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# Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work

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# Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work

SHELLEY CAVALIERI\*

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*Feminist legal theorists have devoted enormous attention to conceptualizing the issues of sex work and trafficking for sexual purposes. While these theories vary, they typically fall into one of two camps. The abolitionist perspective, having grown out of dominance feminist theory, perceives sex work as inherently exploitative. In contrast, a second group of theorists adopts a liberal notion of*

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*individual choice and draws on the poststructuralist rejection of gender essentialism to envision a theoretical model of sex-worker rights. The legal and public policies that grow from these two models are similarly polarized. Radical feminist abolitionists are often strange bedfellows with evangelical Christian organizations, working to end all sex work by rescuing women, regardless of any individual volition exercised in choosing the profession. On the other hand, organizations focused on sex-worker rights seek to help sex workers take care of themselves without fully questioning the social circumstances that lead women to make such a choice.*

*This Article proposes a new theoretical model of trafficking for sexual purposes: a third-way feminist account of sex trafficking. Leveraging the feminist literature on constrained autonomy, the author draws on her own experience working with trafficked African and Asian populations to offer this new approach. This model relies on the dominance feminist critique of social conditions generative of women's economic desperation, which often underlies women's choice to engage in sexual labor. At the same time, the author rejects gender essentialism and endorses a liberal notion of the individual woman as an actor with real, though constrained, personal autonomy. Having explored this theoretical model, the Article identifies a series of interventions in trafficking for sexual purposes that recognize the individual and her personal resources while ultimately seeking to further her own autonomy.*

*In proposing these interventions, this Article directly offers a vision of how feminist legal theory can work to alleviate poverty and other social barriers that third-world women encounter in trying to support themselves and their families. Finally, the Article closes with a consideration of the relationship between the author's proposed third-way feminist model and the international development literature on the capabilities approach. The interventions that arise from this third-way conception of feminist theory complement the capabilities model of development, as both seek to broaden the individual's life options in pursuit of a more robust individual agency.*

#### INTRODUCTION

In May 2003, law enforcement officers raided a brothel in Chiang Mai, the capital of the northern region of Thailand and the regional center for the many indigenous peoples or hill tribes that populate the surrounding mountains.<sup>1</sup> They conducted this raid at the behest of a coalition of Thai non-governmental organizations and an American evangelical Christian organization.<sup>2</sup> The American organization, with funding from the U.S. government and in conjunction with the Thai non-governmental organizations, was dedicated to investigating and reporting brothels with children inside to the authorities, and tried to persuade the police to

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1. This raid is well documented in the popular press, even in the United States. See, e.g., Noy Thrupkaew, *The Crusade Against Sex Trafficking: Do Brothel Raids Help or Hurt the 'Rescued'?*, NATION, Oct. 5, 2009, at 12, 15–16.

2. The International Justice Mission (IJM) is an evangelical human rights organization that works extensively on trafficking issues in the sex industry. IJM's involvement in this raid is known and documented. See *id.* at 14.

shut down such locales.<sup>3</sup> The particular brothel raided in this story was a brothel like many others in the country, filled with ethnically Shan women from Burma.<sup>4</sup> Most of the women were of the age of majority, but while accounts vary, some organizations asserted that there were teenagers working in the brothel as well.<sup>5</sup> How these teenagers reached the brothel is unclear; the organizations claiming that teenage girls were there also asserted that the girls' presence could not be voluntary due to their age and that the girls were victims of human trafficking.<sup>6</sup>

The coalition of organizations effected what they termed a "rescue" of the women in the brothel because of the believed presence of children.<sup>7</sup> What followed was a human rights debacle. Twenty-eight women and girls, most of whom were, by all accounts, adults, were involuntarily detained beyond the period of time that victims of trafficking may be confined under Thai law. They were not arrested or charged with crimes, but detained, according to the authorities, because they had been rescued from a situation of human trafficking. They were deprived of access

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3. Gary A. Haugen, the founder of IJM, has published a book that explains the philosophy and theology behind the work of IJM. GARY A. HAUGEN, *GOOD NEWS ABOUT INJUSTICE: A WITNESS OF COURAGE IN A HURTING WORLD* (1999).

4. *See* Thrupkaew, *supra* note 1, at 14.

5. *Id.*

6. *Id.* International law defines trafficking as

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.

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. 55/25, U.N. Doc. A/45/49 (Nov. 15, 2000) [hereinafter *Trafficking Protocol*].

7. While this raid has been discussed in the popular press, the account contained in the next five paragraphs summarizes my own conversations during the summer of 2003, which I spent traveling throughout Thailand as an interested movement participant. As I was in Thailand as a fellow social services worker who had provided assistance to trafficked women in Italy, my methodology was an informal snowball sampling approach: I interviewed trafficked women, former sex workers, and myriad social services providers, all with the goal of developing a broader understanding of the trafficking phenomenon on the ground in Thailand. While it is of course the case that cultural and linguistic gaps imposed significant limitations on my research, and I do not believe that my position as an outsider gave me an objective vantage point, I also believe that I, as a Westerner, had access to locations, individuals, and conversations that a Thai researcher could not have gained. In this regard, I wholeheartedly agree with Martha Nussbaum's assessment of her own work in India: "In a situation of entrenched inequality, being a neighbor can be an epistemological problem." MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* 10 (2000). Simply stated, being an outsider gave me entrée to situations that neighbors could not have gained. I remain profoundly grateful for the way that the trafficked women, former sex workers, and social services providers shared their stories with me.

to their belongings and saved earnings, which were locked inside the inaccessible brothel under police control; they never regained ownership of these possessions. After a lengthy period of time, the government deported many of these women to Burma. All of these actions, which the women experienced as both harmful and alienating, occurred under the guise of rescuing them from the brothel in which they worked.

According to social services workers who interviewed four women who escaped from the brothel as the police arrived, all of the women were ethnic Shan from Burma and were at least nineteen years of age at the time of the raid.<sup>8</sup> Prior to immigrating to Thailand, their status as members of the Burmese Shan indigenous group rendered these women subject to summary detention and rape at any time at the hands of officers of the Burmese junta.<sup>9</sup> Faced with the option of abuse by the authorities in a region of Burma overwhelmed by poverty, many Shan women chose, and continue to choose, to cross the mountains that demarcate the Thai-Burma border and move to a Thai city to work in a brothel.<sup>10</sup> This choice has a certain logic, as forced labor, forced relocations, and food shortages remain an endemic problem in Burma.<sup>11</sup> For many, work in a Thai brothel presented the opportunity to escape the repression of the Burmese junta and to send adequate money home in order to support families, educate children, and maintain

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8. The relationship of the Burmese government, which is comprised primarily of ethnic Burmans, and the Shan ethnic group is a complex one that is not truly monolithic; the details of this relationship are unimportant to the topic at hand. In short, the Shan are an ethnic minority that the junta targets for particularized forms of oppression. *See, e.g.*, HUMAN RIGHTS WATCH, NO SAFETY IN BURMA, NO SANCTUARY IN THAILAND pt. 4 (1997), available at <http://www.hrw.org/en/reports/1997/07/01/no-safety-burma-no-sanctuary-thailand>; MARTIN SMITH, MINORITY RIGHTS GROUP INT'L, BURMA (MYANMAR): THE TIME FOR CHANGE 19–20 (2002), available at <http://www.minorityrights.org/1022/reports/burma-myanmar-time-for-change.html>; *Burma "Terrorising Ethnic Minorities,"* BBC NEWS WORLD EDITION (July 17, 2002, 06:49 GMT), <http://news.bbc.co.uk/2/hi/asia-pacific/2132986.stm>.

9. THE SHAN HUMAN RIGHTS FOUND. (SHRF) & THE SHAN WOMEN'S ACTION NETWORK (SWAN), LICENSE TO RAPE: THE BURMESE MILITARY REGIME'S USE OF SEXUAL VIOLENCE IN THE ONGOING WAR IN SHAN STATE (2002), available at [http://www.burmacampaign.org.uk/reports/License\\_to\\_rape.pdf](http://www.burmacampaign.org.uk/reports/License_to_rape.pdf) (documenting the use of rape as a weapon of war in Shan State); *see also* THE KAREN WOMEN'S ORG., STATE OF TERROR: THE ONGOING RAPE, MURDER, TORTURE AND FORCED LABOUR SUFFERED BY WOMEN LIVING UNDER THE BURMESE MILITARY REGIME IN KAREN STATE (2007), available at [http://www.womenofburma.org/Statement&Release/state\\_of\\_terror\\_report.pdf](http://www.womenofburma.org/Statement&Release/state_of_terror_report.pdf) (documenting sexual violence against women in Karen State, the home of another indigenous population in Burma).

10. SMITH, *supra* note 8, at 20 ("As a result [of ethnic tensions and conflict], despite the spread of ceasefires, by the turn of the century the humanitarian crisis was extreme in several border areas. In addition to illicit drug production, there were large numbers of internally displaced persons, as well as thousands of women going into prostitution in Thailand.")

11. The Burmese military has made a policy of denying food supplies to ethnic regions and of forcing relocations and labor within these areas. Civilians are commonly compelled to serve as military porters or to sweep routes for mines in advance of troops. THE KAREN WOMEN'S ORG., *supra* note 9, at 9, 12.

households. From the perspective of these women, that they at times paid people to facilitate their passage to Thailand was merely incidental.

Further, the women who escaped the brothel prior to the raid claimed that they, like the women “rescued” in this particular scenario, and like many other Shan sex workers in Thailand, worked in the brothel of their own volition. According to these women, they were free to come and go as they liked; they were not subject to physical restraint in any way. They were not in debt bondage in the traditional sense of the phrase, although some did at times take pay advances from the brothel manager to travel home and back; they would repay such advances with a portion of their earnings over time, much like a loan against future paychecks that some workplaces offer in the United States. Yet from the perspective of the American evangelical organization doing this work, the women in the brothel, particularly the minors, needed to be rescued from the brothel. According to the IJM employee with whom I spoke during the summer following the raid, as all of the women had traveled across borders and left their communities to work in the sex industry, they qualified as exploited women in need of assistance, even when they personally denied that they experienced harm in the brothels.<sup>12</sup> That they may have paid others to facilitate their migration was presented as further evidence of their exploitation.

Nearly every anti-trafficking organization in Thailand had a different perspective on this situation. The explicitly feminist organizations unanimously supported the women, organizing letter-writing campaigns decrying the treatment of these detained sex workers and writing scathing white papers to bring public attention to the situation.<sup>13</sup> The Western evangelical organization that initiated the raid on the basis of their own brothel research claimed that they had orchestrated the rescue because two or three children were trapped against their will in the brothel.<sup>14</sup> It was only in my interview of a Thai-European man who worked extensively in anti-trafficking efforts that I came to appreciate the complexity of the situation surrounding this particular raid. He identified the myriad perspectives from which individuals and organizations perceived trafficking for sexual purposes and tried, in the context of his work, to maintain good working rapport with all of the local groups. In listening to him describe this working style, it became apparent to me that the raid and its aftermath crystallized the difficulty he encountered in working with organizations that shared no common ground in their approaches to trafficking. Although his approach was no more objectively correct than the others,

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12. Thrupkaew likewise reports that adults were removed from the brothel in question and indicates that they were deported. Thrupkaew, *supra* note 1, at 14. However, during the controversy that followed Thrupkaew’s article, IJM placed the following statement on its website as part of a letter to the editor submitted to *The Nation*: “In more than 10 years of experience on the frontlines of this field, IJM has found that effective policing can be done without infringing on the rights of adult women voluntarily engaging in commercial sex.” *IJM Letters to the Editor of The Nation*, INT’L JUSTICE MISSION, <http://www.ijm.org/ijmnews/nationletterstoeditor>.

13. While I observed this firsthand, Thrupkaew, *supra* note 1, at 13–14, offers further confirmation of this observation.

14. Again, this observation is based on my own interviews and confirmed by Thrupkaew. *Id.*

his appreciation of the conflict helped frame for me the questions that animate this Article.

I do not claim to know all of the nuances of this particular story, and I do not narrate it as authoritative. But the fallout from this raid has haunted me since that time because it illustrates and exemplifies the ongoing ideological conflict that surrounds the trafficking of women for sexual purposes.<sup>15</sup> A lack of shared dialogue among organizations typifies the anti-trafficking movement, in Thailand and elsewhere.<sup>16</sup> Rather than coordinating efforts by reaching consensus on at least some shared goals, these groups constantly argued among themselves about the most basic of concerns and, therefore, could not even broach harder topics.<sup>17</sup> This particular raid highlighted the extent of disagreement over what could be proper interventions and, even more problematically, over who required rescue. The organizations never reached agreement on the deeper issues such as the dilemma of brothels, when or whether the rescue of adult women is appropriate, or the essential

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15. Trafficking does not occur only in the sex trade. Agriculture, food processing, manufacturing, domestic labor, public works, and fishing are all industries in which trafficking has been documented. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* 24, 36, 47 (2009). However, despite the fact that women are particularly susceptible to trafficking due to employers' beliefs that female laborers are "submissive, cheap, and pliable," *id.*, scholars and activists have reported that the U.S. government overreports sex trafficking and underreports trafficking into other labor sectors. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 324-25 (2007) (observing that while the government reports over two-thirds of trafficking cases to be sex trafficking, one service provider in Los Angeles reported 40% domestic work, 17% factory work, 17% sex work, 13% restaurant work, and 13% servile marriage). I too have written about this problem elsewhere. Shelley Cavalieri, *The Eyes That Blind Us: The Overlooked Phenomenon of Trafficking into the Agricultural Sector*, 31 N. ILL. U. L. REV. (forthcoming 2011) (proposing explanations for why trafficking for sex work is the primary focus of public discourse, suggesting why trafficking into agriculture is particularly overlooked, and proposing policy interventions to shift attention to trafficking in agriculture). Likewise, trafficking of minors, whether into sex work or any other industry, raises a whole separate set of issues, as children's capacity for consent obviously differs from that of women, but what qualifies as a child likewise varies from country to country. See Jyoti Sanghera, *Unpacking the Trafficking Discourse*, in *TRAFFICKING AND PROSTITUTION RECONSIDERED: NEW PERSPECTIVES ON MIGRATION, SEX WORK AND HUMAN RIGHTS* 3, 13 (Kamala Kempadoo ed., 2005). While all of these concerns about trafficking are critical, they are also outside the scope of this Article.

16. The lack of reliable data also hinders efforts to prevent trafficking and address its effects on trafficked persons. The incidence of human trafficking remains difficult to quantify due to the fact that trafficked persons in all labor sectors remain hidden populations who are engaged in stigmatized and illegal behavior, who are difficult to locate, and who may refuse to cooperate in research or give "unreliable answers to protect their privacy." Guri Tyldum & Anette Brunovskis, *Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking*, in *DATA AND RESEARCH ON HUMAN TRAFFICKING: A GLOBAL SURVEY* 17, 18 (Frank Laczko & Elzbieta Gozdzik eds., 2005).

17. Again, this observation is based on my own interviews and confirmed by Thrupkaew, *supra* note 1, at 14, who notes that "[e]ven the other anti-trafficking groups couldn't get along with [the evangelical organization]." That conflict existed between these groups is well documented.

acceptability of sex work. This raid demonstrated that the organizations simply could not agree on how to engage with the problem, much less on any shared ideological premises from which to coordinate their efforts.<sup>18</sup> In the absence of coordinated anti-trafficking efforts, these organizations wasted enormous amounts of time infighting rather than providing direct assistance to the myriad trafficked and voluntary sex workers in Thailand who might have benefited from social services aid.<sup>19</sup>

From a theoretical perspective, this Thai scenario displays the ideological chasm that divides anti-trafficking organizations. Whereas in this particular scenario the abolitionist organization was evangelical Christian, a number of feminist groups also share abolitionist values.<sup>20</sup> Although their first principles differ dramatically, both kinds of abolitionist organizations hold in common a fundamental instinct that consent to the sale of sexual labor is problematic. Beginning from this premise, feminist abolitionist organizations articulate a gender-based critique of the social conditions that create the economic desperation underlying women's choice to engage in sexual labor.<sup>21</sup> Further, they advocate the ultimate abolition of all forms of sexual labor as the solution to the coercive choice of engagement in sex work.<sup>22</sup> Yet as they cannot fully explain the private choices that individual women make in the context of conditions of social oppression and economic desperation, their account offers a narrow critique focused solely on the sexuality inherent in the labor, without acknowledging the other aspects of women's lives that shaped their choices to perform sexual labor.

The sex-worker-rights organizations examined the raid from the opposite perspective. Beginning with an initial reliance on the concept of self-determination, these organizations asserted that the women in the brothel had chosen to be there and that the raid's forcible removal of them was a fundamentally unacceptable abridgement of their autonomy. As the women worked of their own volition, were free to stay or leave, and were not in debt bondage, the conditions of their work were consistent with their autonomy. Further, the sex-worker-rights organizations emphasized the particularized context of these women's choices. Faced with the option of sexual abuse and hunger at the hands of the Burmese junta, these organizations asserted that the choice to live and work in a brothel was a rational

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18. The same conflict has been identified in on-the-ground intervention in sex work and trafficking in other contexts as well. See, e.g., MEREDITH RALSTON & EDNA KEEBLE, *RELUCTANT BEDFELLOWS: FEMINISM, ACTIVISM AND PROSTITUTION IN THE PHILIPPINES* 52–62 (2009).

19. See Thrupkaew, *supra* note 1, at 15 (discussing how sex-worker-rights organizations would help women avoid raids and deal with their aftermath).

20. The Coalition Against Trafficking in Women (CATW), discussed *infra* Part I, is the most notable of the feminist anti-prostitution organizations. CATW's mission statement begins with the following paragraph: "The Coalition Against Trafficking in Women (CATW) is a non-governmental organization that promotes women's human rights. It works internationally to combat sexual exploitation in all its forms, especially prostitution and trafficking in women and children, in particular girls." *An Introduction to CATW*, COAL. AGAINST TRAFFICKING IN WOMEN, <http://www.catwinternational.org/about/index.php>.

21. See *infra* Part I.

22. See *infra* Part I.



decision that individuals made based on the circumstances of their lives in Burma.<sup>23</sup> However, by framing brothel work as a series of individual decisions, these groups overlooked the social influences that constrained the range of options available to women who chose to engage in sexual labor.

These practical, activist positions on trafficking share important connections to the strains of feminist theory that provide their underlying rationales.<sup>24</sup> The abolitionist movement is closely tied to the dominance feminism school of thought, paradigmatically defined by the work of Catharine MacKinnon.<sup>25</sup> In the context of sex work generally and trafficking specifically, Kathleen Barry and others have articulated the nuances of the application of the dominance feminism model to this issue.<sup>26</sup> Other feminist authors, notably Jo Doezema and Kamala Kempadoo, discuss the sex-worker-rights position, which possesses two sets of roots. First, it arises in significant part from a liberal vision of trafficking and its critique of dominance feminist theory.<sup>27</sup> Second, in important and largely unstated ways, it draws on poststructuralist feminism's rejection of gender essentialism.<sup>28</sup> Martha Nussbaum also offers an explicitly liberal vision of trafficking and sex work from a more specifically philosophical position.<sup>29</sup>

The weaknesses and strengths of these strains of feminist theory closely parallel the problems articulated above regarding approaches to sex trafficking. The dominance school of feminism brilliantly offers a scathing critique of gender and sexualized privilege in society, and at times extends the critique equally well to the arenas of first-world privilege. Yet dominance feminism provides this critique in such a universalized way that it fails to account for the individual circumstances of particular women's lives. In short, dominance feminism extends its critique too far, compulsorily drawing all women into its purview, and offering abolition as its singular solution predicated solely on a stunted view of trafficking. Feminists focused on sex-worker rights, in contrast, insightfully leverage liberal thought to appreciate the condition of individual women's lives and place women's decisions within a personal context; they look to poststructuralism<sup>30</sup> to help construct a

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23. Even a former staffer of the IJM has noted that the women "were making a rational decision under horrible conditions—to be raped for free in Burma or paid to do commercial sex work is one situation. For me, they are making a rational decision, but that's a decision no one should have to make." Thrupkaew, *supra* note 1, at 16 (quoting Christa Crawford, former IJM country director in Thailand).

24. Chantal Thomas has discussed these two general camps in her considerations of governance feminism and sex trafficking. Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 348–51 (2006).

25. *See infra* Part I.

26. *See infra* Part I.

27. *See infra* notes 88–95 and accompanying text.

28. *See infra* notes 96–98 and accompanying text.

29. *See infra* notes 148–60 and accompanying text.

30. Poststructuralism "emphasizes the variety, complexity, and contingency of the discursive influences that shape subject formation." Kathryn Abrams, *Afterword, Critical Strategy and the Judicial Evasion of Difference*, 85 CORNELL L. REV. 1426, 1437 n.52 (2000). Put another way, poststructuralism rejects a monolithic account of a group and

feminism cognizant of individual difference. But they neglect the broader social context in which individual women make private life choices, which is a crucial element of a feminist social critique.

This Article articulates a new feminist approach to the trafficking of women for sexual purposes. Drawing on existing feminist scholarship that both appreciates the constrained autonomy within which individuals make decisions and proffers a more generalized condemnation of patriarchal social structures, this project enlists both dominance and liberal feminism to stake out a middle ground—a third way—between the poles of victimhood and agency.<sup>31</sup> Rather than focusing on the ideological battle over women’s bodies as represented in the trafficking and sex work debates, this Article offers a new model that properly conceptualizes trafficked women and voluntary transnational sex workers and highlights preventative and interventionist approaches consistent with this vision of who these women are. While focusing on trafficking for sex work because of the generative force of feminist legal theory, these interventions are equally useful in addressing trafficking into any labor sector.<sup>32</sup>

Part I lays out the dominance feminist approach to sex work in general, and trafficking specifically, offering a critique of the weaknesses of this approach. This Part simultaneously identifies the strands of this line of theorizing that might be salvaged to offer an alternative to the existing bifurcated approach to trafficking.

Part II similarly articulates the main arguments of sex-worker-rights advocates, contextualized in their liberal theoretical origins. This Part attends to the role of

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captures ambiguity and heterogeneity within ostensible groups. Within feminist discourse, poststructuralists typically adopt a standpoint in which intersecting identities are identified and often valued. I am grateful to Kathryn Abrams for our lengthy discussions of the poststructuralist implications of this Article.

31. Aya Gruber, Cyra Choudhury, Leigh Goodmark, and Laura T. Kessler have identified this rejection of the agent/object dichotomy as one of the three major tenets of an evolving neofeminism. They identify neofeminism as a new movement in feminist legal theory that moves beyond the three key feminist orthodoxies of absolutism, the use of police power to affect change, and the acceptance of the agent/object dichotomy. Aya Gruber, Leigh Goodmark, Cyra Choudhury & Laura Kessler, University of Baltimore Feminist Legal Theory Conference: Workshop on Neofeminism (Mar. 4, 2010); *see also* Aya Gruber, Cyra Choudhury, Leigh Goodmark, Frank Rudy Cooper & Shelley Cavalieri, Fifteenth Annual LatCrit Conference: NeoFeminism: Exploring New Feminist Analyses and Methodologies (Oct. 8, 2010).

32. The research and discourse on trafficking overemphasizes trafficking for sexual purposes to the exclusion of scholarly and public attention to trafficking into different labor sectors. Although trafficking itself is notoriously difficult to quantify properly, this reporting bias generates data skewed in the direction of trafficking for sexual purposes. Elzbieta M. Gozdziaak & Elizabeth A. Collett, *Research on Human Trafficking in North America: A Review of Literature*, in DATA AND RESEARCH ON HUMAN TRAFFICKING, *supra* note 15, at 99, 117 (observing that in the North American context, “[a] great deal of research has focused on trafficking for sexual exploitation, to the detriment of investigating trafficking for bonded labour and domestic servitude”); *see also* Liz Kelly, “You Can Find Anything You Want”: A Critical Reflection on Research on Trafficking in Persons Within and into Europe, in DATA AND RESEARCH ON HUMAN TRAFFICKING, *supra* note 15, at 235, 235 (offering “an attempt to move beyond the focus on trafficking for sexual exploitation to include that for domestic service and labour exploitation”).

poststructuralism in shaping a growing movement of theorists and activists who attend to the particularity of the situations of women of the global South, rejecting a monolithic understanding of “woman,” even in discussions of trafficking for sexual purposes. It offers a critical assessment of this theoretical model while identifying the elements of this approach that are most promising for a new articulation of how to do feminist law and policy making in a manner that critiques societies but continues to properly apprehend women as individuals.

Part III articulates a new third-way approach to trafficking by reconciling the salvageable strands of the above two models and suggesting the basic tenets of a new public policy approach that grows from third-way feminism. Finally, it concludes by showing how these tenets can generate specific public policies that enact this set of feminist principles in interventions in the lives of trafficked women.

Part IV connects this third-way feminist theory and policy to scholarship on the capabilities approach to human development, observing that this kind of third-way feminist policy intervention resonates deeply with the effective and original approach of Amartya Sen and Martha Nussbaum on how to properly conceptualize development work. This Part concludes by noting how development and human rights law that properly apprehends the intended beneficiary can generate meaningful, lasting change in the lives of women.

## I. DOMINANCE FEMINISM AND SEX WORK

### *A. Sex Work as Oppression: An Overview of Dominance Feminism*

By fundamentally questioning the fabric of gender relations in society, the dominance feminist model has radically shaped contemporary feminist discourse. Beginning with the primary assertion that men’s sexual coercion of women creates and sustains the ongoing social inequalities that pervade relationships between the genders in all aspects of modern society, dominance feminism has broadly addressed many issues that are pressing to the women’s rights movement.<sup>33</sup> A wide-ranging group of dominance feminist theorists has considered pornography,<sup>34</sup>

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33. For example, Catharine MacKinnon has litigated, drafted amicus briefs, served as an expert trial witness, and consulted on others’ litigation regarding myriad feminist issues, including rape, sexual harassment, and pornography. *See, e.g.*, *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986) (MacKinnon as coauthor of brief on hostile environment forms of sexual harassment); *Kadic v. Karadzic*, 70 F.3d 232, 236–37 (2d Cir. 1995) (MacKinnon representing a group of women in a mass tort action under the Alien Tort Claims Act against Bosnian Serb leader Radovan Karadzic, asserting that they were the victims “of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war”).

34. *See, e.g.*, ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981). Andrea Dworkin’s work on pornography typifies the way that dominance feminist thinkers not only generated rich explanatory theories of gender relations, but also engaged in campaigns for legal change, cognizant of this growing understanding of the nature of sexual oppression.

sexual harassment,<sup>35</sup> and other forms of sexualized power through this analytical lens, assessing the prevalence of sexualized domination throughout women's lives.<sup>36</sup> From its radical roots thirty years ago, this school of thought has generated a broad-based awareness of the ways in which sexualized coercion is a basic aspect of society that escapes public awareness because of its hegemonic control over everyday social encounters.

Sex work and the trafficking of women for sexual purposes have also fallen under the scrutiny of dominance feminist theorists; Kathleen Barry has perhaps become the most influential of these writers, not only because of the impact of her scholarship, but also because she translated her academic interests into activism through her involvement in founding and directing the Coalition Against Trafficking in Women.<sup>37</sup> *Female Sexual Slavery*, published in 1979, marked a fundamental re-visioning of the meaning of women's sexual labor in male-dominated society, consistent with the paradigm-shifting work of the other dominance feminists.<sup>38</sup>

Drawing on the scholarship of other dominance feminists including Kate Millet, Susan Griffin, and Susan Brownmiller, in *Female Sexual Slavery*, Barry places all forms of sexual labor in what she called the "rape paradigm," in which rape is a political act rather than an individuated experience of individual women.<sup>39</sup> By characterizing all forms of commercial sexual activity as rape, to which no woman can consent, Barry frames the entire discussion of commercial sex in the terms of the rape paradigm.<sup>40</sup> Advancing from these general principles of dominance feminism, Barry rapidly jumps from stating that sexual domination defines women's lives in society to equating all forms of sexualized domination, including prostitution and the trafficking of women, due to their shared pervasive context.<sup>41</sup>

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35. See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

36. "Pornography and prostitution, including erotic dancing, are blood sports of male supremacy." CATHARINE A. MACKINNON, *Pornography Left and Right*, in *WOMEN'S LIVES, MEN'S LAWS* 327, 341 (2005).

37. KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 5, 17 (1995) [hereinafter BARRY, *THE PROSTITUTION OF SEXUALITY*]; see also Jo Doezema, *Forced to Choose: Beyond the Voluntary v. Forced Dichotomy*, in *GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION* 34, 37 (Kamala Kempadoo & Jo Doezema eds., 1998) (discussing the history of CATW).

38. KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (New York Univ. Press 1984) (1979) [hereinafter BARRY, *FEMALE SEXUAL SLAVERY*]. This book laid bare the politicized nature of relationships between men and women, focusing on how power pervades both public and private negotiations over sex.

39. *Id.* at 40–42.

40. See *id.* at 41. Barry likewise wove other forms of women's sexual domination into the fabric of sexually oppressive circumstances in which all women live and discussed the sexual subjugation of women in all kinds of intimate relationships as part of the problem of sexualized dominance. *Id.*

41. *Id.* at 41–42. Barry here explicitly parallels MacKinnon's central insight that the experience of sexualized domination is a defining characteristic of women's lives in a gender-subordinating society. While Barry discusses this concept in the context of her work on trafficking and commercial sexual activity, she is by no means the only scholar to make

Claiming that “virtually the only distinction that can be made between traffic in women and street prostitution is that the former involves crossing international borders,” Barry refuses the traditional distinction between voluntary and involuntary sexual labor.<sup>42</sup> Instead, she creates the category of “sexual slavery,” and includes within it both international trafficking of women for sexual purposes and forced street prostitution.<sup>43</sup> In short, she shifts the analysis from one of the means by which women entered sex work to one that focuses on the ultimate end of sex work, which she considers to be wholly exploitative, in an attempt to moot counterarguments to her conflation of all prostitution with trafficking for sexual purposes.<sup>44</sup> Because pimps, recruiters, and others who benefit from prostitution use force or violence in many cases, she suggests that all prostitution is compelled or violent.<sup>45</sup> The net effect is a monolithic account of all kinds of sex work applied to all women working in sexual labor, no matter how they began the work or what prompted them to perform it.

However, Barry’s early work was unselfconsciously inconsistent in equating voluntary and involuntary sex work. *Female Sexual Slavery*, for example, faulted legal authorities for their “inability . . . to distinguish between victims and volunteers”<sup>46</sup> and recognized that not all women are forced or defrauded into

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these kinds of comprehensive connections between forms of sexualized oppression. For example, Andrea Dworkin observes how pornography’s major theme is male power, expressed in myriad forms. DWORKIN, PORNOGRAPHY, *supra* note 34, at 24–25. If anything, this kind of thinking on sexual violence and gendered subjugation is the shared connection that allows Barry, MacKinnon, and others to hold in common the name of dominance feminist. See generally CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter MACKINNON, FEMINIST THEORY].

42. BARRY, FEMALE SEXUAL SLAVERY, *supra* note 38, at 7. This differentiation between voluntary and involuntary prostitution dates back at least as far as discussions about the “white slave trade,” the phrase used to describe the traffic in women around the turn of the twentieth century. Doezeema, *supra* note 37, at 35–36. Morally defensible women, known as “white slaves,” were the ones tricked into participation in the sexual labor market. *Id.* Those who knowingly entered the market were simply common prostitutes. *Id.* The point of the distinction was to differentiate the morally pure, who warranted rescue and aid because they were victims, from the fallen, who had volitionally begun the work and therefore were culpable for any subsequent harm.

43. BARRY, FEMALE SEXUAL SLAVERY, *supra* note 38, at 7. She conflated the two phenomena by first rejecting the importance of the procurement strategy that pimps or recruiters use, portraying it as a false dichotomy. *Id.* In place of this distinction, she emphasized the material conditions of women who work as sexual laborers. *Id.* Because both women who have been coerced, kidnapped, or defrauded and women who have willingly entered the industry labor under the same conditions of sexualized domination, Barry posited that these conditions were the true locus of the violence perpetrated against women in “sexual slavery.” *Id.*

44. In so doing, Barry replicated the logic of the white slavery debates of the early twentieth century, which characterized all commercial sex transactions as inherently violent. For an outstanding historical discussion of consent and women’s sexuality, see PAMELA HAAG, CONSENT: SEXUAL RIGHTS AND THE TRANSFORMATION OF AMERICAN LIBERALISM 84 (1999).

45. BARRY, FEMALE SEXUAL SLAVERY, *supra* note 38, at 7–8.

46. *Id.* at 60.

entering prostitution against their will.<sup>47</sup> Yet rather than using these observations to acknowledge the limitations of her theoretical model, Barry instead suggests that the examination of an individual woman's motivation for entering sex work is merely demonstrative of bias and victim blaming.<sup>48</sup> To focus on the means or motives by which women enter sex work, rather than the harm they suffer therein, masks the injury and blames the woman for what happened, instead of looking to the actual social cause, which is the pervasive sexual domination of women.<sup>49</sup> In place of focusing on the complicity of women in their own oppression, Barry recommends foregrounding the actual working conditions of women in sexual labor, which escapes an individualist focus and generates a politicized, collective understanding of the societal source of sexual oppression.<sup>50</sup>

Indeed, *Female Sexual Slavery*'s most important contribution is the radical analytic shift that it proposes for understanding the social meaning of prostitution. Prior to the advent of dominance feminism, prostitution was traditionally framed as an economic transaction, building from the trite expression that it is the oldest profession in the world.<sup>51</sup> Critiques of prostitution focused on economic exploitation as the primary axis of oppression that sex workers experienced. But Barry shifts this focus, instead enlisting the primary analytical axis of the dominance feminist school: gender.<sup>52</sup> By focusing explicitly on the gendered nature of sexual slavery, Barry swings from an economic analysis to a solely gender-based one.<sup>53</sup> She rejects the practice of equating male prostitution with female prostitution, noting that "[t]he victimization and enslavement to which women are subject in male-dominated society find no equivalent in male experience."<sup>54</sup> Prostitution and trafficking, under Barry's dominance feminism model, are exclusively about the sexualized oppression of women by men. This represents a shift to understanding prostitution and its effect on women as a class, rather than as isolated, discrete individuals.<sup>55</sup>

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47. *Id.* at 84.

48. *See id.*

49. The application of this approach in the arena of trafficking closely mimics its more common usage in the treatment of rape in general. *See, e.g.,* Amy Grubb & Julie Harrower, *Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim*, 13 *AGGRESSION & VIOLENT BEHAV.* 396 (2008) (documenting how victim blaming functions in rape cases).

50. *See* BARRY, *FEMALE SEXUAL SLAVERY*, *supra* note 38, at 85.

51. *See id.* at 9–10. In this conception of prostitution, it is a predictably age-old economic exchange that women sell sex to men as a mainstay of the economy. Women enter prostitution much as they would choose any other form of money-making activity, thus primarily shaping a vision of sex work as about money and labor, not sex, gender, and power.

52. *See id.* Again, Barry here theorized in the good company of her dominance feminist comrades. MacKinnon's post-Marxist analysis and Barry's reconceptualization of prostitution as a secondarily economic transaction are cut from the same cloth. For MacKinnon on this point, see, for example, MACKINNON, *FEMINIST THEORY*, *supra* note 41, at 113.

53. BARRY, *FEMALE SEXUAL SLAVERY*, *supra* note 38, at 9–10.

54. *Id.* at 11.

55. *See* BARRY, *THE PROSTITUTION OF SEXUALITY*, *supra* note 37, at 9. This gendered,

In *The Prostitution of Sexuality*, Barry reconceptualizes *Female Sexual Slavery* to make her arguments more pertinent to the substance of the feminist conversation on trafficking and prostitution in the middle of the 1990s,<sup>56</sup> moving from a focus on “the sexuality of prostitution” and all kinds of sexual exploitation to a new venture focused on the “prostitution of sexuality” and commodified sexual activity in particular.<sup>57</sup> It reflects the public legal engagement of dominance feminism, including the passage of the “Dworkin-MacKinnon ordinances”<sup>58</sup> and the international human rights involvement on the issue of trafficking,<sup>59</sup> documenting how these scholars’ theories supported the public feminist actions of the 1980s and 1990s. The rise of legal reform seeking to embody dominance feminist principles removed the topic from solely theoretical scholarly discourse and placed it squarely within the public legal arena, thus rendering dominance feminist discussions of trafficking and sex work especially relevant to ongoing public debates.

*The Prostitution of Sexuality* makes explicit many of the unstated premises that Barry had employed in *Female Sexual Slavery*, a point that Barry acknowledges early in the second text.<sup>60</sup> *The Prostitution of Sexuality* unambiguously states Barry’s belief that the consensual engagement in prostitution is both a logical impossibility and, at its foundation, the wrong analysis of the phenomenon.<sup>61</sup> Building from the initial dominance feminist premise that sexual domination defines the whole of women’s experience, Barry asserts that the reduction of women from people to the sexualized object of the body is the origin of gendered oppression.<sup>62</sup> Because this reduction is the central element of women’s class-based experience in the world, Barry fundamentally rejects the liberal notion of consent as the dispositive factor in the description of domination.<sup>63</sup> Instead, she posits that

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group-based analysis is reflective of the traditional feminist epistemology that refused to minimize individual experience, instead proclaiming its class-based analysis under the aegis of “the personal is political.”

56. *Id.* at 15–19.

57. *Id.* at 11. This book exists at the nexus of feminist theory and law, and specifically attends to the prevalence of legal intervention as the primary way dominance feminists as a group brought their theoretical positions to practical fruition.

58. *Id.* at 3. Dworkin and MacKinnon proposed a model anti-pornography civil rights ordinance. See ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY 138–42 (1988). At least some jurisdictions, including Indianapolis, passed a variation of this ordinance, though it was ultimately declared unconstitutional for violation of the First Amendment. See Kelly Ann Cahill, Note, *Hooters: Should There Be an Assumption of the Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1146 n.204 (1995) (citing *American Booksellers Assoc. v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986)).

59. By shifting the discourse away from the issue of consent, dominance feminists accomplished the insertion of their philosophy directly into the legal regime that now controls the issue of trafficking internationally. BARRY, *THE PROSTITUTION OF SEXUALITY*, *supra* note 37, at 4–6.

60. *Id.* at 9.

61. See *id.* at 17. In contrast, *Female Sexual Slavery* had merely danced around the topic of consent.

62. *Id.* at 23.

63. *Id.*

the key failing of liberal theory in understanding the sexual domination of women is its inability to properly frame oppression due to its excessive reliance on the role of consent.<sup>64</sup> In place of a liberal conception of the individual as the actor in question, Barry advances a sweeping critique of the sexualized and gendered domination of women that pervades social life, stating, “In this work I am shifting from the nearly singular standard of consent or force in the determination of violation to its full human, interactive bodied experience, to span the range of oppression from individualized coercion to class domination.”<sup>65</sup> By rejecting the importance of the liberal ideas of consent or individuated volition in assessing whether domination has occurred, Barry thus prepares the way for a sweeping reconceptualization of both the class-based nature of oppression and the experience of sexualized domination.<sup>66</sup>

The centerpiece of Barry’s critique is her four-pronged description of the ways in which prostitution “socially constructs the sexual exploitation of women.”<sup>67</sup> Prostitution sex *distances* women’s very selves from the act of prostitution, or causes a kind of internal fragmentation for women who do sex work.<sup>68</sup> It causes women to *disengage* themselves from the work they do and the ways they spend their time.<sup>69</sup> Prostitution demands that women *dissociate* themselves from the work or segment themselves into parts for purchase by men.<sup>70</sup> Finally, women who perform sex work experience *disembodiment* and remove themselves from the work they do in order to survive it with their identities intact.<sup>71</sup> Barry uses this analysis to bolster the claim made in *Female Sexual Slavery*: that no woman can choose to do the work of prostitution for two reasons. First, it involves a level of self-harm to which no woman could consent; second, no other meaningful labor option exists, which renders choice impossible.<sup>72</sup> The sum of this four-part proposition thus supports her universalized approach to prostitution and trafficking: as all women are exploited, no matter how they entered the sex trade, the same theoretical explanation of their condition is appropriate in all cases. One theory of sex work accounts for the experiences of literally every woman engaged in it.

At its essence, then, Barry offers a framework for the consideration of prostitution and trafficking for sexual purposes that views both phenomena

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64. *Id.*

65. *Id.* at 23–24. In so doing, she also stakes out clearly her break from liberal feminist thought, which typified the earliest years of feminist theory and activism. See, e.g., JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (1869), reprinted in MILL 133, 133 (Alan Ryan ed., 1997) (“That the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.”).

66. BARRY, *THE PROSTITUTION OF SEXUALITY*, *supra* note 37, at 24.

67. *Id.* at 29.

68. *Id.* at 30.

69. *Id.* at 31.

70. *Id.* at 34–35.

71. *Id.* at 35.

72. *Id.* at 29–33.



singularly through the lens of the subjugation of women as a monolithic class on the basis of sexualized domination. A number of other scholars have adopted, refined, and expanded on Barry's groundbreaking work on female sexual labor since the publication of *Female Sexual Slavery*, and especially since the more recent publication of *The Prostitution of Sexuality*.<sup>73</sup> The model of feminism that Barry and others who share her philosophy espouse presents a radical reconceptualization of the meaning of sexual labor in contemporary society.<sup>74</sup> Other scholar-activists have heavily engaged in the continued discourse that Barry's earliest writings prompted, persistently and publicly advocating the abolition of all forms of commercial sexual activity.<sup>75</sup> Their organizations sponsor activist groups of former sex workers, domestic and international lobbying efforts, and active engagement in the public and scholarly discourse, and have brought Barry's theories to practical fruition. While these newer scholars have contributed original voices to the conversation and have brought public attention to the general theoretical orientation of dominance feminists, their foci differ in meaningful ways from the theory that Barry forwarded initially.

More recently, dominance feminists have increased their focus on the role of intersecting axes of oppression in prostitution and trafficking for sexual purposes, particularly when considering international trafficking situations.<sup>76</sup> While Barry

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73. Indeed, Barry's terminology of "sexual slavery" has been adopted even by many who write in a more journalistic manner on human trafficking. *See, e.g.*, ANDREA PARROT & NINA CUMMINGS, *SEXUAL ENSLAVEMENT OF GIRLS AND WOMEN WORLDWIDE* (2008); TO PLEAD OUR OWN CAUSE: PERSONAL STORIES BY TODAY'S SLAVES I (Kevin Bales & Zoe Trod eds., 2008). However, the use of the terminology of slavery, particularly in the United States, with its history of legally entrenched chattel slavery of imported African people and their descendants, to describe indentured sexual labor raises real questions in the legal context of whether this terminology is legally accurate or a form of politicizing the phenomenon to raise public attention.

74. *See* BARRY, *FEMALE SEXUAL SLAVERY*, *supra* note 38; BARRY, *THE PROSTITUTION OF SEXUALITY*, *supra* note 37.

75. These most notably include Evelina Giobbe, who created the organization known as WHISPER (Women Hurt in Systems of Prostitution Engaged in Revolt) in 1986, and Janice Raymond, one of the co-executive directors of CATW (Coalition Against Trafficking of Women). BARRY, *THE PROSTITUTION OF SEXUALITY*, *supra* note 37, at 5–6. Giobbe and Raymond have been involved in anti-trafficking and anti-prostitution efforts for decades, largely as activists and organizational leaders. While Raymond does write, her books do not focus on the issue of sex work. *See, e.g.*, JANICE G. RAYMOND, *A PASSION FOR FRIENDS: TOWARD A PHILOSOPHY OF FEMALE AFFECTION* (1986); JANICE G. RAYMOND, *TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* (1979); JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM* (1993).

76. Catharine MacKinnon has acknowledged the essentialist critique of dominance feminism, but dismisses it as "a sneer, a tool of woman-bashing, with consequences that far outrun its merits," asserting instead that she does not "relegate women of color to footnotes and brackets, . . . assume that all women are white, . . . [or] require women to choose between their ethnic identification and their gender." CATHARINE A. MACKINNON, *Keeping It Real: On Anti-"Essentialism,"* in *WOMEN'S LIVES, MEN'S LAWS*, *supra* note 36, at 84, 88. MacKinnon argues that the charge of essentialism has "undermined the contributions that dominance theory, as developed in feminism, could make to antiracist work. Feminist dominance theory is a theory of social and political inequality as such. It builds on

dealt with this issue as one entwined with, but secondary to, the sexualized domination of women in prostitution,<sup>77</sup> other dominance theorists have considered multiple forms of oppression as ways that dominance actually functions in the lives of real women.<sup>78</sup> Racism, classism, and colonialist privilege function in combination to “exacerbate oppressive social and economic conditions that make poor women and women of color particularly vulnerable to prostitution.”<sup>79</sup> In the trafficking and prostitution context, the dominance feminist analysis of sexualized

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antiracism and builds it in.” *Id.* at 89–90. MacKinnon raises the specter that anti-essentialism “corrodes group identification and solidarity and leaves us with one-at-a-time personhood: liberal individualism.” *Id.* at 90. Thus, she maintains that dominance feminism offers “a reality of group oppression that exists whether we identify with our group or not.” *Id.*

77. Barry attempts to inform her analysis with an acknowledgment of intersecting axes of oppression, including race and colonialism, but this effort is somewhat incomplete. *See* BARRY, *THE PROSTITUTION OF SEXUALITY*, *supra* note 37, at 24. She suggests that racial difference, like sexual difference, is used to justify the oppression specifically of women of color in the commodification of sexuality. *See id.* She notes that men who are johns often enlist racialized stereotypes as an element of the sexual performance they compel from women, *see id.* at 34, a phenomenon that I have noted firsthand; the experiences of Nigerian women trafficked into Southern Italy are rife with racialized violence perpetrated against them by white men.

Yet Barry fails to appreciate the compounding effect of racial stereotypes in creating the demand for sex workers from particular geographic locales and specific ethnic identities, which I have observed in many parts of the world. In Italy, Nigerian participants in the commercial sex sector are streetwalkers. Women from former Soviet republics usually work in brothels. Italian women and other western Europeans are most commonly call girls. In Southeast Asia, the shade of an indigenous sex worker’s skin can dictate the level of the commercial sex industry in which she may work. Streetwalkers are uncommon in Thailand, but the darkest-skinned indigenous women work in the most ramshackle of the brothels, which manual laborers frequent, while fairer indigenous and Thai women can work in the karaoke bars that are the hub of student life. The fairest-skinned women with the best command of the spoken Thai language work in high-priced clubs where Thai, Japanese, and Korean corporate employees transact business.

Likewise, Barry recognizes that conditions of economic disparity, feudal marriage, and rural poverty render particular, racially oppressed groups of women susceptible to the market for sex work. *Id.* at 175, 178. Yet, she maintains the gendered axis of oppression and the sweeping critique of sexualized dominance as her primary explanation for the incidence of trafficking and other forms of prostitution, even where other circumstances are more central to the compulsion of women into sexual labor. *See id.* at 196–97. Barry acknowledges that these women are not “trafficked” in the traditional sense of the term when they choose to engage in sexual labor; she speaks of the choice as a coercive one, not one representative of a freely made decision. *See id.* But she fails to fully comprehend how additional axes of oppression in a particular woman’s life might make a choice that appears to be constructed by gendered oppression one that actually releases a woman from the most pernicious effects of other kinds of oppression present in her life.

78. In this regard, Barry’s dominance feminist successors’ writings reflect the important work of poststructuralist feminists, who reject singular discourses in favor of ones that have been described as “poly-vocal” by poststructuralists such as Marie Ashe. *See* Marie Ashe, *Mind’s Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129, 1169 (1988).

79. Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism and Feminist Discourse*, 10 HASTINGS WOMEN’S L.J. 37, 44–45 (1999).

privilege has also been expanded to include an explicitly racial element that recognizes the role of *white* male supremacy as the primary oppressive force in sexualized labor.<sup>80</sup> Where Barry comfortably posited a single vision of the oppression of sex workers, her successors in the dominance school grasp the ways that poststructuralism has shown how intersecting axes of oppression complicate this vision and make the achievement of a cogent unitary model of oppression impossible.<sup>81</sup> Poststructuralist scholars thus succeed in rendering the analytic frame cognizant of the myriad forms of oppression that jointly create the system of sexualized, racialized, and colonized domination in which victims of human trafficking function and survive. This stands in contrast to Barry's model, which considers gender in isolation as the primary way in which all women, including women of color, indigenous women, women of the global South, and poor women, experience oppression as sex workers.<sup>82</sup> Barry's successors have thus informed dominance feminism with the insights that poststructuralism has contributed to feminist thought in general.

#### *B. Weaknesses of Dominance Feminism in the Trafficking Realm*

Yet three primary conceptual problems pervade the work of Kathleen Barry and her dominance feminist peers. First, they exploit the lack of definitional clarity between voluntary sex work and involuntary trafficked sex work in order to further their theoretical position about the exploitative nature of all sexual labor. Second, the universalized categorization of all forms of sexual labor as inherently exploitative means that the theory refuses to engage with any counterexamples to its presumptions and, in effect, fails to account for the lives and experiences of myriad women. Third, the pervasive and singular definition of women who are sex workers as universally oppressed rejects any liberatory possibility for the role of sex work in the lives of the women who perform it.

As described above in Barry's work, dominance feminist theory as applied to the realm of prostitution and trafficking takes full form in the conflation of voluntary and involuntary sex work.<sup>83</sup> This technique serves two central purposes. First, it shifts the focus away from the liberal approach that centers on autonomy and consent. In so doing, dominance feminist theorists on trafficking create the oppositional nature of their fundamentally radical approach as set against the traditionally liberal conception of the individual. Second, and more importantly for the purposes of this analysis, it allows for the broad imposition of the theory on ever larger groups of women. Such a propensity for universalizing tends to mask the differences between sex workers, the conditions that predicate their entry into the sexual labor market, and the situations in which they perform the work of commodified sex. Rather than offering a description adequately nuanced to reflect the particularity of individual narratives, these universalizing tendencies lose the individual in a theory painted in broad strokes.

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80. *See id.* at 38, 44–45.

81. *See id.*

82. *See* BARRY, THE PROSTITUTION OF SEXUALITY, *supra* note 37, at 196–97.

83. *See supra* notes 60–72 and accompanying text.

The assertion of such a broadly applied theory that hinges on a monolithic account of sexual labor as inherently exploitative overtly disregards all experiences of individual sex workers that undermine this theoretical perspective.<sup>84</sup> In short, it means that the theory accounts for sex workers engaged in pro-sex-work efforts as experiencing false consciousness, or as existing in abnormal circumstances that thus do not merit analysis, and, therefore, disregards their experiences without actually addressing them individually.<sup>85</sup> At times, dominance feminists brandish outlandishly unqualified, universalized opinions on sex work that dehumanize the individual women who engage in it:

A good prostitute is devoid of a unique and personal identity. She is empty space surrounded by flesh into which men deposit evidence of their masculinity. She does not exist so that he can. Prostitution done correctly begins with theft and ends with the subsequent abandonment of self. What remains is essential to the job: the mouth, the genitals, anus, breasts . . . and the label.<sup>86</sup>

Rather than allowing for a contextualized particularity in approaching the lives of women engaged in sex work, such descriptions are intended to obviate relevant differences between individuals so that the theory can account for all women. Yet, to return to the introductory narrative of this Article, the Shan women of that story cannot be described in this way. They claim their own identity, not generated within their work but in fact as the predicating element of their work. In the face of socially generated oppression on axes of ethnicity and indigeneity, the Shan women working in Thai brothels claimed sex work as a means of escape from the repression of the Burmese junta. Other commentators on migrant sex work have similarly noted that many women leave their country cognizant of the kind of work that awaits them, but still migrate for employment purposes to do sex work.<sup>87</sup> The

84. Angela Harris has persuasively discussed how Catharine MacKinnon's "work, though powerful and brilliant in many ways, relies on what [Harris] call[s] gender essentialism—the notion that a unitary 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990); see also *id.* at 590–601 (offering a critique of MacKinnon specifically and dominance feminism generally). The critique that I offer here of Barry's treatment of sex work resonates with Harris's insight that a feminist theory that purports to describe women's lives without regard for "realities of experience" is insufficient.

85. In her effort to undermine the application of false consciousness theory, Mari J. Matsuda defines false consciousness as the idea that members of subordinated classes are incapable of offering any valuable insight on their own subordination or that their subordination taints their own analysis. Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1777–78 (1990). However, Matsuda suggests that academics have a strong incentive to believe that poor and working people have little of value to say about law, social life, or politics. *Id.* at 1778.

86. Carter & Giobbe, *supra* note 79, at 46 (emphasis omitted).

87. See Kinsey Alden Dinan, *Migrant Thai Women Subjected to Slavery-Like Abuses in Japan*, 8 VIOLENCE AGAINST WOMEN 1113, 1117–20 (2002) (describing the situation of Thai women whose migration to Japan to engage in prostitution was facilitated by a trafficker).

crude narrative of the dominance feminist approach loses the particularized elements of the lives of trafficked women. In the place of individualized nuance, broad-based assumptions appear as the central descriptors of the lives of individual trafficked women.

This loss of particularity comes at a cost to the women whom dominance feminists claim to describe. Because the theory offers a singular description of the meaning of trafficking in the lives of women and leaves no room for ambivalent experiences of the phenomenon, it cannot account for the potentially conflicting experiences of different women or the complexity of the responses of individual women. From a purely theoretical perspective, dominance feminism offers a singular perspective on trafficking and no opportunity for dialogue with alternative viewpoints. On one hand, this approach encapsulates the potent awareness of the harms that accompany sex work and the impact of such injuries on real women. Yet dominance feminism also displays a calculated neglect of the freedom or autonomy that the work of sexual labor offers in the lives of women who find themselves oppressed along the lines of ethnicity and indigeneity. By overlooking the potentially liberatory qualities of sex work for women from marginalized groups, dominance feminism fails to account for the personal narratives of women whose experiences contradict the thrust of the theory. This shortcoming generates societal costs as well in preventing the creation of a broader public understanding of the possibility of an ambivalent meaning of trafficking and transnational sex work. Dominance feminist theory of trafficking renders simple an outrageously complex issue and does so by relegating dissenting voices to the margins.

Beyond these individualized costs to specific sex workers, the unitary perspective of dominance feminism also comes at a social price. It denies the broader public an accurate understanding of the complexities of trafficking and reduces it to a singular phenomenon that a single intervention can solve. This is the real expense of dominance feminism to the world: it presents only a limited vision of trafficking and then enlists this incomplete model to sell the sole public policy intervention of abolition, which alone is insufficient to cause broad-based change in the lives of sex workers. Dominance feminists see incisively into the social nature of sexual domination, but their generalized theory of dominance fails to account for the reality of trafficking, and thus generates legal and public policy interventions that offer, at best, partial solutions.

## II. CONSENT, COERCION, AND TRAFFICKING FROM THE LIBERAL FEMINIST TRADITION

### *A. Liberal Feminist Theory, Poststructuralism, and Sex Work Advocacy*

A liberal conception of the individual as the agent of her own life lies at the foundation of the liberal feminist position on the trafficking of women for sexual purposes. Whereas the dominance feminist position initially asserts a broad characterization of the society into which individuals are thereafter inserted, liberal feminists start with the first principle of the equality of all human beings by virtue

of their capacity for reason and choice.<sup>88</sup> Liberal feminism builds on classical liberalism by clarifying that the same notion of equality of men that animates traditional liberalism also defines women.<sup>89</sup> According to Martha Nussbaum, the goal of liberal political theorizing is “to put people into a position of agency and choice, not to push them into functioning in ways deemed desirable.”<sup>90</sup> At its core, liberal political philosophy regards the individual as the primary actor of concern and centers its analysis of society on the treatment of and respect for the individual and his or her choices.<sup>91</sup>

These fundamental tenets of the liberal feminist political model form the foundation of the sex-worker-rights position that stands in opposition to the dominance feminist model articulated in Part I. Beginning from a rich, liberal concept of the individual woman as agent of her own life and choices, proponents of a sex-worker-rights model forward a vision of women autonomously choosing to engage in sexual labor as they would choose any other form of employment.<sup>92</sup> Exploitation and coercion are duly considered as incompatible with this model of sexual labor, but only insofar as they override the choices of an individual.<sup>93</sup> Consistent with the fundamental tenets of classical liberalism, liberal feminist advocates of an autonomy-based approach to sexual labor consider the consent of an individual woman to be the touchstone for assessing the presence of domination.<sup>94</sup> The liberal feminist analysis of abuse in the realm of prostitution turns on whether engagement in sexual labor is consensual or by force, fraud, or coercion.<sup>95</sup>

Poststructuralist feminism also informs the perspective of sex-worker-rights advocates on trafficking for sexual purposes. Poststructuralism rejects liberal feminism’s singular definition of what women are, embracing a more complex description that comprehends difference among women and allows for dissent.<sup>96</sup> Poststructuralism is a response to what Angela Harris calls “[t]he need for multiple

88. MARTHA C. NUSSBAUM, *Introduction: Feminism, Internationalism, Liberalism to SEX AND SOCIAL JUSTICE* 1, 10 (1999).

89. *See id.*

90. *Id.* at 11.

91. This liberal understanding of the choice of the individual as relevant to the law’s treatment of sexuality is a relatively new contribution to American jurisprudence. *See* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 794–95 (1988).

92. For example, Nussbaum’s treatment of sex work and trafficking begins with a consideration of the ways in which sexual labor is similar to and different from other ways in which individuals take money for the use of their bodies in such work as factory work in a chicken processing plant, domestic service, nightclub singing, teaching philosophy, providing massages, and what she terms “colonoscopy art.” *See* MARTHA C. NUSSBAUM, *Whether from Reason or Prejudice: Taking Money for Bodily Services*, in *SEX AND SOCIAL JUSTICE*, *supra* note 88, at 276, 276, 280–85.

93. *See* Priscilla Alexander, *Feminism, Sex Workers, and Human Rights*, in *WHORES AND OTHER FEMINISTS* 83, 91, 93 (Jill Nagle ed., 1997).

94. *Cf. id.* at 93.

95. *See id.*

96. *See* Ashe, *supra* note 78, at 1169 (discussing the relationship between absolute liberalism and “poly-vocal . . . radical feminist insight”).

consciousness in the feminist movement” because it has moved feminist thought “away from univocal toward multivocal theories of women’s experience.”<sup>97</sup> Although poststructuralist feminist theorists have not expressly focused on trafficking and sex work, unlike their liberal and dominance sisters, their authority shapes the way some sex-worker-rights advocates theorize trafficking for sexual purposes. When scholars of trafficking discuss differences among women, accounting for the roles of race, indigeneity, and country of origin in the experiences of trafficked women or questioning any singular articulation of what it means to be trafficked, they pay tribute to the valuable contributions of poststructuralist feminists.<sup>98</sup> Although not all sex-worker-rights advocates, who typically leverage liberal thought,<sup>99</sup> invoke poststructuralist insights, this strain of theory is sufficiently prominent in this genre of writing to merit closer examination throughout this discussion of sex-worker-rights advocacy.

International human rights law most clearly evidences the intersection of classical liberal feminism with the issue of trafficking. The primary legal instruments of international human rights entrench a fundamentally liberal notion of rights as rooted in the individual person and abused at the individual level as well.<sup>100</sup> In part, this focus is an outgrowth of the human rights perspective on the liberal conception of the right of the individual to make self-determining choices in pursuit of the good and to define those choices independently.<sup>101</sup> Because of the primacy of the liberal view of human rights in international law, it is predictable that the primary international instrument controlling trafficking, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and

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97. Harris, *supra* note 84, at 586–87.

98. See, e.g., *Acknowledgments* to GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, *supra* note 37.

99. Jody Freeman likewise “treat[s] prostitutes’ rights groups as having the same ideological base as those we might call liberal feminists.” Jody Freeman, *The Feminist Debate over Prostitution Reform: Prostitutes’ Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 BERKELEY WOMEN’S L.J. 75, 75 (1989). However, it warrants mention that most sex-worker-rights advocates would probably eschew being defined as liberal, for reasons of the critique offered below.

100. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) (providing human rights to persons on an individual, rather than collective, basis).

101. The codification of the Western liberal understanding of the individual and the state is more a demonstration of the victory of the West during the initial discussions of human rights than any kind of confirmation of the superiority of this position. The ramifications of the entrenchment of this version of human rights continue to be experienced in the difficulties that the human rights community faces in seeking recognition of economic, social, and cultural rights as the equals to the civil and political rights that the global West successfully entrenched in the post–World War II period of international law making, just as the Cold War began. See Lesley Wexler, *The Promise and Limits of Local Human Rights Internationalism*, 37 FORDHAM URB. L.J. 599, 611 (2010) (“The emphasis on political and civil rights, as opposed to economic rights, both kept with domestic commitments and allowed criticism of cold war adversaries.”).

Children (“Trafficking Protocol”), would continue to enlist a similar vision of the individual as the subject of international law on trafficking.<sup>102</sup>

During the debates surrounding the passage of the Trafficking Protocol, liberalism as captured by international human rights instruments came under attack by dominance feminist arguments consistent with the historical abolitionist perspective on sex work.<sup>103</sup> Sex-worker advocates continued to promote the idea that trafficked persons could consent to illicit activity, including prostitution, despite the dominance feminist insistence that all sexual labor was trafficking and violated women’s human rights, regardless of whether coercion occurred.<sup>104</sup> Feminists favoring sex-worker rights asserted that in the context of codifying legal definitions of trafficking, sexual labor was equivalent to any other form of labor into which persons could be trafficked.<sup>105</sup> As a result, the issue was not the sexual nature of the labor, but the way in which the laborer was recruited or transported into the work. To prevent the codification of an abolitionist understanding of trafficking for sexual purposes, this group sought to define trafficking according to the use of coercion in bringing a woman into a situation of trafficking, such that all women working as sex workers would not be considered victims of trafficking.<sup>106</sup> While dominance feminists sought to negate the importance of consent in trafficking, sex-worker-rights advocates consistently advanced the concept that coercion, or the denial of the opportunity for meaningful consent, is the touchstone of the definition of trafficking under international human rights law.<sup>107</sup> The Trafficking Protocol ultimately codified this position by specifying that the consent of the individual woman is not enough to overcome the use of coercion so as to negate the trafficking.<sup>108</sup>

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102. Trafficking Protocol, *supra* note 6. However, it is important to note that the Trafficking Protocol itself does not offer a human-rights-centric approach to trafficking. Rather, as a protocol supplementing the Convention Against Transnational Organized Crime, it takes an expressly law-and-order position, addressing trafficking largely as a criminal matter. *See id.*

103. *See* Jo Doezema, *Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol*, in GENDER, TRAFFICKING, AND SLAVERY 20, 21–23 (Rachel Masika ed., 2002).

104. *Id.* At the same time, dominance feminists did not insist on the extension of their definition of trafficking to other labor sectors. The goal was to achieve an international definition that included all forms of sexual labor as trafficking, so that when any woman was transported for the purposes of prostitution, it would qualify as trafficking even where she may have consented to the movement and subsequent labor. In contrast, migrant farmworkers or domestic workers, for example, could still render meaningful consent to be voluntarily transported to engage in their labor sector in another state. *See id.*

105. *Id.* This perspective is consistent with the reality that both men and women are trafficked into agriculture, sweatshop, domestic, restaurant, and other kinds of labor as well as into the sexual labor that was the basis of the dominance feminist lobbying efforts in the negotiations leading up to the passage of the Trafficking Protocol in 2000. However, human rights advocates have noted that all of these labor sectors share the “3D” characteristics: difficult, dirty, and dangerous. *See* Dinan, *supra* note 87, at 1114.

106. *See* Doezema, *supra* note 37, at 34.

107. *See, e.g.*, NUSSBAUM, *supra* note 92, at 288.

108. Trafficking Protocol, *supra* note 6, at art. 3(b). However, dominance feminists offer an interpretation of the international instrument consistent with their definition of all



Indeed, it was in the context of these public policy conflicts that feminist activist-scholars developed a rich theory of consent in relation to the meaning of coercion in the context of trafficking. At the most basic level, this crucial stage in the international dialogue on prostitution and trafficking acknowledged the agency of sex workers.<sup>109</sup> Some theorists are careful to note the distinction between women who are lured or compelled into performing sexual labor and women who choose to engage in the work;<sup>110</sup> this analysis applies in a similar way to distinguishing between voluntary migration for purposes of prostitution and involuntary trafficking.<sup>111</sup> Drawing on poststructuralism's understanding of the multivocal experience of women as a class, these theorists focus particular attention on the fact that third-world women who may encounter oppressions based in colonialism, racism, and indigeneity can still decide to migrate for the purposes of sexual labor.<sup>112</sup> Or, in the alternative, they may choose to migrate and discover that the

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prostitution as trafficking. The interpretive notes to the Trafficking Protocol contain the following statement:

The *travaux préparatoires* should indicate that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.

Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Interpretative Notes for the Official Records (*travaux préparatoires*) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, ¶ 64, U.N. Doc. A/55/383/Add. 1 (Nov. 3 2000). Dominance feminists interpret this to mean that their definition of all sex work as trafficking and thus sexual exploitation could be included within “other forms of sexual exploitation.” See Janice G. Raymond, *The New UN Trafficking Protocol*, 25 WOMEN'S STUD. INT'L F. 491, 495 (2002). Thus, while the international law instrument forwards a coercion-based trafficking definition, the abolitionists still claim victory in this model due to the explanatory notes. *Id.* Anne Gallagher has suggested that this ambiguity in interpretation will become problematic as the Protocol is implemented and international relations are shaped accordingly. Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 984–88 (2001).

109. Doezeema, *supra* note 37, at 40 (noting that United Nations recommendations on violence against women of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) began, in the 1990s, to identify the prostitute as a subject with rights to be protected, not merely a player complicit in the crime of prostitution).

110. Cf. Erick Gjerdingen, Note, *Suffocation Inside a Cold Storage Truck and Other Problems with Trafficking as “Exploitation” and Smuggling as Choice Along the Thai-Burmese Border*, ARIZ. J. INT'L & COMP. L. 699, 699 (2009) (identifying how the exploitation of smuggled migrants who voluntarily sought to cross the Thai-Burmese border for work was not recognized by law enforcement because of their volition in leaving Burma).

111. See Kamala Kempadoo, *The Migrant Tighrope: Experiences from the Caribbean*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, *supra* note 37, at 124, 125–27.

112. See NUSSBAUM, *supra* note 92, at 296.

only work available to them in their destination country is sexual labor.<sup>113</sup> In either case, the choice to migrate remains a volitional one consistent with a liberal vision of the individual capable of making decisions for his or her own life, informed by the poststructuralist awareness of difference among women.

Reconciling this theory of volitional sex work with the reality that women ultimately take different paths to migrate for work in the sex sector can be challenging. Theorists problematize these myriad paths in dramatically different ways relating to the woman's ability to maintain her autonomy.<sup>114</sup> In the most basic sense, some claim that a woman's decision to work in sexual labor can be a freely made, autonomous choice;<sup>115</sup> it thus follows that voluntary migration for the same labor end could also be envisioned. At the other extreme, there are women who encounter coercion consistent with that codified in the Trafficking Protocol definition when entering migratory sex work and experience threats, fraud, deception, or bribery as the trafficker attempts to assert control.<sup>116</sup> The crucial difference between these two concepts of autonomy and coercion is the level of interference that is permitted before a choice becomes coerced. The Doezema definition of choice seems to suggest that simply by merit of having been *chosen* by a woman, the decision becomes volitional or autonomous. In contrast, the Trafficking Protocol definition envisions a form of autonomy that can be threatened more easily, by the many forms of interference it suggests qualify as coercion. Yet the Trafficking Protocol offers what I characterize as a generally liberal vision of trafficking for sexual purposes because it theorizes autonomy as an individual attribute, which is shaped by poststructuralism insofar as it allows for plural definitions or experiences of coercion. Under the Trafficking Protocol, coercive social factors infringe on the autonomy of an individual; they do not render groups incapable of making autonomous decisions.

Further obscuring the question of the meaning of coercion is the reality that a woman's understanding of her position in relation to her trafficker changes over time.<sup>117</sup> A woman may migrate independently, but then be coerced into a position of sexual labor while looking for employment abroad. Or, a woman may voluntarily place herself in a brothel, having been explicitly deceived about the

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113. See, e.g., GAIL PHETERSON, *Right to Asylum, Migration, and Prostitution*, in *THE PROSTITUTION PRISM* 100, 104 (1996).

114. Dina Francesca Haynes has identified the fuzzy boundary between trafficking and the abuse of migrant laborers, an observation that is accurate in all labor sectors, not only sex work. See generally Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 1 (2009).

115. See Doezema, *supra* note 37, at 37 (discussing the Global Alliance Against Trafficking in Women's stand on the possibility of voluntary prostitution).

116. See Trafficking Protocol, *supra* note 6, at art. 3(a) (defining trafficking based primarily on "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").

117. See Susanne Thorbek, *Prostitution in a Global Context: Changing Patterns*, in *TRANSNATIONAL PROSTITUTION: CHANGING PATTERNS IN A GLOBAL CONTEXT* 1, 5 (Susanne Thorbek & Bandana Pattanaik eds., 2002).

intolerable conditions of work there. Questions abound about the definition of consent and the extent of coercion in situations that are not clear-cut; simply identifying a victim of trafficking based on a framework of consent and coercion can be a challenge.<sup>118</sup> Even more complex is the identification of a trafficker—one commentator has described traffickers, only half in jest, as “like travel agents, only rather more expensive.”<sup>119</sup> The ambivalence with which many trafficked women regard their traffickers further complicates the goal of respecting women’s autonomy, when these relationships can be fraught with multiple meanings.<sup>120</sup>

Additional complexity arises in the reality that women make choices to migrate for sex work in the context of other influences on their lives, a fact which sex-worker-rights theorists address in different ways.<sup>121</sup> Nussbaum suggests that the case of a woman who enters prostitution because of a lack of better economic alternatives creates a situation where the woman’s “autonomy has been infringed but in a different way” than the woman who has been coerced.<sup>122</sup> The individual

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118. *See id.* at 4–6.

119. *Id.* at 5.

120. In my own work with trafficked women, I have encountered this problem of trafficked women’s ambivalence toward their traffickers. A Nigerian woman with whom I worked in Italy had a serious heart condition that had been exacerbated by irregular sleeping habits compelled by her trafficker’s insistence that she work the streets each night until sunrise. The condition required hospitalization, which I hoped would give her the chance to get away from her trafficker and establish independence in Italy. I thus did not inform the trafficker of the woman’s hospitalization. However, my client desperately wanted to talk to the trafficker because this was her primary source of social support outside the social service community. So she asked an Italian doctor with a limited knowledge of English if she could use his phone to call “her sister.” His rudimentary English and lack of culturally competent knowledge that Nigerian women often refer to acquaintances from the same cultural group as sisters led him to oblige her request. I was shocked to arrive at the hospital the next day and encounter the trafficker lambasting the doctor for his refusal to release the patient, her sex worker. My client rapidly recognized that she was only a business interest to the trafficker, who showed no concern with her medical condition, and became enormously frustrated at the situation because of the complicated nature of the relationship she had with this woman who was simultaneously her pimp, trafficker, countrywoman, and friend. Such complications are common in work with trafficked women and mean that concepts of autonomy and coercion vacillate. This client perceived herself to be autonomously working for this madam, until the moment when the madam revealed herself to be a business manager and not a friend. My client, who had entered the hospital feeling a sense of autonomy, left cognizant of the coercion under which she truly lived.

121. For example, Pheterson discusses the role of political oppression in women’s choices to pursue sex work, PHETERSON, *supra* note 113, at 102, while Kamala Kempadoo emphasizes the role of trafficking as a way for women to avoid the negative repercussions of globalization on local economies, Kamala Kempadoo, *Introduction: Globalizing Sex Workers’ Rights* to GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, *supra* note 37, at 1, 17. Kempadoo further observes that sex work is usually just one of many activities a woman uses to earn money, and that most of the time it is done “for family well-being or survival; for working class women to clothe, feed and educate their children; and for young women and men to sustain themselves when the family income is inadequate.” *Id.* at 4.

122. NUSSBAUM, *supra* note 92, at 296.

may have the complete personal ability for autonomous decision making including the capacity for self-reflection and bargaining, which are pivotal elements of the liberal definition of autonomy.<sup>123</sup> Yet in the face of only unappealing options, a woman's choice to engage in sex work cannot be termed a truly autonomous one, according to Nussbaum's argument, although it may be the best option from the available array of life choices.<sup>124</sup> A strict definition of coercion cannot always capture the nuances of the softly coercive elements within the lives of women who seemingly autonomously choose to migrate for sex work.

Other theorists draw heavily on poststructuralist and antiessentialist feminism's valuation of actual individual experience to assert the inadequacy of liberal autonomy in the face of limited life choices.<sup>125</sup> Consistent with the shift in focus that the international dialogue on the Trafficking Protocol precipitated, some proponents of a sex-worker-rights theory of trafficking suggest that the liberal preoccupation with consent as the linchpin for the determination of oppression is an illegitimate one because it distracts from what should be more central concerns to sex-worker-rights advocates.<sup>126</sup> For example, Jo Doezema claims that the perpetuation of the voluntary/forced dichotomy imposes "the wrong theoretical framework" for the analysis of the experiences of sex workers.<sup>127</sup> When consent is centered in the conversation about human rights and sex work, abuses perpetrated against women who consented to perform the work are too easily ignored.<sup>128</sup> Focusing on whether a woman has agreed to labor masks whether her labor conditions are incompatible with her basic human rights.

Perhaps even more problematically from the perspective of sex-worker-rights advocates, the distinction between voluntary and involuntary sex workers becomes the contemporary permutation of the innocent/complicit dichotomy<sup>129</sup> that has plagued legal and public policy debate about women's sexuality for decades.<sup>130</sup>

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123. *See id.*

124. *See id.*

125. I consider these theorists in my general discussion of liberal feminism because their conception of feminism remains squarely focused on the individual, not the society, as the primary subject of discussion. This, as will be discussed later, is the key distinction between what I term dominance feminists and liberal feminists. Although Doezema and others take issue with the inadequacy of the liberal definition of autonomy, are concerned about the excessive reliance on the voluntary/forced dichotomy, and ultimately arrive at a number of poststructuralist and antiessentialist conclusions, there is a connection with traditional liberals because of their continued insistence that women's choices to engage in sex work, including migratory sex work, should be taken seriously. Yet their rejection of abstraction, including the abstraction of autonomy, and focus on concrete experience is a fundamentally antiessentialist turn. *See Harris, supra* note 84, at 588, 585 (rejecting "the pull of . . . the voice of abstract categorization" and "the notion that a unitary, 'essential' women's experience can be isolated and described independently of discussing the importance of race, class, sexual orientation, and other realities of experience").

126. Doezema, *supra* note 37, at 42.

127. *Id.* at 34–35.

128. *See id.* at 45.

129. *See id.*

130. ELAINE JEFFREYS, CHINA, SEX AND PROSTITUTION 74 (2004) (noting the existence of the virgin/whore complex).

When consent is the basis of analysis, trafficked women can be framed in public discourse as victims who are innocent of their own trafficking or entry into sex work; by virtue of their lack of complicity, they therefore merit protection from the government.<sup>131</sup> Innocent trafficking victims stand in categorical opposition to the guilty or complicit sex worker who chooses voluntarily to access trafficking networks so she can engage in the sexual labor market.<sup>132</sup> By framing these two groups of trafficked women in opposition to one other and creating a public discourse of victimization around the involuntarily trafficked category, the voluntary migratory sex workers are excluded from public services offered to the group defined as “trafficking victims.”<sup>133</sup> In effect, this serves as a way to distinguish deserving from undeserving victims in the sex-work realm: the deserving victim is the one who lacked knowledge of the work she would do, while the undeserving victim knowingly chose to do sex work and, therefore, “asked for” any mistreatment that followed.<sup>134</sup>

In the policy arena, this distinction functions as a means test for the provision of services to trafficked women.<sup>135</sup> During the time I spent working in Italy with trafficked Nigerian women, I was consistently disappointed that this was the litmus test when seeking assistance for my clients. Social services centers time and again asked if the women for whom I sought aid knew that they would do sex work prior to arriving in Italy. Assistance was inevitably forthcoming for women whose traffickers had defrauded them, while women who had chosen to migrate but then found themselves trapped in an untenable situation of debt bondage were left to their own devices.<sup>136</sup> Prior knowledge separated those with access to social services from those without such access. The contrast between the treatment of “innocent” trafficked women and those who choose voluntarily to engage in the sexual labor market is striking, and it demonstrates another way to deny women basic human rights because, in this particular scenario, those who exercised agency were treated as if they “deserved” the abuses they experienced. From a purely contractual vision

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131. Doezema, *supra* note 37, at 45.

132. See Sally Cameron, *Trafficking of Women for Prostitution*, in *TRAFFICKING IN HUMAN\$: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS* 80, 85–86 (Sally Cameron & Edward Newman eds., 2008) (observing that the inherent exploitation in trafficking is complicated by the reality of individual women’s agency).

133. This dynamic can be seen in the nature of public services offered in the United States to victims of trafficking in persons as defined under the Trafficking Victims Protection Act of 2000. Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. §§ 7101–12 (2006). Persons trafficked into any labor sector receive immigration benefits, resettlement assistance, job training, and other social services. *Id.* § 7105. Women trafficked into sexual labor are included in this group of recipients of aid, while women who voluntarily engage in sexual labor are not. See *id.* §§ 7102, 7105.

134. Cameron, *supra* note 132, at 85 (“The simplistic view is that to be victimized one must be ‘blameless’ in all regards.”).

135. Worse yet, where trafficked women exhibit agency, they can be treated as co-conspirators in the crime of trafficking. *Id.*

136. I frequently responded to such a question with a nonresponsive question of my own: Would anyone choose to do this? Usually, this question resulted in my clients receiving services.

of coercion, their consent to engagement in the sexual labor market served as a blanket consent to any subsequent harms at the hands of their traffickers.<sup>137</sup>

Living in a social construction of sex work defined by the innocent/complicit dichotomy also silences the independent, complicating voices of the sex workers whose experiences the framework categorizes. The situation of the “rescue” of the Shan women from the Thai brothel highlights the impact of this dynamic.<sup>138</sup> Justifying the brothel raid as the rescue of trafficked minors trapped in a situation of compelled prostitution, the organizations that implemented the raid overlooked the majority of the women in the brothel who wanted to remain there. In part, the intentional disregard for the wishes of the voluntary sex workers was an outgrowth of an abolitionist viewpoint that the women could not consent to any kind of sex work.

A more insidious interpretation of this raid is that it stood in reckless disregard of these women’s choices altogether. The interactions of the authorities with the women who were voluntarily present in the brothel represent more than an overblown abolitionist effort to protect these women. It was in fact an intentional effort to ignore their wishes. In effect, the choices of these women whose volitional engagement in sex work was known, constrained as they were by the situations that motivated them to migrate for sex work, warranted less respect than the abuses of the purported minors who were also present. The innocent/complicit dichotomy focuses on the abridgment of the autonomy of the innocent by coercing her into sexual labor. Yet this focus simultaneously creates a necessary condition of negating the choices of women who voluntarily make sexual labor their living. It names women victims when they may not choose this label for themselves.<sup>139</sup> When women resist the label of victim, this discourse of innocence and complicity disregards them altogether.

Other theorists within the sex-worker-rights movement take this argument a step further than merely an effort to respect the choices of women who do sex work, and begin to identify the ways in which this kind of work offers liberation to the women who do it. The argument, however, differs significantly from the sex-radical understanding of the liberatory nature of sexual labor,<sup>140</sup> which focuses on sex

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137. This dichotomy pervades feminist analyses of sex-related oppression. When a woman asks a rapist to use a condom, or even uses birth control at all, her contemplation of the possibility of sexual contact is sufficient for her to be treated as culpable for the occurrence of the contact, even when she has explicitly not consented to the contact itself. See generally Carla M. da Luz & Pamela C. Weckerly, Recent Development, *The Texas ‘Condom-Rape’ Case: Caution Construed as Consent*, 3 UCLA WOMEN’S L.J. 95 (1993); Donna J. Case, Comment, *Condom or Not, Rape is Rape: Rape Law in the Era of AIDS—Does Condom Use Constitute Consent?*, 19 DAYTON L. REV. 227 (1993).

138. See *supra* notes 1–29 and accompanying text.

139. See Nicola Gavey, “*I Wasn’t Raped, but . . .*”: Revisiting Definitional Problems in *Sexual Victimization*, in *NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT* 57, 67 (Sharon Lamb ed., 1999) (discussing the problems with victim identification and self-identification in the context of questions of narrative, rape, consent, and power).

140. Carol Queen, *Sex Radical Politics, Sex-Positive Feminist Thought, and Whore Stigma*, in *WHORES AND OTHER FEMINISTS*, *supra* note 93, at 125, 127.

workers' subversive use of sexual power in a patriarchal society.<sup>141</sup> Whereas some migrant sex workers conceive of the possibility of sexual liberation through their work, of greater interest to this analysis is the possibility of liberation from other forms of oppression for migrant sex workers. Gail Pheterson, for example, recognizes that for many women, particularly those in developing states, their lives are often lived in situations of both gendered and economic oppression from which they seek liberation.<sup>142</sup>

Yet for such women, these kinds of oppression do not merely function as social problems, but as a political, class-based violation of women's human rights intended to maintain women in a position of political subjugation.<sup>143</sup> In cases where this is an accurate description of women's condition, Pheterson argues that migration can serve as a resistance strategy to the gendered oppression that women experience in their daily lives.<sup>144</sup> I would expand this analysis to include the oppression that women experience on the basis of race or indigeneity, which again can be pervasive elements in the narrative of women's oppression in societies worldwide.

This description applies, for example, in the case of the Shan women depicted at the beginning of this Article. In the situations of the women described in that narrative, the government targets them in a gendered manner by oppressing them through sexual abuse, but does so because of their membership in the indigenous, ethnic Shan group. For these women, to remove themselves from the state that perpetrates such harms to a state where they have more control over their daily existence is a resistance strategy. It marks a form of struggle against the economic oppression that coexists with ethnic and racial domination, by demonstrating economic capacity outside the limitations imposed by a brutal military regime.<sup>145</sup> Yet while this resistance strategy may appear subversive, it is more in line with a

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141. An entire literature and a set of strip clubs have grown up around the possibility of sexual performance as liberation or resistance. Annie Sprinkle is one sexual performance artist whose work is often noted. See, e.g., Linda Williams, *A Provoking Agent: The Pornography and Performance Art of Annie Sprinkle*, 37 SOC. TEXT 117 (1993). The Lusty Lady, a unionized strip club in San Francisco, remains another locale where sexual performance liberation is discussed in the context of workers' rights. Glen Martin, *S.F. Strip Club Ratifies Union—First in U.S.*, S.F. CHRON., Apr. 11, 1997, at A19. Finally, the rise of competitive pole dancing indicates how notions of liberating, and even athletic, sexual performance have gone mainstream. See *USPDF Championship 2011 Ticket Sales*, U.S. POLE DANCING FEDERATION, [http://uspoledance.com/Video\\_uspdfChampionship.php](http://uspoledance.com/Video_uspdfChampionship.php).

142. PHETERSON, *supra* note 113, at 101–02.

143. *See id.* at 102.

144. *See id.*

145. *See id.* In this regard, the commercialization of sex can be described as what Kathryn Abrams calls resistant self-direction, which is typified by women's efforts "simply to pursue their own choices and plans in contexts where doing so evokes serious gender-based challenge." Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 832 (1999). Resistant self-direction, according to Abrams, is not always explicit and thus sometimes is not recognized as resistance, despite women's efforts to "negotiate gender-based obstacles in order to achieve their larger goals." *Id.* at 833. For a helpful discussion of resistance strategies and their role in avoiding essentialism, see also Harris, *supra* note 84, at 612.

traditional, liberal model of encountering and overcoming oppression. Here, trafficked women simply seek equality—equality of access to migration channels, equality of employment opportunity, equality of admission to a nondomestic economy—as freedom from the economic insecurity that plagues subsistence farming households worldwide.<sup>146</sup> Trafficked women who choose to be trafficked are coping by accessing a type of practical equality of opportunity, which is a traditionally liberal goal. Migrant sex workers do not seek to exert their sexuality subversively through performance in response to oppression. Rather, they sell it because it is the one commodity they possess that will fetch a price, and in earning that wage, they subvert a system that denies them economic privilege.<sup>147</sup>

*B. The Weaknesses of Feminist Sex-Work-Rights Advocacy  
in the Realm of Trafficking*

While these positions on sex work and trafficking offer the possibility of reconceptualizing sex work and the status of sex workers, they are also fraught with problems. One glaring issue, particularly in the writings of some first-world liberal feminists such as Martha Nussbaum, is the pervasive assertion that sexual labor is just another kind of work. Beginning with the premise that all forms of work require the sale of some use of the body, Nussbaum, for example, offers an explanation of how sexual labor is similar to and differs from other kinds of work.<sup>148</sup> She compares sex work to other kinds of labor, including as examples the jobs of a factory worker at a poultry processing plant, a philosophy professor, and a masseuse, among others.<sup>149</sup> She engages in this exercise in an effort to undermine some of the stigma attached to sexual labor, trying to show that other lines of work, like sex work, have both positive and negative attributes. Nussbaum's ultimate goal, however, is to demonstrate that the widespread stigmatization of sex work as an undignified line of work is an irrational attachment to a puritanical notion of sex.

Nussbaum is correct to identify the ways that sex work has been the subject of stigma and that the cost of stigmatization has been levied on the women who do the work.<sup>150</sup> Basic worker rights, as Nussbaum accurately suggests, would provide

146. See Kempadoo, *supra* note 111, at 3–4 (discussing the income generation that leads third-world women to perform sex work).

147. It is not uncommon for women to feel a great sense of pride in their own self-sufficiency in generating income for perhaps the first time. *Lilya 4-Ever* is a film that documents a sex worker's sense of accomplishment in her own earning power. In this fictional film about the trafficking of a young woman, Lilya, from a former Soviet republic to Sweden, one observes the shame of the protagonist when she enters the local convenience store and lacks the money to purchase the few groceries she had selected. After selling sex for the first time out of economic desperation and retching with revulsion at the act, Lilya enters the same store, fills a basket with groceries, and grins when paying in large bills. *LILYA 4-EVER* (Memfis Film 2002).

148. NUSSBAUM, *supra* note 92, at 276, 280–85.

149. For a more detailed description of the specifics of this example, see *supra* note 92.

150. See NUSSBAUM, *supra* note 92, at 285–86. Jody Freeman, while critical of liberal feminists' treatment of sex work, likewise argues that in Canada, where prostitution is legal but all surrounding activity is illegal, "[t]he threat of prosecution and the stigma attached to prostitution undoubtedly make it difficult for prostitutes to organize and impossible for them



substantial improvement in the lot of sex workers.<sup>151</sup> Yet without waxing in the direction of dominance feminist theory on the violence and oppression that are endemic to prostitution, it is reasonable to say that prostitution, as it currently exists, is an unusually dangerous profession for most women who engage in it. Even ensuring basic workers' rights for sex workers—say, through wage and hour laws and workplace safety measures—still cannot inoculate sex work from its inherent dangers as compared to other kinds of work. Improvements might be made, but the risk endemic to sex work will remain.

Understanding the potential dangers of sex work does not require a complex thought experiment. Ten years ago, it was common for Nigerian women who had been trafficked to Italy to wait along the sides of roads winding between towns in Tuscany and Umbria in order to sell sex to passersby.<sup>152</sup> These women would ride the interurban bus to their appointed hairpin turn in the morning, wait throughout the day seated on a folding chair for their clients to stop in their cars, and then, as the last bus of the afternoon arrived, hide their folding chair in the underbrush in a hurry to catch the last ride home. If these women had been selling sodas or sandwiches along the roads between hill towns, they would not have encountered the same level of threat. Performing work that requires the laborer to strip naked and render herself vulnerable to her customers simply involves a higher level of risk than fully clothed employment options.<sup>153</sup> Regulation cannot resolve all of the dangers of sex work, though it can improve working conditions in some circumstances.

Certainly, there are more dangerous lines of work, some of which threaten similar kinds of risks as those specific to sex work. Yet sex work, particularly the migrant sex work that is at issue in most trafficking situations, is the instance of the intersection of multiple forms of oppression with the real possibility of serious harm for the women who engage in it. Some sex workers assert that sex work is a liberatory way to reclaim sexual agency for women, and some women who make these claims are migrant sex workers from developing countries.<sup>154</sup> But most women who are publicly engaged in this kind of sex-radical effort in the sex-worker-rights movement are from developed contexts;<sup>155</sup> economic necessity may

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to seek the protection of the police when they are victims of crime.” Freeman, *supra* note 99, at 82.

151. See NUSSBAUM, *supra* note 92, at 298.

152. This observation is based upon my time living in Arezzo, Italy, during August and September of 2000.

153. These risks of physical danger are real. Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 111 (2006) (identifying sex workers as vulnerable to “intimate partner violence by customers as well as pimps” and asserting that “[p]imps and customers use methods of coercion and control like those of other batterers: economic exploitation, social isolation, verbal abuse, threats, physical violence, sexual assault, captivity, minimization and denial of their use of physical violence and abuse”).

154. Cf. *supra* note 142 and accompanying text.

155. The sex-worker-activist-scholars who contributed to Jill Nagle’s exemplary 1997 book *Whores and Other Feminists*, *supra* note 93, are primarily first-world women writing about their experiences in sex work and the liberating effects of such labor. While Annie Sprinkle’s revolutionary work on de-stigmatizing sexual labor is important to the first-world

have motivated their entry into sex work, but the kind of complex migration issues that underscore trafficking are not usually implicated.

A more fundamental critique is often leveled at liberal feminists, arising from the long-standing debate around the intersection of feminism and classical liberalism. Some, perhaps many, feminist scholars support the claim that no liberal position can be feminist because it would not reflect the constraints of social influence and structure.<sup>156</sup> Because liberals view the individual as the actor of concern, liberalism is often criticized for its failure to contextualize the individual in society.<sup>157</sup> Inherent in this critique of liberal feminism is the concept that a feminist position is one that offers a society-based critique of the operation of gender relations, rather than one born from in the rights of an individual.<sup>158</sup> Even archetypal feminist liberal thinkers like Martha Nussbaum have addressed this issue, with an effort to frame much of their writing from an internationalist, humanist perspective that is concerned with the social shaping of preference and

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sex-worker rights movement, it is not necessarily an accurate description of the experiences of all women in the sexual services industry who seek radical change to their profession. Whereas sex-worker rights movements of the global North leverage sexually ironic or gender-role subversive performance in commentary on social norms and constraints, third-world sex-worker movements tend toward more populist kinds of interventions. In the sense that these women assert their choice to engage in sex work, and request respect as professionals, it parallels the North American and European sex-radical movements. But unlike these movements, third-world sex workers tend not to emphasize the performative, sexually subversive elements of the work. Rather, they look more like factory workers attempting to organize for labor rights. The most radical sex-worker movements in developing contexts seek unionization, labor rights, education, credit facilities, vocational training, and health care. The difference then is not merely of degree but of kind; for radicalized third-world sex workers, commodified sexual activity is much more about economic than sexual liberation. For detailed, firsthand accounts of third-world organizing efforts and the kinds of collective actions workers take, see, for example, Angelita Abad, Marena Briones, Tatiana Cordero, Rosa Manzo & Marta Marchán, *The Association of Autonomous Women Workers, Ecuador: "22nd June,"* in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, *supra* note 37, at 172 (discussing organizing in Ecuador); Claudia Colimoro, *A World of People: Sex Workers in Mexico,* in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, *supra* note 37, at 197–99 (interviewed by Amalia Lucia Cabezas) (discussing organizing in Mexico); Shane A. Petzer & Gordon M. Issacs, *SWEAT: The Development and Implementation of a Sex Worker Advocacy and Intervention Program in Post-Apartheid South Africa (with Special Reference to the Western City of Cape Town),* in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, *supra* note 37, at 192 (discussing organizing in South Africa).

156. See, e.g., Freeman, *supra* note 99, at 75 n.2, 89.

157. *Id.* at 87 (“Feminist theory and critical legal studies have attempted to expose the inability of liberal theory to account for our connections to others, or our ‘social constitutiveness.’ The central features of liberalism—the public/private distinction, a highly individualistic conception of rights—are commonly attacked as inappropriate for, and unresponsive to, feminist demands for equality and freedom.”).

158. Indeed, some feminist scholars working in the liberal tradition posit that patriarchal bias is inherent in liberal political theory and describe liberal feminism as, at best, an oxymoron. See, e.g., ZILLAH R. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 5–9 (1981) (developing the concept of liberal feminism as problematic and potentially contradictory).

desire as well as with sympathetic understanding.<sup>159</sup> This answer is helpful insofar as it addresses the most egregious shortcomings of traditional liberal theory; Nussbaum holds herself to a rigorous model of the liberal individual as engaged in society, and, thus, she escapes some of the most common critiques of liberalism.<sup>160</sup>

But the problem remains that the individual functions as the primary subject of liberal feminist inquiry, and society-wide or class concerns are relevant for their impact on the individual. Social factors may cause some of the problems that the individual woman encounters, but liberal feminist theorizing engages society through the individual, not from an independent social critique. Because of this, liberal feminism, even when Nussbaum stretches it skillfully, cannot offer a cogent, self-sufficient theory of social oppression of women as a class, even a nonmonolithic one.

Sex-worker-rights advocates, including Doezeema and Kempadoo, are not subject to the same kind of criticism of the basis of their feminist self-identification. In part, this seems to be because activist-scholars like these address trafficking from a position of claiming the rights of individual sex workers rather than offering a more sweeping theory of the feminist significance of prostitution, as Nussbaum articulates. Another factor that inoculates such work from the critiques that traditional liberal feminist scholars encounter is the centering of individual experience in the theoretical project.<sup>161</sup>

The centrality of coercion to liberal feminist thought on trafficking is also potentially problematic. At times, the discussion of coercion tends toward a narrow, legalistic definition of the concept. Reliance on a strict form of coercion as the dispositive element of a case of trafficking is problematic, although this is precisely the codified vision of what sex trafficking is: sex work under coercion. Consent, as defined in the Trafficking Protocol, is insufficient to override the coercion that

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159. NUSSBAUM, *supra* note 88, at 6.

160. Unlike historical liberal political philosophers, Nussbaum envisions a liberal individual who exists in community and society, not in atomistic isolation. *See id.* at 10–11.

161. To appreciate the ways in which the experiences of individuals can be centered in broader considerations of trafficking, see generally GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, *supra* note 37. But what to call this generation of sex-worker-rights advocates is a puzzle. The epistemological claim that the lives of women generate the fodder for theoretical development is closely associated with the poststructuralist movement. *See Harris, supra* note 84, at 585. Yet, although this group of activist-scholars offers a theory of trafficking with greater attention to the role of social systems in the life of the individual sex worker than a traditional liberal feminist, the individual as a constituent member of a social class remains the central element of the theory. Furthermore, the sex-worker-advocate orientation envisions an individual who is influenced by social pressures but ultimately acts as a unitary agent, even while engaging in the kind of social-movement work that these authors espouse. At the foundational level, both traditional liberals and contemporary sex-worker-rights advocates focus on the rights of the individual migrant sex worker, as animated by the choices of the individual. Most importantly, the individual's experience of coercion, whether at the hand of a trafficker or under the influence of an oppressive society, shapes the contours of each theory. So although the theories differ in key ways, they are rooted in a similar understanding of the sex worker as an individual agent of her own life, who acts within society in furtherance of her own, self-defined goals. This conception of the individual ultimately has some liberal origins.

defines a trafficking case.<sup>162</sup> Yet the vision of coercion contained in the international definition is perhaps too weak of an understanding of coercive force in the lives of women who experience domination on the basis of sex, race, third-world disadvantage, indigeneity, or some combination thereof.

Martha Nussbaum's vision of coercion<sup>163</sup> is worth repeating here. Although a traditional liberal model of coercion would require some kind of explicit force or fraud, a more nuanced, feminist understanding of coercion acknowledges the coercive force of societal oppression. This is consistent with Nussbaum's intentional rejection of the atomistic vision of the individual and her appreciation for the context in which the individual lives;<sup>164</sup> it is also represented in the thought of Doezema, Kempadoo, and their contemporaries, who all reject a vision of women's choices as occurring in a vacuum.<sup>165</sup> While this mode of thought accounts for the social nature of coercion, none of these theorists believe it worthwhile to undermine an individual woman's agency in order to protect her from systemic, categorical oppression.

However, the entire concept of coercion, even where broadened to allow for the impact of diffuse social pressures, is still predicated on the impact of coercive pressure on the individual. A focus on coercion requires a close examination of individual choices, which implicates society as a corollary matter. Yet coercion, as envisioned by the theorists here discussed, is defined by its impact on individuals, not by its social nature. One can imagine ubiquitous, subtle, and hidden results of social oppression that pressure individuals in a coercive manner, but that are not identified as coercion either because no specific persons are aware of the experience of coercion or because the coercion is such a pervasive element within society that it evades observation. So whereas liberal feminists leave theoretical space for this kind of "soft," social-pressure coercion, in some cases, it would seem to escape their notice, as they rely on the individual as the touchstone of assessing coercion.<sup>166</sup> Sex-worker-rights advocates similarly look at individual experience as the ruler for measuring coercion.

162. Trafficking Protocol, *supra* note 6, at art. 3(b).

163. *See generally supra* notes 122–24 and accompanying text.

164. *See* NUSSBAUM, *supra* note 88, at 10–11.

165. *See, e.g.,* Kamala Kempadoo, *Introduction: Globalizing Sex Workers' Rights*, in *GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION*, *supra* note 37, at 17–19.

166. Susan Moller Okin has offered a careful and nuanced assessment of how feminist theory can account for this kind of soft, diffuse coercion without resorting to a strict notion of false consciousness. Susan Moller Okin, *Reply*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 117, 126 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999). Okin discusses the observation that women sometimes express preferences for antifeminist, subordinating social choices, which she terms adaptive preferences, by noting that "[o]ne need not rely on the Marxist theory of false consciousness to recognize that persons subjected to unjust conditions often adapt their preferences so as to conceal the injustice of their situation from themselves." *Id.* She continues by considering that older women in a patriarchal culture tend not to want change because it is difficult to question cultural constraints and because their roles might depend on successful enculturation of younger people, particularly daughters-in-law, to performance of traditional, patriarchal social roles. *Id.*

Leaving theoretical space for the soft coercion of social forces still does not bring these generally liberal theorists to a systematic understanding of the oppression that trafficked women experience as a class. Foregrounding coercion requires explicit focus on the individual, as well as the theoretical construction of society-wide oppression as the sum of individual experiences, not as a pervasive element of a society itself. Thus, while a collection of individual experiences *can* generate a societal conceptualization of oppression as the source of coercion, it does not *necessarily* do so. A broad-based critique of the limits of sexist society can result from the liberal identification of coercion, but it does not automatically follow from a liberal notion of coercion; the liberal theory of the individual may actually make it harder to identify patterns of coercion within groups of individuals. Because of this attachment to the individual as the basis of liberal theory and the possibility that coercion will not be subject to collective analysis, liberal feminist thought on trafficking often lacks the kind of expansive social critique that seeks to explain the occurrence of trafficking and the possibilities for its eradication.

### III. HARMONIZING FEMINIST APPROACHES TO TRAFFICKING: THIRD-WAY FEMINISM

In the context of trafficking for sexual purposes, political pragmatism and feminist commitment to social change that improves the lot of women demand efforts to bring opposing organizations into dialogue. While liberal and dominance feminists engage in a public policy death match for theoretical primacy, women trafficked for sexual purposes continue to face the tangible harms that purportedly concern these feminists. Even for those who expressly reject feminism but are concerned with human suffering in general, this ideological conflict poses a problem, insofar as it exhausts valuable energy that might be invested in aiding people in need.<sup>167</sup> The kinds of situations described in the introduction, in which activists, governments, and social-service providers subjugate the needs of particular trafficked women in the pursuit of ideological warfare in the public-policy realm, have proven inconsistent with ardent advocacy for trafficked women that focuses on concrete interventions. How we have thought about trafficking for sexual purposes has inhibited what we have been able to do about it.<sup>168</sup> The following proposed harmonization of these two theories thus serves the pragmatic

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167. To the extent that this conflict over the meaning of sex work distracts from more constructive, pragmatic discourse on trafficking into all labor sectors, resolving this problem pays dividends when trying to generate cogent public policy interventions in situations of trafficking for other forms of labor as well. Chang & Kim, *supra* note 15, at 318–19 (noting the U.S. government’s focus on sex trafficking and ongoing ignorance of “trafficking into agriculture, domestic service, restaurants, hotels, manufacturing, and construction” and observing that the “emphasis on criminal enforcement and antiprostitution policies curtails the rights of trafficked persons voluntarily engaged as sex workers, and marginalizes trafficked persons in non-sex related industries”).

168. See, e.g., Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 351 (2007) (observing the U.S. response to trafficking by noting that if the government insists on rescuing girls chained to beds in brothels, it will overlook the vast majority of trafficked persons in the country).

goal of implementing effective public policies that might obviate the need for continued infighting in the anti-trafficking community. A third way between these two feminist accounts of trafficking seeks to harness the analytical strengths of each in order to avoid the perils of the other. Finally, while the foregoing descriptions are offered in theoretical terms, this harmonized account of a feminist theory of trafficking for sexual purposes resonates with specific, practical public-policy interventions because it is a practical, rather than normative, project.

*A. Third-Way Feminism: A Practical Middle Ground*

There are shortcomings to both major theoretical approaches to the trafficking of women for sexual purposes. As described above, dominance feminism mutes the voices of sex workers who would offer an alternative vision of their sexual labor. Through its monolithic conflation of voluntary and involuntary sex work and its refusal to consider the dissenting views of individual women, it obliterates the possibility of sexual labor serving any kind of liberatory purpose in the lives of women.<sup>169</sup> On the other hand, because of the liberal conception of the individual as the subject of questions of political philosophy, liberal feminists cannot offer a rich account of the societal structures and pressures that shape women's experience in the public labor market. This shortcoming has its most critical expression in the excessive liberal dependence on an individually determined vision of coercion, which relies narrowly on the experiences of individual women rather than offering a more visionary critique of the systematized nature of the oppression of women along axes of gender, race, and indigeneity.

Yet both major strains of theory offer significant and powerful contributions to a complete understanding of trafficking for sexual purposes. Kathleen Barry's dominance feminist model portrays the depth of sex-based domination that is at the root of the trafficking of women for sexual purposes; she offers a scathing critique of a world that relegates many women to a life-long position of oppression, with sexual labor as one of few economically viable fields of work.<sup>170</sup> Her theory expresses a deep understanding of the similarity of the lives of many women and of how these experiences are part of their class-based condition. At the other extreme, the liberal attachment to the individual allows room for the ambiguity and complexity of individual women's experiences; it does not force the discrete voices of particular women to conform to a monolithic theory of what trafficking for sexual purposes means from a feminist perspective. Furthermore, the poststructuralist conception of the individual allows greater appreciation of the ways in which different women experience oppression along distinct axes. Together, liberal and poststructuralist feminisms allow room for women to name and define their own oppression, and to suggest what kinds of solutions they need to solve the problems they perceive in their own lives.<sup>171</sup>

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169. Kamala Kempadoo, *Women of Color and the Global Sex Trade: Transnational Perspectives*, MERIDIANS, Spring 2001, at 28, 28.

170. See *supra* notes 37–73 and accompanying text.

171. Sex workers themselves have identified space between victimhood and agency in which they live and work. Travis S.K. Kong, *What It Feels Like for a Whore: The Body Politics of Women Performing Erotic Labour in Hong Kong*, 13 GENDER, WORK & ORG. 409

A middle way between these two opposing theoretical positions must embrace the strengths of both models, using each theory to bolster the other in substantive ways. If reconciled, the liberal appreciation for individual experience and the poststructuralist awareness of the need for individualized intervention can resolve the flaws of dominance feminism's universalized account. Similarly, reconciling aspects of liberalism and dominance theory permits the use of the class-based analysis of dominance feminism to overcome the liberal failure to provide a cogent description of the social nature of the oppressions that cause trafficking. Such complementary work has been performed, but primarily at a theoretical level, in the current dialogue around the issue of partial agency within the law, which hints at what a concretized version of the theory might resemble in the context of legal and policy reform.<sup>172</sup>

Yet the third-way feminist approach that I advocate differs from the existing theories in important ways. First, it is context specific. Whereas scholars such as Kathryn Abrams develop a multipurpose account of women's agency that can be imported into discussions of feminist legal theory as applied to any substantive area of law,<sup>173</sup> the present model, as offered here, is specific to the issue of trafficking for sexual purposes. Second, the instant account finds normative mandate in the widespread ideological conflict that creates chaos of concrete trafficking interventions. Thus, its impetus resides outside the realm of theory and squarely inside that of public policy and law. Although it describes in great detail the generative theoretical accounts of trafficking that underlie present political positions, here the theory serves to clarify the normative positions underlying particular forms of policy advocacy; this project, at its essence, is pragmatic and seeks ideological unity among bickering organizations. Abrams, in contrast, finds epistemological origins in theory, from which she generates policy.<sup>174</sup> Both are endeavors of feminist legal theory; yet, as they take their cues from different sources, they conclude in different places. Abrams's project provides a thorough but generalist approach for feminist law and policy making;<sup>175</sup> the task of this Article is to frame a theoretical model of trafficking for sexual purposes that is generative of interventions acceptable to all feminists. In short, this project takes up Abrams's suggestion to "address[ ] particular controversies as they arise."<sup>176</sup>

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(2006) (documenting this complexity through a series of in-depth individual interviews with sex workers in Hong Kong).

172. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 351–53 (1995) (discussing partial agency from the standpoint of analyzing the nature of the legal subject). While the first step in such a project is defining the nature of the subject, Abrams delineates a clear space for carrying such theoretical discussions into the realm of concrete controversies. See *infra* note 176 and accompanying text.

173. Abrams, *supra* note 172, at 355 ("I will classify these approaches by the type of strategy they involve—the particular use that they propose to make of legal rules and/or imagery—rather than by the area(s) of substantive law to which they apply.").

174. See *generally id.* at 351–76.

175. See *id.* at 355.

176. *Id.* ("[T]he agency critique would seem to point toward a strategic or pragmatic approach that addresses particular controversies as they arise, in light of more generally shared goals." (internal citation omitted)).

*B. Third-Way Feminism's Four Central Tenets*

With regard to the trafficking of women for sexual purposes and migration for sexual labor, four central tenets serve to describe in broad strokes a feminist third way. First, the theoretical harmonization of dominance and liberal feminism in the context of the trafficking of women and migration for sexual labor would adopt the dominance feminist cognizance of the system of oppression in which individual women make choices. Particularly in the case of international migration for sexual labor, the reality is that many women encounter intersecting oppressions on a daily basis; racism, sexism, discrimination on the basis of indigenous status, classism, and myriad other forms of oppression are part of life for women worldwide and pervade women's conceptualization of their life choices. In a third-way theory, prioritizing an overarching awareness of the systematic nature of how privilege structures opportunity is a tribute to dominance feminism's effort to describe a world of sexualized domination. Indeed, the key contribution of dominance feminism to this third-way model of trafficking is its profound sociological insight into the structural aspects of gender and power, which cannot be fully understood by looking at individuals, but rather requires a broad, even globalizing, analysis. Interventions that forward this tenet happen society-wide, likely in institutional spheres, and seek to systematically deconstruct laws supportive of continued oppressive circumstances.

Second, a harmonized feminism attempts to explain and counteract the impact of multiple forms of oppression on the lives of women. This theory of oppression draws on the strength of dominance feminism in perceiving oppressions from a social, rather than individual, perspective. Yet where dominance feminism breaks down due to its universalizing that refuses to accept the multiplicity of oppressions that shape women's lives, the poststructuralist model of intersecting oppressions presents an alternative method of comprehending oppressions as uniquely experienced by individuals. The third-way theory of trafficking for sexual purposes accounts for the class-based nature of these oppressions. Barry's influence is felt by acknowledging that women as a group can be partially understood through an explanation of oppression. Yet this third-way project also reflects the poststructuralist awareness that because not all women experience each axis of oppression, individuals' needs and responses will differ. Interventions consistent with this tenet offer women trafficked for sexual purposes opportunities, information, and resources to overcome the power differentials inherent in these intersecting oppressions, while refusing to mandate a monolithic, one-size-fits-all intervention.

Third, a harmonized feminist account of trafficking does not subsume the particularized experiences of individual women in the social explanation of the nature of oppression. Space remains within this description of a shared, class-based status for women to opt out. This tenet arises from the liberal feminist respect for an individual's ability to narrate her own story on her own terms. Interventions that embrace this aspect of a third-way discourse on trafficking for sexual purposes provide individual women opportunities to name the sources of their own oppression, rather than defining the trafficking experience for them, and also to coordinate anti-oppression efforts with others who self-identify as similarly situated.



Fourth, the harmonized feminist account of trafficking leaves open the possibility of agentic<sup>177</sup> action, even under oppression. Multiple oppressions are not the sole defining characteristics of women's existence under a third-way model of trafficking for sexual purposes. Oppressions occur socially, and can be opposed both socially and individually; the choice of how to oppose oppression remains with individual women. This element of the project acknowledges that oppression's impact is far reaching, but strongly asserts women's ability to stand in opposition to oppression. This tenet of third-way feminist theory focuses on the need to affirmatively increase women's options for agentic action. Merely allowing space for independent agentic action is insufficient; interventions that advance agentic action leverage law and public policy to create legal channels in which women can act on their own behalf.

### C. Third-Way Feminist Sociolegal Interventions

These harmonized elements also point in the direction of the kind of sociolegal interventions that best serve trafficked persons, while simultaneously avoiding each theory's primary pitfalls.

First, at least portions of both sides of the abolition/sex-worker-rights debate advocate the decriminalization of prostitution,<sup>178</sup> specifically by removing engagement in sexual labor from the criminal code.<sup>179</sup> This proposition alone would

177. This use of the term "agentic" invokes Amartya Sen's use of the term "agent" in its older—and "grander"—sense as someone who acts and brings about change, and whose achievements can be judged in terms of her own values and objectives, whether or not we assess them in terms of some external criteria as well. This [theory] is particularly concerned with the agency role of the individual as a member of the public and as a participant in economic, social and political actions . . . .

AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 19 (1999). For example, in discussing the actions of women in demanding wartime government accountability, Kathryn Abrams has written that "women are playing an agentic part in managing the culturally-constructed contradictions of their role. They are negotiating the balance between the gendered and the gender-neutral in interesting and creative ways." Kathryn Abrams, Lecture, *Women and Antiwar Protest: Rearticulating Gender and Citizenship*, 87 B.U. L. REV. 849, 881 (2007).

178. Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas describe four ways in which the legal system can deal with sex work. Halley et al., *supra* note 24, at 338–39. Complete criminalization criminalizes both the sale and purchase of sex. *Id.* Partial decriminalization decriminalizes the actions of sex workers, but criminalizes the actions of johns. *Id.* Complete decriminalization removes all criminal penalties from engagement in sex work, though other kinds of criminal liability may attach to actions taken during the sale or purchase of sex. *Id.* Finally, legalization involves complete decriminalization plus regulation of sex work. *Id.*

179. See CATHARINE A. MACKINNON, *Prostitution and Civil Rights, in WOMEN'S LIVES, MEN'S LAWS*, *supra* note 36, at 151, 155 ("Criminal laws against prostitution make women into criminals for being victimized as women, yet there are no cases challenging these laws as sex discrimination on this ground. Criminal prostitution laws collaborate elaborately in women's social inequality; through them, the state enforces the exploitation of prostituted women directly." (internal citation omitted)); NUSSBAUM, *supra* note 92, at 296 ("Certainly

make serious progress in both shifting the stigma of sex work, a priority of liberal theorists, and reducing the likelihood of women's victimization at the hands of police operating within a system of sexualized dominance. Consistent with the four tenets of third-way theory, decriminalization acknowledges the system of oppression in which trafficked women live and reframes these women, at least in part, either as victims of the crimes of traffickers or, in the alternative, as individuals capable of asserting their own agentic choices. Decriminalization thus offers the possibility of the neutrality of the law in its encounter with trafficked women, rejecting a universal definition of the trafficked sex worker as criminal and instead providing the opportunity for self-definition on the spectrum of agency and victimhood.

Reform of police investigation and prosecution offers a more moderate and perhaps more attainable third-way intervention, which similarly leverages change to the perceived criminality of trafficking-related sex-work offenses.<sup>180</sup> This kind of restructuring is much more widespread in practice than the kind of decriminalization typically advocated in the literature, and, similarly, attempts to protect individual trafficked women from specific harms at the hands of police and prosecutors that follow from the stigma of sex work. Yet, unlike full-fledged decriminalization, more moderate interventions do not pose the problem of offending local mores and social norms regarding sex work in the same way that complete decriminalization does.<sup>181</sup> Either decriminalization or reform is consistent with third-way feminist values, but reform might be preferable for pragmatic reasons.

Reforms of this kind can be found when police officers and agencies opt to work outside formal legal structures to help social-service providers work with trafficked

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[the economic situation of women] will not be ameliorated by the criminalization of prostitution, which reduces poor women's options still further."). *But see* Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 J. OF TRAUMA PRAC. 315, 316 (2003) (arguing against the legalization of sex work because it would legitimate "prostitution as work [and make] the harm of prostitution to women invisible, expand[] the sex industry, and [fail to] empower the women in prostitution").

180. This vision of intervention in trafficking in the criminal sphere reflects both the trend toward governance feminism, critically described as the "infiltration of specifically feminist activism into generalist forms of power-wielding," Halley et al., *supra* note 24, at 343 (emphasis omitted), as well as the current pushback by feminists who challenge the co-optation of feminist power by the police state, Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 653 (2009) (leveling this critique in the arena of rape laws). The rejection of the absolute reliance on police power to create change is one of the emerging neofeminist principles. Gruber et al., *supra* note 31.

181. Where efforts to decriminalize prostitution have occurred in the United States, they have been opposed in many instances. *See, e.g.*, John M. Glionna, *Proposition to Protect Sex Work Splits S.F.: Backers Say Measure Would Help Public Health, Foes Contend It Will Attract Criminals*, L.A. TIMES, Sept. 15, 2008, at A2 (quoting Kamala Harris, San Francisco District Attorney, on the topic of a decriminalization proposition, stating that "Prostitution is not a victimless crime. . . . It's a crime that victimizes neighborhoods and plagues communities and compromises the quality of life of the people who live in those neighborhoods. This measure would prohibit us from putting public resources into helping those residents. And that's not acceptable in this community.>").

women. The interventions of a handful of officers in an Italian police force offer one example of this in practice.<sup>182</sup> Without the knowledge of the majority of the department, a few officers assisted local service organizations with removing individual women from trafficking situations. This aid typically came in the form of falsified arrests or deportations. A few officers would coordinate efforts with social-service providers to stage false police confrontations with local trafficked women. Those who wanted to return home to their families in Nigeria would have deportations fabricated and would return voluntarily; those who wanted to stay in Italy, but feared reprisals from traffickers, could assert an Italian law that granted residency to those who testified against their traffickers, and then would use a falsified arrest as the impetus to move to a social-service center or convent at the opposite end of the country, away from the community where their identities were known. These women would be free from their contracts, in most cases, once “deported” or “arrested,” which was a self-serving response that divested madams and traffickers of any sense of responsibility for the trafficked woman once she encountered legal trouble.

Such a solution to the intractable dilemma of how to get already-trafficked women out of their situations recognizes key shortcomings in the ability of the state to offer meaningful interventions for trafficked women; it thus operates cognizant of the social nature of trafficking and the societal obstacles that prevent women from leaving trafficking. The corruption of local officers and their collaboration with traffickers meant that universal access to state assistance in leaving trafficked sex work was an impossibility; crooked officers would simply tip off traffickers so they could remove their sex workers from the city in anticipation of police action. Further, implementation of this strategy highlighted the insufficiency of both national and international legal coordination in offering protection to women who would try voluntarily to leave trafficked sex work.

Beyond the pragmatism of this intervention, it also is consistent with the tenets of a third-way consideration of trafficking. The police who helped trafficked women in this way acted in knowledge that systematized oppression based on gender, race, and national-origin privilege allowed corrupt police to take advantage of trafficked women. Without these police officers’ insight into the pervasive, structural aspects of gendered power, which derives in large part from dominance feminist thought, such an intervention would not be possible. They refused to see these women merely as individuals who had made bad choices and instead appreciated them as persons stuck in a system that offered them few exit strategies. The solution of falsified legal action offered a bypass around the institutional structure that magnified the impacts of these oppressions on the lives of individual women. Further, by allowing the individual women who were well-suited to this kind of intervention to decide for themselves if and how they wanted to leave the trafficking situation, the police embraced the agency of individuals to act on their own behalf. Most importantly, these police used institutional resources to equalize power differentials based in male and race privilege by offering women the opportunity to choose to get out. Yet the police did not universalize the experience

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182. This example was drawn from my own experience working in Italy in 2000–01.

of individual women, instead generating context-specific, individualized plans that could account for the particularity of a single woman's experience.

Second, the creation of viable alternatives to sex work also follows necessarily from a theory that requires offering possibilities for agentic action; entering a trafficking situation can only be seen as an agentic life choice for women when it is chosen from among other viable life options. Liberal scholars suggest possible programs for increasing sex workers' alternatives. Martha Nussbaum has articulated four stages for addressing liberal concerns with prostitution: 1) provision of education to prostitutes and their children to increase their life options; 2) provision of microcredit to women to increase their employment options; 3) creation of labor unions for women in low-income jobs to create the possibility of collective, agentic action; and 4) creation of groups to increase women's connectedness to one another.<sup>183</sup> These suggestions closely parallel the kinds of interventions that the activist-scholar group advocates for as well.<sup>184</sup> Nussbaum's proposals approach a third-way model, except that she does not specify the relationship between her ideas and the social nature of gendered oppression.

A third-way model might offer programmatic interventions similar to those of Nussbaum but develop them with a specific eye to undermining systemic social factors that render women susceptible to trafficking.<sup>185</sup> These interventions take their lead from a sociological observation of the systematic nature of the pervasive lack of privilege among poor women of color in societies of the global South, owing in large part to dominance feminist insights on structural aspects of gender and power, but intervene in the lives of individuals in a fashion perhaps better understood as liberal. Put another way, this kind of intervention leverages dominance feminist social observations but enacts typically liberal solutions. The American Himalayan Foundation offers an example of how these interventions

183. NUSSBAUM, *supra* note 92, at 296–97.

184. *See supra* note 155 (discussing organizing). Whether activist or scholar, that Nussbaum and Doezema alike advocate for collective action by sex workers indicates that women in situations of sex work might find strength in numbers. Simply stated, this kind of group action by women, sex workers or not, is a well-documented way to produce the kind of positive change in life circumstance that leads to improved social conditions. *See, e.g.*, NUSSBAUM, *supra* note 7, at 15 (emphasizing the role of Indian women's collective action in improving their socioeconomic conditions).

185. Janie Chuang has offered a meaningful discussion of the factors creating susceptibility to trafficking, observing that

[t]he problem of trafficking begins not with the traffickers themselves, but with the conditions that caused their victims to migrate under circumstances rendering them vulnerable to exploitation. Human trafficking is but “an opportunistic response” to the tension between the economic necessity to migrate, on the one hand, and the politically motivated restrictions on migration, on the other.

Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 *IND. J. GLOBAL LEGAL STUD.* 137, 140 (2006). Chuang goes on to identify how migratory push-pull factors function in the trafficking arena. *Id.* at 140–47. Dina Francesca Haynes has made similar observations in her scholarship on trafficking. *See* Haynes, *supra* note 168, at 353–55.

might be developed. One of their programs provides funds to keep Nepali girls in school during the years they are most vulnerable to being trafficked or to migrating to engage in sex work.<sup>186</sup> It is an intervention that occurs at the level of the individual, but is crafted and shaped according to social reality. Further, it is a third-way feminist model because it explicitly acknowledges the intersecting systems of gender, race, and class that deny female children in Nepali villages access to education. It also views these systems with a forward-looking gaze, recognizing that educated girls will raise the standard of living for the community as a whole, and their families in particular, with the intent of solving the problem of trafficking in the future.<sup>187</sup> Yet it encounters these oppressions with an eye to the empowerment of individual, specific girls, offering them viable future options of agentic adult action, through which they might, if they choose, avoid lives of commercial sex work. The American Himalayan Foundation takes seemingly liberal interventions but contextualizes them in a profound understanding of systematic social oppression, which they seek to overcome. Even more robust interventions could involve paying formerly trafficked women who have since graduated to be school teachers so they can earn a salary, or paying families some kind of stipend on top of the scholarship for their daughters to overcome the opportunity cost of having a girl in school instead of earning money for the family's support.

Third, any kind of direct intervention in a situation of sex work or trafficking must be done in dialogue with the women in question. Public policy that ignores the real needs of individual trafficked women does not show respect for the choices of individual women. Yet recently developed domestic public-policy options demonstrate how legal interventions can let individual trafficked persons shape how they will pursue their own paths once they have successfully left a trafficking situation. Advocates for trafficked persons successfully lobbied for the amendment of the Trafficking Victims Protection Act with the inclusion of a civil remedy provision in the Trafficking Victims Protection Reauthorization Act of 2003.<sup>188</sup> With access to a civil remedy, trafficked women need not rely solely on criminal prosecution of their traffickers to see justice done. Prosecutorial discretion and resources thus are not the only factors determining if a trafficking case of some kind can be brought. Leveraging the lower standard of proof in civil litigation, civil remedy actions allow individual women to seek money damages from their traffickers directly, without concern for establishing the trafficking offense beyond a reasonable doubt.

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186. See *Projects: Stop Girl Trafficking*, AM. HIMALAYAN FOUND., <http://www.himalayan-foundation.org/live/project/stopgirltrafficking>.

187. K. Subbarao & Laura Raney, *Social Gains from Female Education: A Cross-National Study*, 44 *ECON. DEV. & CULTURAL CHANGE* 105, 105 (1995) (documenting, over the period of 1970–85, that female secondary education has a very strong effect on fertility and mortality and that family planning reduces fertility more when combined with female education).

188. Trafficking Victims Protection Reauthorization Act of 2003 § 1595, Pub. L. No. 108-193, 177 Stat. 2876.

More recently, the California Trafficking Victims' Protection Act, passed in 2005, offers legal protection for the individual choices of trafficked women.<sup>189</sup> It too offers a civil remedy provision, and even more importantly, includes a human trafficking caseworker provision, which defines the relationships that trafficked individuals establish with their social-service caseworkers as privileged, much like attorney-client relationships.<sup>190</sup> Previously, traffickers' defense attorneys could, in their efforts to defend their clients, invade these relationships to access information about the trafficking; the fact that they could be subpoenaed made caseworkers uneasy about hearing full accounts of the trafficking, which reduced their effectiveness in assisting their clients because of a lack of complete knowledge about clients' post-trafficking needs. Now, a privileged relationship means that trafficked persons can feel safe seeking assistance through candid communication.<sup>191</sup> This provision operates to level, in part, the inequality that trafficked persons experience from any of a number of axes of oppression. By allowing women to seek assistance from those trained to offer information and counsel, caseworker privilege means that social-service providers can maximize an individual's range of options and opportunity to express agency by equipping her to make informed, individualized decisions about her subsequent actions, once free from a trafficker's control.

Legal solutions such as caseworker privilege or civil remedy provisions in trafficking-related laws exemplify third-way intervention because they provide systematic solutions that enlarge the scope of a particular woman's autonomy. They qualify as third-way interventions because they assist trafficked persons by leveraging society-wide legislative change to alter systematized oppression, but refuse to offer only unitary forms of intervention that universalize the experience of trafficking. Instead, a legislative grant of the right to seek civil remedies offers social change at a macro level while allowing women to assert their own rights against traffickers, reclaiming the profits of their forced labor for their own benefit. Caseworker privilege shifts the burdens and benefits of prosecution to support women as they seek counsel and make choices from a position of information rather than ignorance of the range of options available to them. In both cases, legal interventions offer social change, which enables individual women to agentically assert a self-defined vision of the good in their own lives.

A more extreme, nonlegal form of intervention in dialogue with trafficked women is exorcism. Among Nigerian women trafficked to Italy, it is a common experience to be taken to the local practitioner of the animistic, indigenous religion by the trafficker prior to leaving a home village. There, the shaman casts a spell,<sup>192</sup> using blood, pubic hair, and underpants, a woman is bound to her trafficker by this curse, with various kinds of harm to follow for her or her family if she runs

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189. California Trafficking Victims Protection Act, ch. 240, A.B. 22 (2005).

190. *Id.* at sec. 2, 52.5(a).

191. This is an observation from my work advocating for the California Trafficking Victims Protection Act as a law student at Boalt Hall in the 2004–05 academic year.

192. See Aderanti Adepoju, *Review of Research and Data on Human Trafficking in Sub-Saharan Africa*, in DATA AND RESEARCH ON HUMAN TRAFFICKING: A GLOBAL SURVEY, *supra* note 16, at 75, 86.

away.<sup>193</sup> From time to time, one Protestant minister who works with these women engages in a practice of exorcism in which he frees his clients from the spells they believe to oppress them.<sup>194</sup> When asked to explain why he does this for the Nigerian women who are his clients, as this pastor does not himself believe exorcism to be occurring, his response is a profoundly third-way one: he does it because the women themselves believe the spell to be the source of their oppression. He intervenes with exorcism precisely because it subverts the systematized oppression that these women seek to overcome in order to be freed from their circumstances.

Even this kind of nonlegal solution is third way because it balances recognition of social sources of oppression—here, culturally specific religious belief—with the lived oppression of an individual. This pastor does not exorcise each of his clients, but only those who identify the voodoo spell as an obstacle to leaving trafficked sex work. In this sense, he does not universalize the solution. Rather, in a third-way feminist manner, he identifies the systematized oppression and the particular source of the oppression in which he must intervene, acknowledges the intersection of this form of oppression with others, and ultimately offers individual women the choice of agentically requesting exorcism as a solution to their trafficking situations. While this is obviously not a legal intervention in trafficking, it does offer a valuable model of how those who do third-way work with trafficked women offer solutions rather than force them upon individuals. To offer a trafficked woman access to what she believes that she needs in order to get out of trafficking, without regard for one's own personal beliefs in its efficacy, is to allow women space for agentic action.

Notably, none of the interventions discussed here as third-way solutions to trafficking forcibly removes women from trafficking situations. Instead, they provide access to social resources that might shift the calculus that an individual trafficked woman performs in deciding whether to run away or seek assistance in leaving a life of trafficked sex work. These interventions demonstrate a profound comprehension of an oppressive social system, but look to identify a particular intervention point; they see women as individuals living under a system of oppression and present solutions as choices to individuals, rather than externally imposing intercessions.

Although these are only initial visions of what third-way intervention in trafficking looks like, they differ dramatically from the “rescue” example discussed in the Introduction. Third-way intervention is dialogical and radical. It seeks to change society and to change the station of individual women through social reform. It respects individual women, but offers a powerful critique of the society in which specific women make their personal life decisions. Rather than

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193. KEVIN BALES, UNDERSTANDING GLOBAL SLAVERY 131 (2005) (documenting the occurrence of these practices within Nigerian populations of trafficked women in Italy).

194. This pastor was my supervisor during my time providing social services to Nigerian women in southern Italy; this observation draws on my work from September 2000 until December 2001. During my research in Thailand, I likewise observed that evangelical Christians who offer social services to trafficked indigenous women in Thailand also commonly offer spiritual healing at the request of their clients, who similarly believe themselves to be under supernatural control.

condemning individual women's choices as unworthy of respect or demonstrative of false consciousness when those choices increase the possibility of personal harm and oppression to women, this third-way approach mandates constant questioning of the context in which individuals make decisions and ongoing effort to render that society more just and equitable, thereby increasing options for individual women. It cannot abstract the individual from her society; neither does it consider the society to the detriment of particular women. Third-way feminism seeks feminist change through a combination of social critique and individual action.

#### IV. SYNERGIES BETWEEN THIRD-WAY FEMINIST INTERVENTIONS AND THE CAPABILITIES APPROACH TO HUMAN DEVELOPMENT

While this Article conceptualizes trafficked women through the lens of feminist legal theory and generates a set of interventions as the fruits of a feminist theoretical harmonization, third-way feminist theory on trafficking likewise finds generative force from another source. The development theory articulated by Amartya Sen and Martha Nussbaum, known as the capabilities approach to human development, resonates strongly with the theory here articulated of the victimized and yet agentic trafficked woman as an intended beneficiary of development and human rights efforts. Although the capabilities approach found its earliest articulations as an economic model offered by Nobel Prize-winning economist Amartya Sen and a strain of Aristotelian thought from feminist philosopher Martha Nussbaum, the theory of the capabilities approach to human development has subsequently taken great hold in the arenas of public policy and political philosophy.<sup>195</sup>

The capabilities approach to development is one particular application of the answer that Amartya Sen proposed to the question, “[e]quality of what?”<sup>196</sup> Unlike many other forms of egalitarian moral reasoning that focus on strict equalities of outcome or opportunity as the basic definition of fairness, Sen's take on the capabilities approach advocates equality of individual capabilities to achieve “functionings” as the crucial dimension of distributive justice.<sup>197</sup> Under this conceptualization, a functioning is a part “of the state of a person—in particular the various things that he or she manages to do or be in leading a life.”<sup>198</sup> Functionings might include nourishment, health, or even more complex notions such as self-respect.<sup>199</sup> Nussbaum presents the model slightly differently by focusing on concrete capabilities of “what people are actually able to do and to be,”<sup>200</sup> expressly articulating a list of ten “central human functional capabilities”: “(1) Life,” “(2) Bodily Health,” “(3) Bodily Integrity,” “(4) Senses, Imagination, and Thought,” “(5) Emotions,” “(6) Practical Reason,” “(7) Affiliation,” “(8) Other Species,” “(9) Play,”

195. NUSSBAUM, *supra* note 7, at 11.

196. Amartya Sen, Drummond Professor of Political Econ. at Oxford University, *Equality of What?: The Tanner Lecture on Human Rights at Stanford* (May 22, 1979).

197. Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30, 30 (Martha Nussbaum & Amartya Sen eds., 1993).

198. *Id.* at 31.

199. *Id.*

200. NUSSBAUM, *supra* note 7, at 5.



and “10) Control over One’s Environment.”<sup>201</sup> In either case, the key is not the achievement of functionings, but rather the way that capabilities capacitate individuals to live a variety of different kinds of lives.<sup>202</sup> Inherent in possessing such a set of capabilities is the freedom of an individual to envision and bring to fruition a particular kind of life of his or her own choosing.<sup>203</sup>

Applying these basic notions to the development context, the capabilities approach centers around a fundamental notion that the goal of development efforts should be increasing individuals’ capacities to pursue life ends, which Sen describes as a set of freedoms.<sup>204</sup> Poverty, according to the capabilities approach, is not merely the absence of goods or income, since goods are only derivative and income is a means of attaining capabilities.<sup>205</sup> Rather, poverty under this conception is best understood as capability deprivation, under which individuals are constrained in their ability to pursue the kinds of lives they value.<sup>206</sup>

Importantly, the capabilities approach does not mandate a particular set of life choices, a matter on which both Sen and Nussbaum agree. To both theorists of the capabilities approach, freedom to choose has intrinsic importance, since choosing is a part of living.<sup>207</sup> The role of the state is not to control the outcome of the choices, but rather to equip individuals to make refined choices among functionings.<sup>208</sup> To demonstrate this phenomenon of individual choice, Sen distinguishes fasting from starvation.<sup>209</sup> While food insecurity is incompatible with the capabilities approach, an individual who has access to sufficient food for nutritive purposes might choose to fast for idiosyncratic reasons such as religious devotion or political principle. This distinction is illustrative of the agnosticism of the capabilities approach, since it permits individuals to pursue any ends of their own choice with the capabilities they possess, while simultaneously insisting on a social goal of equipping each individual with a set of capabilities above a threshold level.<sup>210</sup>

201. *Id.* at 78–80.

202. Sen, *supra* note 197, at 33.

203. Nussbaum is very explicit about the importance of what she announces as the principle of each person’s capability. Under this conception, the capability of one individual cannot be sacrificed for or subsumed into the capability of another. NUSSBAUM, *supra* note 7, at 5–6, 246–47.

204. SEN, *supra* note 177, at 18.

205. Sen, *supra* note 197, at 33, 41.

206. *Id.* at 41–42; *see also* SEN, *supra* note 177, at 20–21.

207. Sen, *supra* note 197, at 39. It is worth quoting Nussbaum at length on this point:

The central capabilities are not just instrumental to further pursuits: they are held to have value in themselves, in making the life that includes them fully human. But they are held to have a particularly pervasive and central role in everything else people plan and do. In that sense, too, they play a role analogous to that of primary goods in Rawls’s recent (political-liberal) theory: they have a special importance in making any choice of a way of life possible, and so they have a special claim to be supported for political purposes in a pluralistic society.

NUSSBAUM, *supra* note 7, at 74–75.

208. Sen, *supra* note 197, at 40.

209. *Id.*

210. NUSSBAUM, *supra* note 7, at 75.

The relationship between the feminist rendition of trafficking offered here and the capabilities approach to development and human rights work more generally indicates the problems inherent in oversimplifying complex social phenomena that affect the least advantaged of the global society. The capabilities approach highlights how theorists and policy makers alike must properly comprehend the relationship between a woman and the experience of trafficking. The third-way feminist approach I offer provides a second framework for conceptualizing the situation of a trafficked woman because it demands that women have meaningful life choices. When trafficking represents a choice under circumstances of constrained autonomy where limited alternatives are available, the capabilities approach insists that the proper intervention is to increase individual capabilities. Whether the choice to be trafficked is, as Sen terms one possible negative array of options, one among a group that the individual might describe as “‘bad,’ ‘awful,’ and ‘gruesome,’”<sup>211</sup> or is actually reflective of agentic action of choosing among viable options is essentially impossible for the outsider to know.

What the outsider can do, however, is offer prophylactic and post-trafficking interventions that boost the capabilities of the individual woman who is either susceptible to trafficking or already trafficked, which are precisely the kinds of sociolegal interventions that third-way feminist theory offers as well.<sup>212</sup> Crucially, both for this form of feminist thought and under the capabilities approach, the ultimate individual choice to perform sex work is outside the realm of the proper sites of intervention. Instead, it is by increasing the array of options available to a particular woman that her agency is furthered and her choice might approach a level of freedom consistent with her autonomy.<sup>213</sup> The interventions that I propose here set forth a model for increasing individual women’s life options, whether as a prophylactic measure to prevent trafficking or as an intervention in trafficking situations to assist trafficked women in accessing other life choices. Whether microcredit, civil remedy, or caseworker privilege, all of these interventions build the social capital that an individual woman possesses, rejecting a hegemonic, universal solution in favor of possible interventions that contemplate the complexity of the factors that lead a woman into a trafficking situation and keep her there long term. These interventions are third-way feminist ones because they address the sources of gendered power imbalances, without imposing a unitary outcome on women, and they are consistent with the capabilities approach because they actually increase the possibilities available to individuals.

Approaching the vignette with which this Article begins from the standpoint of the capabilities model, we land in a place of serious concern with the initial choosing moment in which an individual woman susceptible to trafficking assesses her options. The capabilities approach demands that women reach that moment with a full stock of social capital—educated, healthy from access to preventative medical care and proper sanitation, in a nation that respects individual civil and

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211. Sen, *supra* note 197, at 34.

212. See *supra* Part III.C.

213. Martha Nussbaum herself has noted the way that the capabilities approach offers a means of resolving the feminist debate between dominance and economic (or liberal) feminism; she posits that focusing on capabilities, both employment- and sex-related, can move feminists beyond this theoretical schism. See NUSSBAUM, *supra* note 7, at 290–94.

political rights and that offers her viable employment options. The capabilities approach provides a proper degree of outrage when faced with women's conditions in Burma that render them likely to migrate for sex work. Likewise, for women who have already found themselves in Thai brothels, the capabilities approach suggests that preferable interventions are agnostic ones that an individual can leverage in multiple ways to improve her living conditions. Whether framed through the third-way feminist model or the capabilities approach, a reconsideration of the opening vignette requires a posture towards a trafficked person that appreciates the individual as agentic and self-determining in the face of limitations, instead of ascribing a narrow status of victim or agent.

#### CONCLUSION

The promise of third-way feminism is not confined to the theoretical conflict around the trafficking of women for sexual purposes and migration for sex work. Feminist debates on other issues—pornography, pregnancy-related leave, sexual harassment—could be subjected to a similar process, as Abrams suggests.<sup>214</sup> From a broader perspective, the general feminist dialogue on smaller, less controversial topics is even riper for the application of a method that embraces the strengths of polar positions. Furthermore, this kind of concretized analysis of the middle ground between dominance and liberal feminists engages in the developing conversation about the role of agency and constrained autonomy in the legal and philosophical literature. The intervention model suggested here offers one suggestion of a tangible application of this theoretical discussion.

What this model proposes is the possibility of long-term collaboration between the two poles of feminism. Third-way feminism, applied concretely to issues of legal justice, suggests a growing demilitarized zone, where it may be possible for feminists who vehemently disagree about first principles to reach *détente* on the possibility of interventions for the purposes of increasing women's agency under conditions of oppression. Furthermore, this model presents a response to the common and wrongheaded complaint regarding critical legal theory, including feminist theory—that it is destructive, seeking only to critique, rather than constructively offering positive interventions. This project leverages critical feminist insight to propose effective, targeted interventions that address real problems facing real women.

Finally, the synergy between the conclusions that this kind of feminist legal theorizing generates and the principles and purposes of the human capabilities approach offers external validation of this project. At the nexus of liberal-political philosophy, contemporary economics theory, and pragmatic efforts of international development, the capabilities approach indicates how a focus on properly understanding the intended beneficiary of a program can lead to interventions that build room for the exercise of agency even under constraints. Using law and policy to build the capabilities of individuals and communities is a worthy justice goal in itself; that it reaffirms fundamental principles of feminist theory offers additional justification of both modes of thought and possibilities of future scholarship as well.

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214. Abrams, *supra* note 172, at 355.