers as agents who can negotiate within institutions as individuals. While the discussion of feminist legal projects of regulation is more amenable to such polarized presentations, feminist theorizing is far more nuanced and sophisticated than these ideal typical formulations of the feminist position on sex work and trafficking suggest. Feminists are always mindful of the fractious nature of the feminist debates on sex work and negotiate their ways around or over them even if this means simply acknowledging the need for breaking out of the impasse in light of the limitations of both approaches. Others are motivated by an impulse to hybridize these opposing feminist camps, and yet others explicitly take on the project of making peace between them. Similarly, even structuralist feminists will acknowledge that sex workers have some agency, some of the time, and that the commodification of sex may be permissible on pragmatic grounds.<sup>246</sup> So also, individualist feminists will recognize that sex workers choose to do sex work out of a highly restricted set of livelihood options and experience violence in sex work.

Unable to resolve the originating dilemma over the terms of this debate—is sex work a form of work or violence, is it chosen or coerced, are sex workers agents or victims—most feminists belie an uneasy truce between the ideal types of the structuralist analysis offered by radical feminists on the one hand, and the individualist analysis offered by sex radicals and sex workers on the other. In other words, in between these two apparently extreme feminist camps lies a continuum of feminist positions of

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<sup>245</sup> See Christine Overall, *What's Wrong with Prostitution? Evaluating Sex Work*, 17 SIGNS 705, 707 (1992) (explaining the divide between individualist feminists and structuralist feminists on the issues of sex work and trafficking).

<sup>246</sup> See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

a structuralist or individualist persuasion. I call these feminists middle-ground feminists, not only because they occupy the space of the continuum, but also because they often explicitly or implicitly are invested in the project of making peace<sup>247</sup> between the feminists who occupy the two extreme ends of the continuum; this is typically reflected in the feminist impulse to hybridize and could play out along several axes of analysis, including the empirical, regulatory, and normative, as well as in terms of scale. For example, Sunder Rajan explains the intense disagreement amongst feminists on sex work as lying in the fact that “it is as *description* that the discourse of prostitution often functions”<sup>248</sup> fueled by “different disciplinary frames and methodological imperatives” that structure feminist meaning-making around sex work. She however also argues that, in addition to conflicting empirical accounts of sex work, feminists also differ in their political positions toward sex work; “abolitionists read prostitution as structure or *system*, decriminalization advocates as *practice* (sex work).”<sup>249</sup> Reconciliation between these two positions she notes is becoming increasingly popular amongst feminists who “embrace the contradiction of abolishing the system while empowering the practice, indeed to achieve the first by means of the latter.”<sup>250</sup> As for a project of law reform, the goal will be to achieve a national law that either decriminalizes sex workers or consciously legalizes toward empowerment while opposing the institution of prostitution at the international level.<sup>251</sup> Middle-ground feminism in this sense involves a mode of argumentation which mediates the existing oppositions between structuralist feminists and individualist feminists in the following way: it supports the rights of sex workers but not the right to sex work;<sup>252</sup> it supports empowering practices of individual sex workers

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<sup>247</sup> Ann Lucas calls on feminists to acknowledge the “facts” of prostitution, namely that prostitution could be a site of resistance but is no guarantor of it; in her words, “recognizing this ‘fact’ of prostitution might also help activists and scholars bridge the gulf that now divides them into ‘pro-prostitution’ and ‘anti-prostitution’ camps.” Ann M. Lucas, *The Dis(-)ease of Being a Woman: Rethinking Prostitution and Subordination* 432 (1998) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author). See also RAJESWARI SUNDER RAJAN, *THE SCANDAL OF THE STATE: WOMEN, LAW AND CITIZENSHIP IN POSTCOLONIAL INDIA* 117, 142 (2003); Marjolein van der Veen, *Rethinking Commodification and Prostitution: An Effort at Peacemaking in the Battles over Prostitution*, 13 *RETHINKING MARXISM* 30 (2001).

<sup>248</sup> Sunder Rajan, *supra* note 247, at 142 (emphasis in original).

<sup>249</sup> *Id.* at 144.

<sup>250</sup> *Id.* at 146.

<sup>251</sup> *Id.* at 146.

<sup>252</sup> Overall, *supra* note 245, at 723–24 (responding to sex worker activists’ claims that women should have the right to do sex work: “it should at least be said that the claim of a right to be a prostitute can be turned against women by those who merely want to preserve men’s entitlement to buy women’s bodies.”). Another feminist notes her dilemma when she draws the following distinction: “Another important issue is whether or not we make a distinction between the rights of women in prostitution and the right to prostitution and how this translates ideologically and practically.” Jean D’Cunha, *Prostitution: The Contemporary Feminist Discourse*, in *EMBODIMENT: ESSAYS ON GENDER AND IDENTITY* 230, 252 (Meenakshi Thapan ed., 1997).

within the sex industry but is against the institution of prostitution itself;<sup>253</sup> and it acknowledges the agency of sex workers but interrogates why sex work should be viewed as work.<sup>254</sup>

These mediations by middle-ground feminists signify a politics of deferral. Typically, it is in the realm of policy that one can witness this most spectacularly, for middle-ground feminists will often support decriminalization as the most appropriate solution in the short term.<sup>255</sup> After all, all feminists are in agreement that sex workers should not be penalized for doing sex work.

#### I. FROM INJURY TO REDISTRIBUTION: THE BLIND SPOTS OF GOVERNANCE FEMINISM

Middle-ground feminism warrants closer attention for two reasons. First, middle-ground feminism's peace-making tends to result in regulatory reform projects like partial decriminalization which are both politically non-controversial and expedient for national governments under increasing U.S. pressure to assess their prostitution law regimes. This is already borne out in the Indian example and the popularity of the Swedish regulatory model confirms this trend. This suggests then that middle-ground feminism has a better chance of being propelled into governance mode.<sup>256</sup> Second, although middle-ground feminism is more a feminist mode of thinking about sex work than a particular school of feminist theory, its limited vocabulary is almost entirely influenced by the terms of the debate

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<sup>253</sup> Overall, *supra* note 245, at 723 ("It therefore makes sense to defend prostitutes' entitlement to do their work but not to defend prostitution itself as a practice under patriarchy.") This is a concern of feminists the world over; see BARBARA SULLIVAN, *THE POLITICS OF SEX: PROSTITUTION AND PORNOGRAPHY IN AUSTRALIA SINCE 1945*, at 165 (1997). See also Sunder Rajan, *supra* note 247, at 146 (endorsing Lynn Sharon Chancer's argument that feminists should support prostitutes while opposing prostitution).

<sup>254</sup> Sunder Rajan, *supra* note 247, at 138–40.

<sup>255</sup> Lucas argues that once we have made peace between the anti and pro-prostitution camps, we can build broader support for decriminalization, which she then demonstrates will help both sex workers and non-sex workers. Lucas, *supra* note 247, at 433–35. Accord Debra Satz, *Markets in Women's Sexual Labor*, 106 *ETHICS* 63, 64 (1995). But see Laurie Shrage, *Should Feminists Oppose Prostitution*, 99 *ETHICS* 347, 361 (1989) (supporting decriminalization but arguing that feminists have legitimate reasons to oppose prostitution politically); Overall, *supra* note 245, at 708, 722 (supporting sex workers' rights but arguing that prostitution is bad because it is an unequal practice taking place against the background of capitalist patriarchy); Chancer, *Prostitution, Feminist Theory, and Ambivalence: Notes from the Sociological Underground*, 37 *SOC. TEXT* 143, 166 (1993), quoted in Sunder Rajan, *supra* note 247, at 146. Indian feminists also voice this view; "There is the need to concretely and actively address in practice the concerns of individual women in prostitution, especially those who continue to operate within the sex service sector, without legitimizing the institution of prostitution and third-party managements." D'Cunha, *supra* note 252, at 252.

<sup>256</sup> RATNA KAPUR, *EROTIC JUSTICE LAW AND THE NEW POLITICS OF POSTCOLONIALISM* 74 (2005) ("Overall, the recommendations of the NCW sought to address the real concerns of sex workers, without condoning sex-work itself. It was for the rights of sex-workers, without being in favor of sex-work.").

set by radical feminism. This is evident in the fact that when confronted by sex workers' demands for workers' rights, middle-ground feminists are persistently able to respond only in the language of harm and injury and reject proposals for workers' rights for sex workers because sex work causes "harm with a capital H"<sup>257</sup> to both sex workers and non-sex workers. This is despite the fact that these harms (even with a capital H) are not unique to sex work, so while they cannot be ignored, invoking them does not constitute a compelling argument for not conceptualizing sex work as a form of labor or legitimate work or for abolishing sex work. Similarly, middle-ground feminism calls upon sex workers who demand workers' rights to explain to feminism the nature of the labor involved in sex work and why it should be recognized as such despite the fact that, all around us, we find markets for sex work. My own analysis is that this is because middle-ground feminism does not have a normative theory of sex and is unwilling to address explicitly the question of whether women can or should sell sex for money.

Another example of how radical feminism animates middle-ground feminism is the latter's focus on the question of sex worker agency in reaction to the radical feminist denial of sex worker agency.<sup>258</sup> This is perplexing because agency is a poor analytical tool (not unlike "choice" in an earlier era of feminist theorizing on sex work) with which to understand the status of sex workers given the multi-dimensional and multi-directional flows of power within any given sex industry, thus severely detracting from examining questions of distribution. My point of departure from middle-ground feminism in its governance mode makes the move from a politics of harm and injury to one of redistribution by pursuing questions of internal and external redistribution; by external redistribution, I mean the need to explore the relationship between sex workers and workers outside the sex industry, such as wives. In other words, how does making rule

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<sup>257</sup> This harm with a capital H can be further broken down into four harms; the first most obvious harm being the physical, emotional, and mental harm and exploitation resulting directly from sex work itself; the second harm being the harm arising from the objectification and commodification of women in sex work, *see generally* Margaret Jane Radin, *supra* note 246; the third harm being its gendered reality and its consequent feminization; and the fourth harm being the harm done to all women because sex work reinforces stereotypes of female availability, exacerbates gender inequality and is a form of sex discrimination. Satz, *supra* note 255. *See also* Shrage, *supra* note 255, at 347, 349, 352; Overall, *supra* note 245, at 721; LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 291 (1998). All four harms are elaborated in a number of radical feminist texts. *See* KATE MILLETT, *THE PROSTITUTION PAPERS* (1971); KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979); KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* (1995); SHEILA JEFFREYS, *THE IDEA OF PROSTITUTION* (1997). *But see* MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 288-97 (1999) (offering a detailed response to these harm-based arguments).

<sup>258</sup> There are exceptions however. Sunder Rajan for instance calls upon middle-ground feminists of an individualist persuasion to give pause to their valorization of sex worker agency and to identify the precise agential role of sex workers in their demands for workers' rights. Sunder Rajan, *supra* note 247, at 140.

changes for sex workers affect wives and *vice versa*? For this, I ask how feminists most engaged with questions of redistribution, namely, socialist feminists, theorized sex work. By exploring debates internal to a school of feminism, which is explicitly *not* in a governance mode, and does not treat sex work as exceptional, but as deeply related to marriage, I suggest that it is possible to address questions of redistribution that are external to the sex industry. For internal redistribution, I propose exploring the prospects for redistribution amongst sex workers who work in highly differentiated sex markets, regulated by criminal law. For this, I draw on the insights of legal realism and the considerable scholarship on illegal economies, legal pluralism, and private ordering in the shadow of the law.

Socialist feminist analyses of sex work have been overshadowed and even mischaracterized as supporting sex work as a form of legitimate work<sup>259</sup> in the feminist debates on sex work. On the contrary, even in the labor republic sex work was viewed as the very antithesis of work.<sup>260</sup> Despite the abolitionist politics which socialist feminism shares with radical feminism, their modes of argumentation could not set them further apart. The most significant difference in this respect is the socialist feminist understandings of the relationship between sex work and marriage. While classic socialist feminist texts provocatively asked if there was any difference between sex work and bourgeois marriage, later socialist feminist analyses of sex work have argued that sex work and marriage form two ends of the continuum along which women exchange sex for consideration. In other words, patriarchy is a unitary system that collectively appropriates the labor of women in both marriage (sexual and social labor) and sex work (sexual labor) and maximizes this appropriation by reinforcing the divide between marriage and sex work, both materially and ideologically. This approach furthers a redistributive feminist understanding of sex work, as it holds both sex work and marriage in continuous conversation with each other by highlighting their differential institutional coordinates for providing sexual labor without collapsing them into each other or articulating a hidden preference for one over the other. In contrast, GF informed by the radical feminist analytic of sex work privileges marital sex over non-marital sex by calling for the criminalization of sex work, even if directed at the customer, and by viewing sex work as nothing but sexual violence, while ignoring the exploitation inherent in marriage unless it assumes the form of domestic violence.

However, the radical potential of socialist feminist insights on sex work is severely handicapped because socialist feminism shares with radical feminism the latter's top-down totalitarian theory of power that has little

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<sup>259</sup> Margaret Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 *YALE J.L. & FEMINISM* 47, 102 (1992).

<sup>260</sup> See generally ALEXANDRA KOLLONTAI, *Sexual Relations and the Class Struggle*, in *SELECTED WRITINGS OF ALEXANDRA KOLLONTAI* 237 (Alix Holt trans., 1977).

room for resistance, pleasure, or the possibility of bargains between sex workers and other players in the sex industry. To that extent, it is perfectly possible, even after effecting the discursive shift within feminist theory from a radical feminist analytic of sex work as sexual violence to the socialist feminist analytic of sex work as labor, that feminists will engage in a politics of deferral by reproducing sets of oppositional categories along the primary dichotomy of desirable labor versus undesirable labor.<sup>261</sup> Still, socialist feminism may provide critical insights in enabling a turn to redistribution at this juncture of feminist theorizing on sex work.

## II. FROM INJURY TO REDISTRIBUTION: LEGAL REALISM IN THE STUDY OF SEX INDUSTRIES

The second ground on which to move to redistribution is external to feminist theory. Here, we can use legal realism to develop an understanding of the role of the law in the sex industry. Halley, Thomas, and Shamir have demonstrated the several unintended consequences and blind spots of the prohibitionist agenda of GF in regulating rape, sex trafficking, and sex work, producing in the process methodological tools that might make such analysis possible. While substantially reiterating the insights they provide, I add to this methodological repertoire my *empirical* analysis of the role of the criminal law in two *local* Indian sex industries, namely, that of the biggest and oldest red-light area of Kolkata, Sonagachi and the South Indian temple town of Tirupati. In particular, I focus on the completely counter-intuitive implications of criminal law highlighted by Halley, albeit in the adjudication context. While I am interested in the quantitative questions of over- and under-enforcement of criminal laws and the blind spots and tolerated residuum of abuse they foster, the micro-level workings of criminal law warrant closer attention. Here, I argue that middle-ground feminists are cognizant of the problems attending a prohibitionist legal project, especially the deep connection between criminal law and social marginality that leads them to advocate partial or complete decriminalization. At the same time through a legal realist analysis of the criminal law in local sex industries, I argue that even feminists who call for partial or complete decriminalization have a simplistic understanding that the repeal of certain parts or all provisions of the anti-sex work criminal law regime will somehow ameliorate the conditions of sex workers.

In particular, governance feminists (“GFeminists”) in India have produced an understanding of the role of the anti-sex work law in the sex industry which I call the “structural bias thesis.” There is every indication

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<sup>261</sup> This is already evident in the work of some feminists; see Jane Larson & Berta Esperanza Hernandez-Truyol, *Both Work and Violence Prostitution and Human Rights*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 185–86 (Berta Esperanza Hernandez-Truyol ed., 2002). See also HIRSHMAN & LARSON, *supra* note 257, at 289.



that the state is in agreement with the structural bias thesis.<sup>262</sup> The structural bias thesis presents the story of the cumulative effect of myriad biases leading to the selective and discriminatory enforcement of the anti-sex work laws always to the detriment of sex workers' interests. In particular, both the anti-sex work law and the criminal justice system suffer from biases that systematically and routinely converge: a substantive bias in the law that explicitly scapegoats the victims of commercial sexual exploitation, namely, sex workers, but does not criminalize customers; a bad faith bias of collusion between the law enforcement machinery and the owners and operators of sex businesses leading to chronic under-enforcement of the law; a procedural bias built into the criminal justice system; and an operational gender bias evident in the day-to-day implementation of the law. Even when the benevolent provisions of the law relating to rehabilitation are invoked, it leads to perverse results for sex workers. In light of this analysis, middle-ground feminists of a structuralist persuasion will call for partial decriminalization, that is, to redirect the force of the criminal law against stakeholders in the sex industry other than sex workers. Middle-ground feminists of a more individualist persuasion will call for complete decriminalization, that is, decriminalization of all stakeholders in the sex industry. I will begin by problematizing the proposal for partial decriminalization in light of the structural bias thesis and go on to problematize the proposal for complete decriminalization in light of the blind spots of the structural bias thesis.

There is much to be said for the accuracy of the structural bias thesis. Its validity is borne out in several different contexts. I will highlight only three of them; the first relating to the trial process under the ITPA, the second to the use of the ITPA in a non-sex work context, and the third in a non-law enforcement context. In the first instance, the procedural bias of the criminal justice is patently directed against sex workers. For example, the organization that I worked with in Tirupati called WINS applied for bail in the district court for two street-based sex workers arrested under the ITPA; there we found a stunning range of actors and dispositions stacked against sex workers. For example, the court was a highly gendered space where we, as a group of women, quickly became a spectacle. A criminal defense lawyer obtained the signatures of the sex workers on blank paper when they were produced in court. There was legal ambiguity, even in what might be considered straightforward procedural law, about whether an NGO could post cash surety instead of having to find a personal surety; there was in any case a thriving market in local personal sureties. Finally, a high-caste criminal defense lawyer who offered to take on the case *pro bono* taunted the NGO's sex worker peer educators for

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<sup>262</sup> Plan of Action, *supra* note 136, at 44 (stating that "the present legal framework to combat commercial sexual exploitation results in re-victimisation of the victims of exploitation while the exploiters go scot free.").

wasting the energies of us middle-class women by doing sex work instead of finding an honest livelihood. The typical length of the trial, which in this case extended to fourteen months, did not help sex workers either.

In the second instance, we find that in routine interactions between sex workers and the law enforcement machinery, the ITPA is a powerful tool in the hands of the police for use against sex workers. For example, in one incident in Chittoor, a town near Tirupati, a group of sex workers, one of whom had been kidnapped and raped by a customer, went to the police station. The police refused to register a complaint only of kidnapping and insisted on an additional charge of rape although the sex workers were ambivalent of a successful conviction because the raped sex worker had done sex work with a customer after the rape. The police then offered to help the sex workers frame the rape charge on the condition that the raped sex worker give up sex work. When the sex workers refused, the police finally threatened them with arrest under the ITPA, which essentially meant detention in police custody overnight and the looming prospect of physical and sexual abuse. Hence not only is the ITPA used to target sex workers more when compared to other stakeholders, the ITPA is also used by the police against sex workers when they try to access the criminal justice system to counter abuse from other stakeholders in the sex industry, in this instance, a violent customer.

Finally, even when the ITPA is not directly invoked, stakeholders in the sex industry routinely fashion their living and working arrangements in its shadow. For example, due to the criminalization of tenancy arrangements under the ITPA, sex workers in Sonagachi cannot contest an arbitrary raise in rents or eviction; for the same reason, a landlord will refuse to install an electricity meter in a sex worker's room. Again, a sex worker cannot enforce the terms of her contract with a brothel-keeper or a customer because the agreements between them are illegal under the Indian Contract Act, 1872, for being against public policy as embodied in the ITPA.

In light of these insights of the structural bias thesis, it is perplexing that some middle-ground feminists would advocate for partial decriminalization of sex workers but not of other stakeholders in the sex industry, although sex workers are likely to bear the costs of any increased criminalization of landlords, customers, or brothel-keepers. Other middle-ground feminists as proponents of the structural bias thesis argue that the repeal of the anti-sex work criminal law, that is, complete decriminalization will mean that sex workers are held less hostage to other stakeholders in the sex industry. This certainly could be one result of complete decriminalization. However, three conceptual drawbacks of the structural bias thesis undercut at the simplicity of this proposition regarding the role of the criminal law and therefore its repeal in the real world. These relate first, to the complex rule networks within which the ITPA operates, second, to the radically internally differentiated nature of sex industries, and third, to the fluidity of sex industries. To begin with, in both sex industries that I stud-

ied, the predominant legal regime was one of *de facto* decriminalization, a utopia that many Indian GFeminists clamor for, but which, nevertheless, receives no mention in the discussions around law reform. Further, *de facto* decriminalization could arise from the “routine processing”<sup>263</sup> of minor offenses under the general criminal law (such as the anti-obscenity provision of the Indian Penal Code, 1860) or from the fact that sex worker organizations can negotiate with the local police not to enforce anti-sex work laws against lower-class sex workers resident in the red-light area.<sup>264</sup> Agreements of the latter variety can actually satisfy the elaborate calculus of a corrupt police chief seeking to maximize his profit through selective enforcement of the anti-sex work law against the most profitable of sex businesses. Each genre of *de facto* decriminalization in turn determines the bargaining power of sex workers within sex industries.

Against this backdrop of *de facto* decriminalization then, if we were to heed the legal realist exhortation to focus on background rules, namely, rules that structure the alternatives to being in the bargaining situation rather than simply the rules at hand, namely, the ITPA,<sup>265</sup> we find that the ITPA is suspended within a network of formal legal rules and informal social norms ranging from tenancy practices in the red-light area to enforcement practices of the police, norms and practices within the sex business, changes to such norms and practices resulting from sex worker mobilization, and illegal market structures that arise from the pervasive criminalization of living and working arrangements by postcolonial laws, all of which vary according to the sex industry under consideration. The result, therefore, is that the rule network has already created an extensive realm of private ordering, which in addition to the ITPA, affect the bargaining power of sex workers vis-à-vis the state and other stakeholders in the sex industry, such that even if sex work were to be completely decriminalized or even legalized, to the extent that these components of the rule network are left untouched, it may not translate into better bargaining power for sex workers.

The structural bias thesis also does not account for the highly internally differentiated nature of the sex industry. From my empirical study of the two sex industries of Sonagachi and Tirupati, it is clear that there

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<sup>263</sup> I borrow this term from Marc Galanter’s classic article, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95–160 (1974). Galanter suggests that these cases take “the form of stereotyped mass processing with little of the individuated attention of full-dress adjudication.” *Id.* at 109.

<sup>264</sup> For instance in Sonagachi, due to the mobilization of sex workers by the Durbar Mahila Samanwaya Committee, a sex worker organization, the local police raid brothels under the ITPA only under three circumstances, when a minor has been trafficked, when the police suspect the presence of men accused of serious crimes in the red-light area and when non-residential street-based sex workers visiting the red-light area along with their customers, commit what in their view constitutes “public nuisance.”

<sup>265</sup> DUNCAN KENNEDY, *The Stakes of Law, or Hale and Foucault, in SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 83, 87 (1993).

are several modes and sub-modes of organization of sex work where sex workers exert vastly varied control over their conditions of sex work; that sex work takes place in varied institutional settings and within sex businesses of different scales and where they engage with different sets of stakeholders. Based on this a highly fragmented view of the actors in any given sex industry, I argue that their interests do not always overlap. My method opens up the possibility that any “nexus” between the landlord, brothel-keeper, and pimp might be turned to the sex-worker’s advantage on some dimension of social value; that the system is not necessarily and always directed against the interests of sex workers. Consequently, we find varying bargaining powers of the stakeholders and a differential impact of the rule network on these stakeholders. Once we approach the various stakeholders in sex industries as highly fragmented and differentiated, and block the *a priori* assumption that law enforcement always reduces harm, we can assess the sometimes counter-intuitive and, in some cases, even counter-productive results of apparently progressive legal solutions. For example, complete decriminalization might make sex work far more lucrative for sex workers. It would result in an influx of sex workers into the sex industry where, except for the highest category of sex workers working in large brothels, all other sex workers compete with each other, depressing wages and inciting a race to the bottom, which in turn undermines their bargaining power with non-sex worker stakeholders in the sex industry.

Finally, the structural bias thesis fails to recognize the fluidity of norms and practices within the sex industry induced both by economic changes in the sex industry, the impact of sex worker organization, and the changing relations between the various stakeholders in the sex industry both *inter se* and between them and sex workers. As long as GFeminists view brothel-based sex workers as victims who experience brief and unsustainable flashes of agency in negotiating their work and personal lives, an understanding of the dynamics of living cheek-by-jowl with several other sex workers in a red-light area and the possibilities this offers for collective action will be lost to GF. Even in sex industries like Tirupati that are spatially and institutionally dispersed and where the collective power of sex workers is minimal, negotiations between sex workers and powerful stakeholders like the police, even if sporadic and fleeting in significance, can take place. GFeminists need to be more attuned to these dramatic, if short-lived, changes in the power structure.

In conclusion, I suggest that focusing on a politics of redistribution rather than of harm and injury furthers a legal project of redistribution for sex workers in three ways. First, radically expanding the legal playing field of the criminal law in sex industries allows us to understand the prolific nature of the criminal law and identifies the sets of legal rules, social norms, and market structures with which it interacts to achieve its several effects, anticipated as well as unanticipated. Second, having a more adequate understanding of the differential relation that sex workers in differ-

ent modes and sub-modes of organization of sex work and institutional settings bear to the rule network leads us to acknowledge that the effects of the rule network cannot be determined *a priori* and that in fact, in certain circumstances the rule network may divide sex workers in ways we cannot foresee. Finally, it will allow us to account for fluidity within the sex industry by acknowledging how stakeholders are constantly reorienting their bargaining positions vis-à-vis each other in light of internal and external change. This will at the very least alert us to the limitations of decriminalization while hugely expanding our repertoire for more nuanced law reform projects.

#### CONCLUSION

Generally, these are, we think, the most interesting points of consensus among us:

First, we think the international legal order is increasingly receiving feminists into its power elites and that feminist law reform is emerging there as a formidable new source of legal ideas. However questionable that assertion might be elsewhere, we think it has real bite in recent changes in positive international law governing sexual violence and commercial sex. In the domain of sex trafficking, moreover, these reforms at the international level are having profound consequences in some national and local contexts; sometimes some kinds of legal power shifts to some local feminists, and sometimes local feminists are significantly sidelined by the reform. We are all finding it helpful to think of this engagement of feminism with legal regime as Governance Feminism (“GF”).<sup>266</sup>

To be sure, governance feminists (“GFeminists”) do not experience themselves as wielding consolidated top-down power. This is probably right: the kinds of power they have are the more fragmented, mobile, contingent, and regulatory ones we associate with governance rather than domination. When domination is the name of the game, feminists have sought to have it through the state. Indeed, we find in international GF relating to rape and prostitution a heavy bias in favor of fragmented modes of participating in power, coinciding with an equally heavy preference for outcomes that ban, criminalize, or prohibit the conduct of men in order to protect women who would be their victims.

Still, GFeminists frequently complain that they have no power at all. We think this is a profound error, one which—if GF continues to grow—will lead GFeminists not only to wield power in bad faith, but to make profound miscalculations about what to seek by way of law reform. The denial will mask the many moments in which some feminisms win over other feminisms as they jostle for legal and political priority. And the compari-

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<sup>266</sup> For an initial exploration of this chapter in the history of feminism, see *supra* text accompanying note 143.

son offered here between the effects of the U.N. Protocol and the VTVPA in Israel and India suggests that local differences profoundly condition the actual distributive effects of international GF achievements. Specifically, we find that American and European feminists, making seemingly symbolic victories in the U.S. Congress, the United Nations, the ICTY, or the Rome Statute negotiations, can put in motion chains of legal causation that—by the time they reach Tel Aviv, Kolkata, or Chicago—can be exceedingly acute, and not always feminist in any intelligible sense. Finally, GF operating in the international sphere sometimes explicitly strategizes to bring international achievements “back home” to domestic law, often in the GFeminist’s own hometown. Whether they will produce equally dramatic effects there remains to be seen. In short, GF has distributive consequences. Denying that GF exists is one way for GFeminists to avoid thinking distributively about its own effects in the world.

Finally, we share the sense that GF operating in these reform projects has foreshortened the relationship between social theory and legal advocacy. We share a sense of puzzlement about the attitude toward law adopted in the parts of GF that have participated most significantly in international reform targeting rape in war and prostitution in international labor migration. Often these projects sound like fairly simple social-control projects. Method: define a wrong happening to women; then either criminalize it with the goal of eliminating it, or decriminalize women’s participation in the underlying exchange with the goal of liberating them in it. The highly contingent and complex relationship between law in the books and law in action—and the multitudinous ways in which the legal system can be designed to shape but cannot control this relationship—seem to fall outside the scope of feminist concern.

Feminist advocacy that imagines prohibition to involve “stopping” or “ending” sexual violence and/or commercial exploitation of sex workers brackets all the social contingency our legal realist and critical analysis would bring into focus. For example, the possible bad and unintended consequences of the resulting rules seem to fall outside the scope of feminist concern. As Thomas and Halley conclude, not much attention gets paid to the possibility that intensification of the humanitarian punishment of wartime rape might (as well as deterring some rapes) increase the value of rape as a weapon of war (thus also producing some rapes) or that the prohibition of prostitution and sex trafficking will produce black markets that are not “wild” but rather highly regulated social spaces.

In two quite different ways GF has turned down its hearing aid to issues of national location. Thomas and Halley both note that GF reforms sometimes end up ratifying national(ist) arrangements without paying much attention to the possible downsides of doing so: feminist indifference to the repatriation of trafficked women to their “proper” location on the globe and the collaboration of feminists with ever-intensifying border-control politics is not a pretty sight; nor is feminist indifference to possible eth-

nic-nationalist deployments of their rules on rape. On the other hand, Shamir and Kotiswaran note the inadequacy of most feminist models for understanding complex national and local legal regimes affected by GF achievements at the international level. They break out the multiple and complex distributional consequences of prohibition and permission for men and women differently situated and motivated: any given legal order has multiple outcomes, not just one; and this is observable, they say, inside actual national and local markets. Inasmuch as some of the people whose lives stand to bear these background effects will be women, the novelty of these observations inside (published) GF puzzles all of us.

Our sense at the moment is that a preoccupation with normative achievements (message sending, making rape/sexual violence visible, changing hearts and minds among elites and across populations) and a legal imaginaire in which prohibition would “stop” or “end” conduct harmful to women—or decriminalize it in order to liberate them and give scope to their agency—animates the GF projects we are studying and detaches them from a certain pragmatic attitude and interest in complex distributional consequences that we seek to bring to the domain. We are all agreed that we’re working, methodologically, for a new legal realism that would anticipate the complex ways in which legal entities meet complex societies.

For feminism in particular, our conversation suggests four new questions:

First, what parts of feminism have engaged in what parts of GF? For instance, if feminism has become a kind of expertise, a form of neutral objective knowledge that qualifies one for neutral objective roles like administering and judging, what is it that these experts “know”? Here is one part of what they know:

Rape and other forms of sexual assault harm not only the body of the victim. The more significant harm is the feeling of total loss of control over the most personal and intimate decisions and bodily functions. This loss of control infringes on the victim’s human dignity and is what makes rape and sexual assault such an effective means of ethnic cleansing.<sup>267</sup>

This formulation of rape has been, however, intensely controversial inside U.S. feminism. Many feminists have argued against this representation of raped women as utterly without control.<sup>268</sup> Its installation in GF thus represents not only a triumph of feminism simpliciter, but a triumph

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<sup>267</sup> *Commission of Experts Report*, Annexes IX to XII, ¶ 25, U.N. Doc. S/1994/674/Add.2 (Vol V) (Dec. 28, 1994) (quoting *Čelebić Trial Chamber Judgment*, Case No. IT-96-21-T ¶ 492).

<sup>268</sup> Haag, PUTTING YOUR BODY ON THE LINE, *supra* note 158; Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in *FEMINISTS THEORIZE THE POLITICAL* 385 (Judith Butler & Joan W. Scott eds., 1992).

of some feminisms over others. How can we study this critically—that is, without taking sides before we have even detected the stakes?

Second, as GF accedes to governance, it becomes detached from its intentional core—its specific basis in feminist advocacy—and disappears into legal technologies that we recognize under other rubrics (universalism, American hegemony, technocratic best practices, etc.), and even into *bien pensant* legal common sense. It is like watching a drop of water hit the surface of a pond and merge into the mass. How can we study this? We do not at all mean to repeat the tedious charge that, by participating in universal discourses like human rights or by forging legal tools that can be used by Bushite social conservatives, feminism “collaborates with” or “is co-opted by” existing non-feminist forms of power. These accusations carry with them assumptions that feminism should thwart its own will to power or stay its hand until it can act in a politically purified world—assumptions that seem completely unreal to us, and for those of us who are feminists, completely at odds with our politics. But we do feel the need for new tools to study the specifically feminist genealogy of the much larger technologies of power into which GF inserts itself.

Third, we are interested in the complex outcomes that become possible as GF emanates from western feminism, moves globally via international legal regimes of various kinds, and arrives in locales in which Western power is feared and resented and in which it is, we think, doing much harm. If international law is imagined not as a restraint on Empire, but as one of its many media, what will be the place of imperial feminism in the local reception of global power? Catharine A. MacKinnon notes that “The post-September 11th paradigm shift, permitting potent response to massive nonstate violence against civilians . . . shows what they can do when they want to.”<sup>269</sup> She urges feminists to mimic the Bush war against terrorism by pulling every available lever in international law to exert an equally concerted, equally diffuse resistance to “Women’s September 11th.”<sup>270</sup> Happily, from our point of view, we are unlikely to see that happen. But if GF is indeed becoming integrated in international legal regimes that manage and sustain U.S. hegemony, is it time to ask after the kinds of power that are mediated when white women seek to save brown women from brown men?<sup>271</sup> If feminism does not have the tools to describe them, what social theories should we turn to instead?

Finally, we think it is time to get past the prohibitionist imaginaire that animates so much feminist legal thinking, and to think even feminism’s most important engagements with international criminal regimes as forms of management, as governmentality in a largely Foucaultian sense. The United

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<sup>269</sup> Catharine A. MacKinnon, *Women’s September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT’L L.J. 1, 1 (2006).

<sup>270</sup> *Id.*

<sup>271</sup> Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 287 (Cary Nelson & Lawrence Grossberg eds., 1988).



States now makes foreign aid conditional on developing countries' adopting what were originally feminist prohibitionist prostitution rules. Shamir and Kotiswaran amply demonstrate that the result, so far at least, is not to "end prostitution" in Israel and India, but to rearrange the micro-investments of power locally. International humanitarian law now prohibits sexual slavery in armed conflict: we might ask how violence will be channeled, legitimated, intensified, or diffused—surely we know it will not be stopped—by the addition of this rule.

