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LAW, OTHERNESS, AND HUMAN TRAFFICKING

Jonathan Todres*

*Until lions have their historians,
tales of the hunt shall always glorify the hunters.*
—African Proverb¹

INTRODUCTION

A gross violation of human rights, slavery has been condemned globally and is viewed by most as a terrible relic of the past. Yet the incidence of human trafficking—a modern form of the slave trade²—persists and, in fact, continues to grow.³ Today, human trafficking is a multi-

* Associate Professor of Law, Georgia State University College of Law. I am grateful to Professors Maxwell Chibundu, Pratheepan Gulasekaram, Meredith Johnson Harbach, Natasha Balendra, Peggy Cooper Davis, Risa Kaufman, Tanya Washington, Doug Yarn, and Gregory Jones for their helpful suggestions and comments. I also benefited from presenting this paper at the Southeastern Association of Law Schools Annual Conference (July 2008). Thank you also to Ana Florez and Nichole DeVries for their excellent research assistance.

1. Dating back roughly twenty years to when I first came across this proverb, I have endeavored from time to time to learn its origins but have found it described only as an “African proverb.” I regret having to include such a Eurocentric attribution line, which ignores the fact that Africa includes fifty-six countries and many more ethnic and cultural groups. It bears noting that in my searching, I never came across a single instance of an English, French, German, or other “Western” proverb being described simply as “European proverb.”

2. I refer to human trafficking as a modern form of slavery because while parallels between the two exist, trafficking does not map precisely onto the 19th century slave trade (e.g., states openly sanctioned slavery, whereas today law prohibits human trafficking). See Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT’L L.J. 207, 270–271 (2007). For so many victims of human trafficking, however, the experience equates to enslavement. For a comparison, see *id.* at 265–293.

3. See Nancie Caraway, *Human Rights and Existing Contradictions in Asia-Pacific Human Trafficking Politics and Discourse*, 14 TUL. J. INT’L & COMP. L. 295, 295 (2006) (reporting an “almost fifty percent increase” in the incidence of trafficking from 1995 to 2000).

billion dollar industry.⁴ While the international community has turned its focus to human trafficking in recent years, progress on the issue has been slow and selective. A central reason for the limited success is the prevailing conception of the problem, which, in turn, forms the basis of the law developed to combat human trafficking.

The recent surge in interest in ending human trafficking has led even Hollywood to take up the cause. Hollywood's foray into this area evidences the problem with the dominant discourse on human trafficking. In 2005, Lifetime Television aired the first major commercial film on the issue, *Human Trafficking*, starring Mira Sorvino and Donald Southerland.⁵ The film was praised for bringing this horrific practice into stark daylight.⁶ The film's portrayal of the issue, however,

4. The profits realized by trade in human beings trails only the arms trade and drug trade. Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 163 (2007). The potential for profit from human trafficking is immense in part because, unlike with arms and drugs, which an individual can sell only once, a human being can be sold repeatedly. Dina F. 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, 342 (2007). While determining the profitability of illegal enterprise inevitably involves some approximation, traffickers earn an estimated five to ten billion dollars each year. *Id.* Other estimates are considerably higher; the International Labour Organization (ILO) reports that human trafficking trade generates over \$31 billion annually for organized criminal enterprises. Srikantiah, *supra*, at 163 (citing 2006 ILO statement). Moreover, other "legitimate" businesses profit from human trafficking as well. For example, the sex trade, an industry that benefits from trafficking in persons, generates billions of dollars annually not only for prostitution rings and other criminal enterprises but also for legitimate businesses, such as hotels, restaurants and shops in tourist locales, travel agencies, and other tourism related enterprises. See, e.g., U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 13-14* (2005), available at <http://www.state.gov/documents/organization/47255.pdf> ("According to the U.S. Federal Bureau of Investigation, human trafficking generates an estimated \$9.5 billion in annual revenue.") [hereinafter 2005 Trafficking Report]; International Organization for Migration, *Trafficking in Migrants: IOM Policy and Activities* (1997) (estimating that the trafficking trade produces a profit of \$7 billion annually).

5. *HUMAN TRAFFICKING* (Echo Bridge Home Entertainment 2005).

6. The New York Times review called it "unusually good: a harsh public-service message built into a clever, suspenseful thriller." Alessandra Stanley, *Selling Sex, That Renewable Resource*, NY TIMES, Oct. 24, 2005, at E1. It was also nominated for two Golden Globes and was Lifetime Television's most-watched miniseries of 2005. Amazon.com, Product Description, <http://www.amazon.com/Human-Trafficking-Mira-Sorvino/dp/B000ETR9VU> (last visited Dec. 25, 2008). Not everyone praised the film, but even critics failed to discuss the film's bias. See, e.g., Tom Shales, 'Human Trafficking':

received little examination; in the film, all of the victims were white girls, except one (a Filipina girl), and all were abducted except one who was sold by her family—the only non-white girl.⁷ This portrayal overlooked important realities of human trafficking, including the fact that globally the majority of exploited girls and boys are not white,⁸ while reinforcing stereotypes that “other” cultures value children less and thus will sell their children while white Western families must be victims.

I submit that these portrayals reflect much deeper held societal views that inform the prevailing understanding of and responses to the problem of human trafficking. Specifically, I suggest that “otherness” is a root cause of both inaction and the selective nature of responses to the abusive practice of human trafficking.

Otherness,⁹ with its attendant devaluation of the Other, facilitates the abuse and exploitation of particular individuals. Otherness operates across multiple dimensions to reinforce a conception of a virtuous “Self” and a lesser “Other.”¹⁰ In turn, the Self/Other dichotomy shapes the

Exploiting Misery, and Creating It, WASH. POST, Oct. 24, 2005, at C01.

7. It might be easy to shrug this off as Hollywood sensationalism, but it is telling that the vast majority of the public accepted the film as truth.

8. Research shows that most of the estimated two to four million individuals trafficked each year are from developing countries whose populations consist predominantly of persons of color. Even in the United States, evidence suggests the pattern is the same. See, e.g., Janice G. Raymond *et al.*, *Coalition Against Trafficking in Women, Sex Trafficking of Women in the United States: International and Domestic Trends* 42 (2001) (finding that women of color constitute majority of trafficking victims in New York City and San Francisco).

9. Otherness, in its most basic form, is “the quality of being not alike, being distinct or different from that otherwise experienced or known.” Princeton WordNet, Otherness, <http://wordnetweb.princeton.edu/perl/webwn?s=otherness&o2=&o0=1&o7=&o5=&o1=1&o6=&o4=&o3=&h=> (last visited Dec. 25, 2008) (defining “otherness”); see also Meriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/otherness> (last visited Dec. 25, 2008) (“Otherness: the quality or state of being other or different.”). In this article, I use “otherness” to encompass the construction of the social and cultural Other. Some have suggested that otherness can be a neutral concept reflecting difference, while others assert that inherent in otherness is a devaluation of the other. See discussion *infra* note 32. For a good overview of otherness and othering, see BILL ASHCROFT ET AL., *POST-COLONIAL STUDIES: THE KEY CONCEPTS* (2d ed. 2007).

10. In this article, I use “Self” and “Other” to discuss the phenomenon of othering. This narrative choice has some shortcomings. Depending on one’s perspective, the “self” of course could be and is anyone. See generally RICHARD

phenomenon of human trafficking, driving demand for trafficked persons, influencing perceptions of the problem, and constraining legal initiatives to end the practice. Thus, for example, otherness leads men in Western, industrialized countries to rationalize their exploitation of women and children in poorer countries.¹¹ It also causes Western leaders to overlook the extent to which human trafficking related abuses occur within their own borders at the hands of their own citizens.¹² Similarly, otherness operates in developing countries to permit the exploitation of particular populations.¹³

Ultimately, appreciating the true nature of the problem of human trafficking and its root causes will require overcoming deep-seated beliefs of the lesser value of “others” and acknowledging a truer picture of the Self and the role that the Self, or dominant group, plays not only in helping others but also in the exploitation of particular populations. Exposing and understanding dominant conceptions of the “other” is a necessary step in both generating the political will to eliminate human trafficking and developing effective measures to combat the practice. To successfully combat human trafficking, it is also essential to recognize and acknowledge all facets of the Self including its responsibility in fostering or tolerating the conditions under which the Other can be exploited.

The growing literature on human trafficking has focused very little, if at all, on the role of otherness in furthering the exploitation of particular persons.¹⁴ The exception is a small

DAWKINS, THE SELFISH GENE (1976) (all individuals are self-regarding). Here, in most instances I employ the term “Self” in discussing the dominant group’s vantage point, because this article is concerned foremost with how the dominant group in the global power structure creates and conceives of the “Other” and incorporates flawed understandings of the Other into its notions about human trafficking and appropriate legal responses.

11. See *infra* notes 65–86 and accompanying text.

12. See *infra* notes 87–100 and accompanying text.

13. See discussion *infra* note 86.

14. Most legal scholarship on human trafficking does not mention otherness. A search of Westlaw’s Journals & Law Reviews database on January 16, 2009 found 1092 articles that mentioned “human trafficking” or “trafficking in persons,” yet only thirty-three of those made any reference to “otherness” or “othering” and an even smaller subset discuss otherness in the context of human trafficking.

number of scholars writing on the victim-subject narrative,¹⁵ but, as discussed below, that issue, while important, is only one aspect of the persistent othering of certain individuals and communities. Moreover, to the extent that the effects of othering have been discussed indirectly by scholars, there has been little regard in the context of human trafficking for the other half of otherness' impact—its shaping of a distorted sense of the Self or dominant group.

This article attempts to unpack the impact of otherness on the prevailing understanding of human trafficking and legal responses to it, with a view to developing a more effective approach to combating this modern form of slavery. Othering operates across multiple dimensions, including race, gender, ethnicity, class, caste, culture, and geography. The result is a devaluation of certain individuals, communities, and even nations, and a privileging of those who are members of the dominant group, class, or country. Some populations experience "intersectional othering" because they possess multiple characteristics that are devalued in the current global power structure.¹⁶ For example, poor women of color in developing countries confront othering across potentially all of the above mentioned dimensions, giving them little or no voice in shaping the dominant understanding of human trafficking or appropriate remedies to the problem. Exposing otherness and its impact is therefore the first step toward developing more effective measures to combat this trade in persons.

In Part I, I begin by examining the definition and complexities of "otherness" and the process of "othering." In Part II, I discuss how otherness operates to render certain individuals and populations in all countries more vulnerable to the exploitation of human trafficking. I focus in particular on the othering engaged in by the West, or Global North. In doing so, I do not suggest that othering does not occur elsewhere; however, given the dominance of the Global North

15. See *infra* note 20 and accompanying text.

16. On intersectionality, see generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (developing the intersectionality idea in examining disempowerment of, and violence against, women of color); see also Johanna Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 124–25 (2003).

in the international arena, the othering that is fostered and sustained by the Global North has particularly far-reaching implications, including the shaping of international agendas and treaties.¹⁷ In Part III, I examine recent legal responses to human trafficking. Since the 1990s, there has been increased focus on human trafficking, resulting in legal measures being adopted at the international, national, and even local levels. Part III focuses on international legal responses and then discusses the U.S. approach as an example of national efforts. My examination of the law on human trafficking reveals the extent to which otherness operates not only in making certain individuals vulnerable initially but also in shaping legal responses purported to assist them. My claim is that in addition to marginalizing individuals, otherness operates to impede the effectiveness of legal responses to human trafficking. Finally, in Part IV, I propose steps to be taken that can begin to address the effects of otherness so that we can reframe the way we understand and respond to the problem of human trafficking and enhance prospects for meaningful progress. Drawing upon recent international gender mainstreaming initiatives¹⁸ and other similar programs, I propose a starting point for mainstreaming the voice and experience of the Other in the development of responses to human trafficking.

In examining human trafficking through an otherness-aware framework, throughout this article I draw upon the discourses of a number of scholarly traditions, including feminist legal scholarship, postcolonial feminism, critical race theory, and various other critical legal studies.¹⁹ My aim in

17. Western powers exert a disproportionate amount of influence on the development of international law, and thus othering engaged in by the dominant groups in the West have a significant impact on the shape of global initiatives, including those aimed at combating human trafficking.

18. See, e.g., U.N. Office of the Special Adviser on Gender Issues and Advancement of Women, <http://www.un.org/womenwatch/osagi/gendermainstreaming.htm> (last visited Dec. 25, 2008) ("Gender Mainstreaming is a globally accepted strategy for promoting gender equality. Mainstreaming is not an end in itself but a strategy, an approach, a means to achieve the goal of gender equality. Mainstreaming involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities—policy development, research, advocacy/ dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects.").

19. For an overview of the different traditions, see generally Berta Hernandez-Truyol et al., *LatCrit X Afterword: Beyond the First Decade: A*

using this approach, rather than applying one single theoretical framework to the issue, is to build upon the existing scholarship in the various traditions to expose a fundamental flaw in the current dominant approach to understanding and addressing human trafficking. As mentioned above, as human trafficking has garnered greater attention globally, more scholars have focused on the issue, including several who have written on the conception of the victim-subject in trafficking, migration, and prostitution.²⁰ This latter work is important and merits greater attention, and I draw upon it later in this article. I argue, however, that the issue of the victim-subject narrative in the dominant discourse on human trafficking is one aspect of a larger problem—the operation of otherness in the conception of the problem of human trafficking and, consequently, the legal strategies developed to combat it. Ultimately, by examining human trafficking through an otherness-aware framework, this article aims to elucidate a deeper understanding of human trafficking and to offer a prescription for reducing the adverse effects of otherness on both efforts to combat human trafficking and the individuals that now suffer such abuses.²¹

I. OTHERING ACROSS MULTIPLE DIMENSIONS

A. *The Self/Other Dichotomy*

Psychologists, social biologists, and anthropologists have written extensively about the human tendency to distinguish

Forward-Looking History of LatCrit Theory, Community, and Praxis, 26 CHICANA/O-LATINA/O L. REV. 237 (2006).

20. See, e.g., Haynes, *supra* note 4, at 337; Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 6 (2002); Srikantiah, *supra* note 4, at 195–204.

21. In the space of a single article, it is challenging to offer commentary on the impact of otherness both historically and globally on human trafficking and related law without resorting to some extent to generalities or selective examples. Therefore, even this project runs the risk of essentialism. I have endeavored to avoid essentializing, but for illustrative purposes, I have had to highlight specific examples and those choices at some level ultimately must reflect my own experiences and perspective (e.g., I draw upon examples from Thailand, having worked in Thailand for several years in international development). Many other examples exist but could not be included due to space considerations. My hope is that the examples provided will help foster a constructive dialogue on the impact of otherness in the realm of human trafficking.

the Self from the Other.²² According to psychologists, the Self/Other distinction is an important step in child development.²³ Some social biologists and anthropologists have suggested that a similar distinction is necessary at the community level, or was at an earlier stage in human history, to ensure survival of the community in question.²⁴ In the latter case, it was important for communities to distinguish “us” from “them” as limited resources (most important, food) had to be distributed in a manner that would ensure the community’s continued existence.

What has evolved from the Self/Other distinction, however, goes beyond mere survival mechanisms. Individuals are socialized to accept a way of thinking of “other individuals either as extensions of the self, or as alien objects to be manipulated for the advantage of the individual or social self.”²⁵ This socialization process results in otherness shaping the views and actions of even the most well-intentioned individuals at the subconscious level.²⁶ Cognitive psychology research has found that individuals, or at least individuals from individualist cultures, are prone to “fundamental attribution error,”²⁷ whereby “an individual

22. See, e.g., Gerhard Roth, *The Evolution of Consciousness*, in BRAIN EVOLUTION AND COGNITION 555 (G. Roth & M. Wulliman eds., 2001); see also JACOB PANDIAN & SUSAN PARMAN, *THE MAKING OF ANTHROPOLOGY: THE SEMIOTICS OF SELF AND OTHER IN THE WESTERN TRADITION* (2004) (critiquing the self/other distinction for its creation of a eurocentric hierarchy of humanity).

23. See HANDBOOK OF CHILD PSYCHOLOGY: SOCIAL, EMOTIONAL AND PERSONALITY DEVELOPMENT 654–656 (6th ed., William Damon, Richard M. Lerner, Nancy Eisenberg eds. 2006); see generally STEVEN PINKER, *HOW THE MIND WORKS* (1997).

24. See Robert Kurzban & Mark Leary, *Evolutionary Origins of Stigmatization: The Functions of Social Exclusion*, 127 PSYCHOL. BULLETIN 187, 187–208 (2001); Robert Kurzban & Steven Neuberg, *Managing Ingroup and Outgroup Relationships*, in HANDBOOK OF EVOLUTIONARY PSYCHOLOGY 653, 673–675 (David Buss ed., 2005); Steven L. Neuberg & Catherine A. Cottrell, *Evolutionary Bases of Prejudices*, in EVOLUTION AND SOCIAL PSYCHOLOGY 163, 163–87 (Mark Schaller et al. eds., 2006); Steven L. Neuberg, et al., *Why People Stigmatize: Toward a Biocultural Framework*, in THE SOCIAL PSYCHOLOGY OF STIGMA 31, 31–61 (Todd Heatherton, et al. eds., 2000); see generally GORDON ALLPORT, *THE NATURE OF PREJUDICE* (1958).

25. John Wild, *Introduction to EMMAUEL LEVINAS, TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* 11, 11–12 (Alphonso Lingis trans., 1969).

26. See *infra* note 44.

27. See NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 56–62 (2000) (examining fundamental attribution error in tort law context); LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 125–33 (1991); see also

sees negative actions by herself and positive actions by others as highly dependent on the situation, but sees positive actions by herself and negative actions by others as reflective of some innate dispositional quality.”²⁸ The result of this dichotomous view is a persistent othering that creates conditions in which simultaneously the Other is devalued and the Self is propped up.²⁹

The Self/Other distinction extends beyond individuals as well, leading to a group-level conception of the Self and the Other. Social psychologists have found group-level attribution error exists, in that individuals are more likely to assess actions of out-group actors based on biased judgments (and conversely evidence a more forgiving assessment of in-group individuals’ actions).³⁰ The collective sense of the Self and the Self’s perceptions of the Other are then given voice through the apparatus of the State. That is, the Self/Other distinction is adopted by the State and serves to shape the law it promulgates, and that law, in turn, serves to further “affect social valuations in general.”³¹

At both the individual and collective level, this Self/Other

Adam Bendorado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 380 (2008) (“Western cultures tend to be more dispositionist than Eastern cultures.”); Douglas S. Krull et al., *The Fundamental Attribution Error: Correspondence Bias in Individualist and Collectivist Cultures*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1208, 1209 (1999) (“Thus, individualists appear to view behavior as primarily the product of actors’ personalities, but collectivists appear to view behavior as substantially due to situational forces.”). But see Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 24 (2004) (finding that fundamental attribution error “is true of people across cultures . . . [although] [i]n some ways, it is more pronounced in the West than it is in the East.”).

28. See Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 180 (2007).

29. See Mark Schafer, *Cooperative and Conflictual Policy Preferences: The Effect of Identity, Security, and Image of the Other*, 20 POL. PSYCHOL. 829, 830–31 (1999) (“Racial groups develop a diversified and enhanced sense of the ingroup and a monolithic, negative sense of the outgroup.”).

30. See Hollander-Blumoff, *supra* note 28, at 179. This has sometimes been referred to as “ultimate attribution error.” See Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport’s Cognitive Analysis of Prejudice*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 461, 468–71 (1979).

31. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 822 (1994); see also Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. (forthcoming March 2009) (discussing law’s expressive function).

dichotomy functions to create (1) a devalued and dehumanized Other, enabling differential treatment of the Other; (2) a conception of a virtuous Self and corresponding assumption that the Self (or dominant group) is representative of the norm; and (3) a distancing of the Other from the Self.³² The persistent othering narrative and accompanying essentialism has deep historical roots making it harder to unearth.

First, and fundamentally, othering serves to devalue and dehumanize the Other. The Other is perceived as different from the Self, and any difference is viewed as aberrant. Thus early voyagers to the "New World"³³ characterized American Indians as "savages."³⁴ The subsequent colonial mandate of conquering the world in the name of "spreading civilization" reflected European colonial powers' view that the rest of the world was "uncivilized" and of lesser standing.³⁵ In this narrative, the dominant group depicts the Other as barbaric, amoral, and of lesser intelligence.³⁶

32. Some scholars suggest that the Self/Other distinction always develops with a conception in which the Self is glorified and the Other is vilified. See EDWARD W. SAID, *ORIENTALISM* 32 (1978) ("To have such knowledge of [the Other] is to dominate it, to have authority over it. And authority here means for 'us' to deny autonomy over 'it'—the Oriental country—since we know it and it exists, in a sense, as we know it."). But see, e.g., William S. Sax, *The Hall of Mirrors: Orientalism, Anthropology, and the Other*, 100 AM. ANTHROPOLOGIST 292, 299 (1998) (countering that while Self/Other distinction may not be avoidable, the valorization of the Self and devaluation of the Other does not necessarily follow in all cases).

33. New only to the Europeans who arrived on ships.

34. JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR*, 149–50 (1986); see also RATNA KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* 18 (2005) (noting how prominent 19th century British accounts of Indian society went to great lengths to show "India [as] backward and incapable of being reformed except through foreign rule and despotism").

35. Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 484–85 (2002) ("By highlighting the position of women in colonial societies to denigrate the third world 'other,' the colonial powers served to focus attention on certain cultural practices that discriminated against women."); Maxwell O. Chibundu, *The Other in International Law: 'Community' and International Legal Order* 9 (2004), http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1077&context=fac_pubs ("With the industrialization of Europe, and its colonization and projection of power throughout much of the world, the superiority of Europe was manifest, and a seemingly self-evident dichotomy was Europe as 'civilized' and much of the rest of the world inhabited by 'uncivilized peoples.'").

36. Great efforts were made during slavery to "prove" the lesser intelligence

This dehumanization of the Other, in turn, provides the dominant group's rationale for treating the Other less humanely. Thus, in the U.S. version of the othering narrative, "[f]rom this Nation's inception, the race line was used to demarcate and patrol the divide between those who constituted the 'We' in 'We The People.'"³⁷ The Three-Fifths Clause of the U.S. Constitution enshrined in the very foundational document of the nation the concept that certain individuals were worth less than others and by law could be treated as less than human, a perception that remained codified at the constitutional level for nearly one hundred years.³⁸ More recently, narratives offered during the Vietnam War and the current War on Terror, including suggestions that "they don't value life like we do,"³⁹ have been used to

of the enslaved. Ian F. Haney Lopez, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 996–1000 (2007) (discussing evolution of race theories in early twentieth century and decline of support for race science).

37. John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 367 (2007). In the infamous Dred Scot case, the Supreme Court wrote that Blacks

were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1856), *superceded by* U.S. CONST. amends. XIII, XIV.

38. See U.S. Const. art. 1, §2, cl. 3, amended by U.S. Const. amend. XIV, §2. It took a civil war and nearly a century to correct that blatant example of othering at the constitutional level. See U.S. Const. amend. XIV, § 2 (amending the Three-fifths Clause of the United States Constitution). Women had to wait even longer for such basic rights as the right to vote. See U.S. Const. amend. XIX; M. Margaret Conway, *Gender and Political Participation*, in GENDER AND AMERICAN POLITICS: WOMEN, MEN, AND THE POLITICAL PROCESS 74, 74 (Sue Tolleson-Rinehart, & Jyl J. Josephson eds., 2000).

39. See Edward S. Herman, *Is Each Individual Life Precious? Distinguishing Between 'Us and Them,'* Z MAG. Oct. 2000, http://www.thirdworldtraveler.com/Global_Secrets_Lies/IsEachLifePrecious.html (citing a Pentagon official's narrative that "the Vietnamese did not 'love life, and fear pain,' as we do, and that 'happiness' is 'beyond the emotional comprehension of the Asian poor.' The Vietnamese are not 'reasonable' and 'defy us by a readiness to struggle, suffer, and die on a scale that seems to us beyond the bounds of humanity.' They virtually invite us to 'carry our strategic logic, to its conclusion, . . . which is genocide.' But we are unwilling to do this, which would 'contradict our own value system.' "); Barry Hindess, *Terrortory*, 31 ALTERNATIVES: GLOBAL, LOC., POL. 243, 253 (2006) (describing that the War on Terror narrative suggests, "they are more prone to violence than we moderns, but they have less to lose from its effects. There is no comparison, then,

justify differential treatment—that is, harsher and poorer treatment—of the Other.

Second, in the Self/Other dichotomy, the Self is glorified and the behavior or characteristics of the Self (or dominant group) are taken to be the norm by which all are judged.⁴⁰ Thus the narrative of the Other asserts that *only* the Other commits savage or barbarous acts.⁴¹ The humanity of the dominant group is presumed.⁴²

The result is that acts by the dominant group that do not fit with the conception of the virtuous Self are often denied or overlooked.⁴³ So, for example, though the dominant narrative of the Holocaust aptly describes the atrocities committed by the Nazis and the liberation of the concentration camps by the Allies, it also engages in the process of othering by attributing all evil to the Nazis and ignoring the support of the Holocaust by many Allied powers.⁴⁴ While the United

between our violence against them and their violence against us. We value life more than they do, the stories assure us, and our lives are more valuable than theirs.”); see also Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1428 (1995) (“It is no coincidence that we still refer to noncitizens as ‘aliens,’ a term that calls attention to their ‘otherness,’ and even associates them with nonhuman invaders from outer space.”); Natsu Taylor Saito, *For “Our” Security: Who is an “America” and What Is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. SOC. JUST. 23, 32 (2003) (“[O]ne of the first lines of attack on those perceived as threats to the status quo has been to label them as ‘foreign,’ either literally because they are immigrants or because they are characterized as representing foreign powers or ideologies.”).

40. See Charlotte Chorn Dunham et al., *Representing the Other in Sociology of the Family Texts*, 32 TEACHING SOCIOLOGY 374, 375 (2004) (“The characteristics of that dominant group are often taken for granted, unexamined, and used as the norm that provides the standard for judging the other.”).

41. See, e.g., Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 222 (2001) (“While there are no cultures that are innocent of discriminatory practices against women, human rights discourse treats non-Western cultures as particularly problematic in this regard.”). As explained below, even in those unusual instances in which the dominant group acknowledges that one of its own has committed a barbarous act, that individual is deemed a deviant who has ignored or abandoned the values of the Self. See *infra* notes 87–100.

42. Dunham, *supra* note 40, at 375 (“[Otherness] reflects a socio-cultural process by which a dominant group defines and reinforces its power.”).

43. Alternatively, as social psychology research has found, such acts are attributed to situational factors. See John W. Howard & Myron Rothbart, *Social Categorization and Memory for In-Group and Out-Group Behavior*, 38 J. PERSONALITY & SOC. PSYCHOL. 301, 303–06 (1980).

44. DOWER, *supra* note 34, at 4 (detailing the “[H]idden Holocaust—that is,

States denounced Nazi theories of Aryan supremacy, it governed a society that subjected blacks to Jim Crow laws, interned over 110,000 Japanese-Americans following Pearl Harbor, and maintained immigration policies severely biased against all non-whites.⁴⁵ In other words, othering operates to block the Self from seeing any of its actions that do not fit with the view of the Self as virtuous, humane, just, and intelligent.⁴⁶

Imbedded in this concept of the virtuous Self is the idea that the Self acts altruistically.⁴⁷ This element of the Self image produces mixed results. There are aspects of the altruistic Self that contain good. That individuals in the dominant group seek to act, either alone or collectively through their government, in an altruistic manner towards others can produce good results and should be encouraged. However, problems arise when related elements of otherness operate to shape the Self's view of how to be altruistic. Thus, for example, European colonial powers thought they were acting in a noble manner by "spreading civilization" but of course the reality was drastically different.⁴⁸ Similarly, today many in the dominant group want to help trafficking victims, but their misperceptions of the Other's experience and needs and their myopic view of the Self, which forecloses the possibility that their actions might not be helping, often lead well-intentioned individuals and governments to exacerbate the harm, or waste resources on initiatives that provide little meaningful assistance.⁴⁹

Third, the Self/Other dichotomy operates based also on

a conveniently forgotten one—in which the annihilation of the Jews was actively supported by French and Dutch citizens, Poles, Hungarians, Rumanians, Slovaks, Ukrainians, Lithuanians, and Latvians.”). Dower notes that “[i]t is now also well documented that anti-Semitism in the United States and Great Britain prevented both countries from doing as much as they could have to publicize these genocidal policies or to mount a serious rescue campaign.” *Id.*

45. *Id.* at 5.

46. See Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 J. PERSONALITY & SOC. PSYCHOL. 369, 369–70 (2002).

47. Jane Allyn Piliavin & Hong-Wen Charng, *Altruism: A Review of Recent Theory and Research*, 16 ANN. REV. SOC. 27, 29 (1990) (“[A]ltruism is a part of human nature. People do have ‘other-regarding sentiments’ . . .”).

48. See *supra* note 30 and accompanying text.

49. Even individuals who are aware that in general bias can shape, even distort, a person's perceptions tend to lack recognition of the impact those same biases play in shaping their own judgments. Pronin, *supra* note 46, at 369–70.

an ongoing distancing between the Self and Other.⁵⁰ As the Self is assigned positive attributes and the Other negative attributes, the distancing serves to ensure that no negative attributes are incorporated into conceptions of the Self, and conversely only negative attributes are ascribed to the Other. The distancing between the Self and Other serves to perpetuate presumed differences between the two and deter the development of a common experience. This distancing through otherness reinforces the nobility of the Self and its actions and entrenches the view of a lesser Other. Through ongoing distancing, the lesser Other is presumed to be only “over there,” far removed from the virtuous Self “over here.”⁵¹

B. Traits of Otherness

Otherness has a significant impact at the individual level of both the Self and the Other. It makes the ego of the Self fragile, resulting in an increasing reliance on denigration of the Other.⁵² Othering also has dramatic effects on the Other, as he or she internalizes the devalued sense of self portrayed in the dominant discourse. For example, “[i]mplicit pro-white bias in the United States is so strong that it often shows up even among blacks; that is, it trumps blacks’ tendency to favor their own in-group members.”⁵³

50. Isabelle Gunning, *Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 199 (1992) (“[T]here is a falsification and oversimplification in the assumption of the distance and difference between self and dependent ‘other’ as well as the conclusion that any evidence that contradicts the assumption of distance and difference is an example of fault in the ‘other.’”).

51. What I seek to describe here is how the Self/Other dichotomy operates in ways that hurt our capacity to address human trafficking and other situations in which particular populations are exploited. This narrative is not a suggestion that altruistic notions out of the West are all bad, but rather that the operation of otherness leads to misconceptions about the Self and the Other such that the dominant group fails to see the full picture of either.

52. Implicit bias research has revealed that Americans have more negative attitudes toward racial minorities than they are aware. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 955–60 (2006); see also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5 nn.12–13 (2006).

53. Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 502 (2007). The doll experiments conducted by Drs. Kenneth and Mamie Clark relied upon in *Brown v. Board of Education* demonstrated that conceptions of otherness were

Although the impact of othering operates in each individual in significant ways, my focus here is on conceptions of a devalued Other as they are inculcated in the dominant discourses about communities, cultures, and countries and thus incorporated in the law. While the othering engaged in by individuals cannot be ignored, assessing macro-level othering helps expose the intersectional nature of the problem. Othering occurs across a number of dimensions, including race, gender, ethnicity, class, caste, culture, and geography, and frequently conceptions of the Other build on constructed negative perceptions of multiple characteristics of particular communities. The more “foreign” a community, the more it and its members are distanced from the Self in the mind of the dominant group and the more the Other’s actions are deemed aberrant. Thus, for example, dominant U.S. characterizations of the Germans and Japanese during World War II reflected a tiered, racialized othering. The narrative of the former, while negative, allowed for humanity with the possibility of “good Germans” while the narrative of the Japanese consistently described them as subhuman.⁵⁴ In the current global power structure, the tiered othering exacts a toll on the most marginalized individuals and communities. For example, poor women of color in developing countries confront an ongoing intersectional otherness and attendant

absorbed at a very early age and that African-American children tended to associate positive attributes with white dolls and negative attributes with black dolls. See APA Online, *Segregation Ruled Unequal, and Therefore Unconstitutional*, <http://www.psychologymatters.org/clark.html> (last visited Dec. 26, 2008). The experiment was repeated in 2006 with almost identical results—most children of color identified the white doll as good or pretty and the black doll as bad or ugly. See A GIRL LIKE ME (Reel Works Teen Filmmaking 2006), available at http://www.educacionenvalores.org/article.php3?id_article=1009; see also Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995) (describing impact of stereotype threat).

54. During World War II, even prior to Pearl Harbor, the Japanese were more hated than Germans in the United States and Britain; “[t]hey were perceived as a race apart, even a species apart.” DOWER, *supra* note 34, at 8. Anti-Japanese sentiment typically “resort[ed] to nonhuman or subhuman representation, in which the Japanese were perceived as animals, reptiles, or insects.” *Id.* at 81. Other descriptions tended to describe Japanese in childlike terms, playing on the narrative of the civilized versus uncivilized. *Id.* at 123. Meanwhile, the narrative used to describe Germans while negative, was not as pervasively negative and allowed for a small number of so-called “good Germans.” *Id.* at 34.

devaluation of their personhood based on stereotyping rooted in discrimination based on race, sex, class, culture, and geography. The result of this persistent othering across multiple dimensions is that certain peoples are deemed and subsequently treated as "other," a less important constituency in the local or global community.

Buttressing these claims about the Other, dominant groups interact with the Other in specific spatial conceptions. Global examples of othering, including colonial ones, create a sense that the Other is "over there" or somehow far away. This distancing is helpful in propping up the ego of the Self, as the problem or the "bad actors" are seen as remote and thus unconnected to, or any way shaped by, actions of the dominant group.⁵⁵ It also succeeds in further marginalizing the subaltern.⁵⁶

These conceptions of the Other have created a dichotomous understanding of the people that inhabit our world—that is, in the dominant discourse there are those "like us" who are virtuous, just, intelligent, and kind, and there are the distant "others" who possess less in the way of intelligence, virtue, or any other positive attribute. To date, the discourse on human trafficking has paid scant attention to the phenomenon of otherness. As I will argue in Parts II and III, however, otherness has permeated the dominant understanding of, and *legal* discourse on, human trafficking, undermining the human rights and liberal ideals anti-trafficking laws are created to achieve.

55. Physical distance, however, is not always necessary. During World War II, Jews' neighbors turned against them, and more recently, neighbors turned on neighbors in genocides and ethnic cleansings in Rwanda and the Former Yugoslavia. This "switch" in perception of the neighbor is triggered at least in part by playing on biases toward the Other that exist below the surface in times of peace.

56. "The term 'subaltern,' drawn from Antonio Gramsci's writings, refers to subordination in terms of class, caste, gender, race, language, and culture, and was used to signify the centrality of dominant/dominated relationships in history." Gyan Prakash, *Subaltern Studies as Postcolonial Criticism*, 99 AM. HIST. REV. 1475, 1477 (1994).

II. HOW OTHERNESS OPERATES GLOBALLY TO JEOPARDIZE THE OTHER

A. *Identifying the Exploited and the Exploiter*

In this section, I focus on the narrative and actions of those in the dominant group. The collective voice of the dominant group is often articulated in the law, which in turn serves to further shape consciousness.⁵⁷ As I discuss the law in Part III, this section focuses on the dominant conceptions held by the Self (expressed through the views and actions of individuals) that facilitate the trade in persons. Conceptions of the Other operate to shape both who is likely to be exploited and who is deemed responsible.

First, research indicates that a number of factors increase an individual's risk of exploitation. These include, but are not limited to: poverty, race, ethnicity, sex, immigration status, class, caste, and age.⁵⁸ Marginalized individuals often experience multiple risk factors—they likely are poor, frequently are individuals from racial or ethnic groups that constitute the minority of the population in their area,⁵⁹ most often are women or girls, and may be young, from

57. See, e.g., Austin Sarat & Thomas R. Kearns, *Editorial Introduction in LAW IN EVERYDAY LIFE* 31 (Austin Sarat & Thomas R. Kearns eds., 1995) ("Law enters social practices and is, indeed, imbricated in them, by shaping consciousness, by making law's concepts and commands seem, if not invisible, then perfectly natural and benign."); Mark Kessler, *Lawyers and Social Change in the Postmodern World*, 29 *LAW & SOC'Y REV.* 769, 772 (1995) (exploring "law as a discourse that shapes consciousness by creating the categories through which the social world is made meaningful. From an ideological perspective, there is no useful distinction between law and society."); Harbach, *supra* note 31 (stating that enshrinement of particular values or views in the law has a "legitimizing function").

58. See, e.g., U.N. Econ. Soc. Council [ECOSOC], Comm. on Human Rights, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, ¶ 55, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) (prepared by Radhika Coomaraswamy, Special Rapporteur on Violence Against Women, Its Causes and Consequences), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf) [hereinafter U.N. Report on Violence Against Women] ("Gender-based discrimination intersects with discriminations based on other forms of 'otherness,' such as race, ethnicity, religion and economic status, thus forcing the majority of the world's women into situations of double or triple marginalization.").

59. For example, in Cambodia, ethnic Vietnamese children make up a disproportionate percentage of children exploited in the sex industry, see *infra* note 86, while in Atlanta the majority of prostituted children are African-

lower social classes, or have uncertain immigration status. As intersectionality scholars have detailed, the presence of multiple factors does not simply place these individuals at risk based on each factor but creates a particular vulnerability to marginalization and exploitation.⁶⁰ This clustering of risk factors leaves them, both as individuals and as communities, more likely to be pushed to the periphery, ignored by governments, and subsequently targeted for exploitation.

What is relevant to this discussion is vulnerability or susceptibility to exploitation. The fact that an individual is poor does not necessarily mean that person will be exploited by traffickers. The overwhelming majority of poor in the world do not end up being trafficked. But poverty limits options, and in the extreme may push individuals into more risky work and other dangerous situations, heightening chances of exploitation.⁶¹ Other risk factors similarly shape the experience of particular individuals and communities, as they attempt to navigate a world that privileges characteristics they do not possess and discriminates against those who share the attributes they do have. Underlying the group of risk factors associated with vulnerability is the othering of individuals and groups in a way that pushes certain individuals and communities to the margins.

Second, otherness operates to construct the dominant view of who is responsible for the gross human rights violations of human trafficking. The dichotomous view of the virtuous Self and the barbarous Other leads many in the

American. *See infra* note 95.

60. *See* Bond, *supra* note 16, at 124–25 (noting that traffickers target women from particular racial or ethnic groups); *see generally* Crenshaw, *supra* note 16 (developing the intersectionality idea).

61. *See* INTERNATIONAL LABOUR OFFICE, AN ILO CODE OF PRACTICE ON HIV/AIDS AND THE WORLD OF WORK 21 (2001), available at http://www.ilo.org/public/english/protection/trav/aids/code/languages/hiv_a4_e.pdf; Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women* (11th Sess. 1992), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19> (“Poverty and unemployment force many women, including young girls, into prostitution.”); *see also* HUMAN RIGHTS WATCH, POLICY PARALYSIS: A CALL FOR ACTION ON HIV/AIDS-RELATED HUMAN RIGHTS ABUSES AGAINST WOMEN AND GIRLS IN AFRICA 12 (2003) (reporting that the subordinate status of women and girls in Africa and the intransient poverty “often conspire to force girls into hazardous working situations that expose them to sexual abuse with attendant risk of HIV infection”).

Global North to blame the problem exclusively on peoples and governments “over there” who “do not value life (or their children) the way we do” rather than recognizing the interconnected nature of global problems, and the fact that the Self and the Other have much more in common—good and bad—than most are willing to acknowledge.⁶² Instead, otherness permeates the current understanding of human trafficking, which asserts that the problem lies with the Other and its culture and downplays the role of the dominant group in facilitating or tolerating human trafficking.

B. In the Global North

1. Fosters Exploitation of Persons “Over There”

Otherness operates in a range of sectors to facilitate exploitation by individuals in the Global North of those from the Global South (or marginalized “others” situated in the North). Individuals are trafficked for a range of purposes, such as forced labor in sweatshops or agricultural settings, exploitation in the sex sector, domestic servitude, forced marriages, and use in armed conflict.⁶³ The breadth of activities implicated is reflected in the definition of human trafficking:

[T]he recruitment, transportation, transfer, harbouring or

62. I am unaware of any credible evidence supporting the contention that, as a people, a particular group “values life less” than another. Research to “prove” this and indicators selected to “measure” this are inherently problematic (and in many cases biased). For example, because the United States ranks 28th in the world based on infant mortality rates, should we conclude that Americans as a people value life less than those in the twenty-seven countries with better infant mortality rates? Just as drawing such conclusions about Americans based on limited data would evidence flawed reasoning, so too would similar assertions about other peoples. I submit that statements that a particular people “values life less” are really evidence of othering, implicit bias, and other related phenomena.

63. See U.S. DEPT OF STATE, *TRAFFICKING IN PERSONS REPORT* 19–25 (2008), available at <http://www.state.gov/documents/organization/105501.pdf> [hereinafter 2008 *TRAFFICKING REPORT*]. The precise breakdown by sector is difficult to ascertain. Some have suggested that trafficking is roughly split among sex trafficking and labor trafficking, but the latter tends to be reported less frequently. See U.N. OFFICE ON DRUGS AND CRIME (UNODC), *TRAFFICKING IN PERSONS: GLOBAL PATTERNS* 33 (2006), available at <http://www.unodc.org/documents/human-trafficking/HT-globalpatterns-en.pdf> (“Human trafficking for sexual exploitation is reported more frequently than trafficking for forced labour at the global level.”).

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.⁶⁴

Although othering operates in all sectors, the impact of othering is readily identifiable in the sex trade, which draws from the pool of trafficked persons, and especially so in the growing phenomenon of sex tourism.

Sex tourism—defined by the World Tourism Organisation as “trips organized within the tourism sector, or from outside this sector but using its structures and networks, with the primary purpose of effecting a commercial sexual relationship by the tourist with residents at the destination”⁶⁵—offers one of the most glaring examples of othering. Those appalled by sex tourism often ask how men can bring themselves to travel around the globe sexually exploiting women and children.

It would be easy to rationalize that only pedophiles and hardcore sexual deviants engage in sex tourism, but research reveals that the majority of sex tourists are situational

64. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3(a), G.A. Res. 55/25 Annex II, U.N. Doc. A/Res/55/25 (Nov. 15, 2000) [hereinafter *Trafficking Protocol*]. This definition represents the generally-accepted international definition of trafficking in persons. Where any of the means set forth above have been used, the consent of the victim to the intended exploitation is deemed “irrelevant.” *Id.* art 3(b). Moreover, “recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth [in the definition above.]” *Id.* art 3(c); *see also infra* notes 147–48 (describing the debate over the definition of human trafficking).

65. World Tourism Organization, Statement on the Prevention of Organized Sex Tourism, Res. A/RES/338(XI), 32, Doc. A/11/Res (Oct. 17–22, 1995), available at <http://www.unwto.org/conferences/ga/en/pdf/11res+corr.pdf>. *See* New Oxford Dictionary Comes Up With 2000 New Words, AGENCE FRANCE-PRESSE, Aug. 12, 1998, 1998 WL 16577164. Oxford defines “sex tourism” as “[t]he organisation of holidays with the purpose of taking advantage of the lack of restrictions imposed on sexual activity and prostitution in some foreign countries.” *Id.* This definition is somewhat misleading, since prostitution is illegal in many of the destination countries for sex tourists (e.g., Thailand).

exploiters who often hold ordinary jobs back home and frequently have families.⁶⁶ As Ron O'Grady explains, "[sex tourists] have often shown the tendency to do in Bangkok or Manila things they would not even contemplate in their home town."⁶⁷

Otherring across several dimensions explains this differential behavior, especially when it involves exploiting individuals in certain locales. Gender-based discrimination and traditional, patriarchal conceptions of society play a central role, leading men to be willing to exploit women.⁶⁸ But more is at play, if we are to explain the differential behavior many Western men exhibit toward women in developing countries versus women in their home countries.⁶⁹ Discrimination based on race, ethnicity, religion, social origin, and class operate both to drive the demand for prostitution globally and to marginalize the poor and minorities, making them more vulnerable targets for trafficking and commercial sexual exploitation.⁷⁰ The sex tourism industry in the United

66. See U.S. Dep't of Justice, Child Exploitation and Obscenity Section, *Child Sex Tourism*, <http://www.usdoj.gov/criminal/ceos/sextour.html>; Melissa Farley, *The Demand for Prostitution*, <http://www.captivedaughters.org/demanddynamics/demandforprostitution.htm> (last visited Jan. 14, 2009); see also Julia O'Connell Davidson, *The Sex Tourist, The Expatriate, His Ex-Wife and Her "Other": The Politics of Loss, Difference, and Desire*, 4 SEXUALITIES 5, 7 (2001); Sara Dillon, *What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children*, 17 U.C.L.A. WOMEN'S L.J. 121, 149 (2008).

67. RON O'GRADY, *THE CHILD AND THE TOURIST* 81–82 (1992).

68. See JULIA O'CONNELL DAVIDSON, *THE SEX EXPLOITER, WORKING DOCUMENT FOR THE WORLD CONGRESS AGAINST COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN* 27 (1996), http://www.csecworldcongress.org/PDF/en/Yokohama/Background_reading/Theme_papers/Theme%20paper%20The%20Sex%20Exploiter.pdf ("Socially prescribed and/or tolerated attitudes towards gender and sexuality are vitally important environmental factors in the creation of 'sex exploiters.'").

69. While the focus of this section is on exploitation of women and children in the Global South, it is also true that a racialized otherring operates within the Global North such that some Western men will treat women of color in a way that they will not treat white women. See ANIA LOOMBA, *COLONIALISM/POSTCOLONIALISM* 138 (2005); see also *infra* notes 87–100 (examining how otherness operates to cause Westerners to overlook the problem of human trafficking at home).

70. Jonathan Todres, *The Importance of Realizing "Other" Rights to Prevent Sex Trafficking*, 12 CARDOZO J.L. & GENDER 885, 893 (2006); see also Bond, *supra* note 16, at 124–25 (noting traffickers target women from particular racial or ethnic groups); Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts*, 11 HARV. HUM. RTS. J. 65, 68 (1998) ("Trafficking in women is fueled by poverty, sexism, and racism."); United Nations Backgrounder, World Conference against Racism, Racial

States, Europe, and Australia draws upon crude stereotypes of Asian women, for example, by emphasizing the “submissiveness of Asian prostitutes and the [supposed] complicity of their families in their situation.”⁷¹ Advertisements for sex tours “build on the patriarchal and racist fantasies of European, Japanese, American, and Australian men by touting the exotic, erotic subservience of Asian women.”⁷² Similar narratives are proffered about women and girls in other parts of the developing world.⁷³

A racialized, spatial, gendered, and class-based othering is operating when white Western men exploit women and children in Thailand, the Philippines or other developing countries,⁷⁴ but would not treat white women and girls in their own countries in the same manner.⁷⁵ These racial and ethnic stereotypes about the Other drive demand for sex

Discrimination, Xenophobia and Related Intolerance, The Race Dimensions of Trafficking in Persons—Especially Women and Children (2001), available at http://www.un.org/WCAR/e-kit/trafficking_e.pdf; U.N. Report on Violence Against Women, *supra* note 58, at 19 (“Gender-based discrimination intersects with discriminations based on other forms of ‘otherness,’ such as race, ethnicity, religion and economic status, thus forcing the majority of the world’s women into situations of double or triple marginalization.”).

71. Harriet D. Lyons, *The Representation of Trafficking in Persons in Asia Orientalism and Other Perils*, in *TRAFFICKING IN PERSONS IN SOUTH ASIA* 101, 102 (Hugh J.M. Johnston & Sona Khan eds., 1998).

72. *Id.* at 104 (quoting Judith Mirkinson).

73. See, e.g., Davidson, *supra* note 66, at 8 (describing othered conception of women in the Dominican Republic); Rose Kisia Omondi, *Gender and the Political Economy of Sex Tourism in Kenya’s Coastal Resorts* (2003), <http://www.arsrc.org/downloads/features/omondi.pdf> (describing same in Kenya); see also Karen Dunlop, *Human Security, Sex Trafficking, and Deep Structural Explanations*, 6 HUMAN SEC. J. 56, 61 (2008), available at http://www.peacecenter.sciences-po.fr/journal/issue6pdf/HSJ6_Dunlop.pdf (“[A] prominent explanation and argument for the status and use of women within the sex trade is the eroticization of male dominance and how gender has become sexualized, especially under heterosexuality.”).

74. Thailand and the Philippines are popular sex tourism destinations, but tours are now run now to various destinations in Asia, Latin America, Eastern Europe, and Africa.

75. If these same white men were asked to react to the idea that a middle-aged man wanted to have sex with their neighbor’s teenage daughter, most, if not all, would be outraged. When they see the young girl as a member of the collective Self, they recognize the outrage of the act. With women and girls perceived as part of the Other, Western men see as acceptable that which they would never tolerate perpetrated against their own.

Some would argue that in fact Western men do tolerate such similar abuses in their own countries. This is addressed, in part, in the next section. However, even in such situations, otherness is operating to limit to connection between the Self and this other Other who is closer to home.

tourism, and thus sex trafficking, by simultaneously enticing Western men while easing any guilt they may have over exploiting poor women and children from developing countries.⁷⁶ To listen to some sex tourists is to hear that not only do they believe they are doing no wrong but that many believe they are helping these young girls and even their families.⁷⁷ As one sex tourist offers, “[i]n the Orient, women are second class citizens, often treated in dehumanizing ways. There’s nothing you can do to change it, but you can still be one of the kind and generous ones who helps [by hiring these women and girls as prostitutes].”⁷⁸ Abuse is thus rationalized as part of the Other’s culture, and the Self is seen as altruistic, “helping” these young girls whose culture imposes their difficult circumstances. Similarly, U.S.-based sex tour operators see no wrong in their running tours to “exotic” locations that exploit women and children “over there.”⁷⁹

Further, while it is right to condemn the sex tourists’ exploitative actions, it is important to take note that their views that their behavior is acceptable “over there” are learned in their home countries, prior to their travel. Thus, their views are derived from more widely held perceptions in Global North that reflect an entrenched cultural othering.

Leti Volpp’s scholarship on perceptions of the role of culture resonates in this context.⁸⁰ Writing about child marriage, Volpp highlights the disparate narratives when a young white girl marries an older white man versus when a young Latina girl marries an older Latino man.⁸¹ In the

76. See Lyons, *supra* note 71, at 102.

77. RYAN BISHOP & LILLIAN S. ROBINSON, NIGHT MARKET: SEXUAL CULTURES AND THE THAI ECONOMIC MIRACLE 168 (1998).

78. JULIA O’CONNELL DAVIDSON, PROSTITUTION, POWER AND FREEDOM 179 (1999) (quoting a sex tourist’s “guidebook”); Sowmia Nair, U.S. Dep’t of Justice, *Child Sex Tourism*, <http://www.usdoj.gov/criminal/ceos/sextour.html> (last visited Dec. 26, 2008) (quoting a U.S. retired schoolteacher as saying: “On this trip, I’ve had sex with a 14 year-old girl in Mexico and a 15 year-old in Colombia. I’m helping them financially. If they don’t have sex with me, they may not have enough food.”).

79. Their views are reaffirmed by the state when, for example, it dismisses criminal charges against a sex tour operator because the court maintains that a travel agent selling sex tours to the Philippines is no different than one selling golf tours to Ireland. See discussion of *People v. Barabash*, *infra* note 175 and accompanying text.

80. Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89, 91–93 (2000).

81. *Id.*

former, the case is characterized as one of aberrant behavior, whereas the latter is perceived as a flaw in the culture of the non-white cultural group.⁸² As Volpp explains further:

Part of the reason many believe the cultures of the Third World or immigrant communities are so much more sexist than Western ones is that incidents of sexual violence in the West are frequently thought to reflect the behavior of a few deviants—rather than as part of our culture. In contrast, incidents of violence in the Third World or immigrant communities are thought to characterize the cultures of entire nations.⁸³

Similarly, in Western efforts to combat trafficking, the white American man engaging in sex tourism is seen as a deviant, while sale of children into trafficking networks in developing countries is written off as “common practice in their culture.” And so the Western sex tourist relies on this narrative of the Other’s culture to justify his abuse of Thai or Filipina girls (or boys); he feels he is doing a good deed by “helping” the young Thai or Filipina child, rescuing her, however briefly, from a culture that purportedly offers her no alternatives.⁸⁴ Significantly, otherness operates here not only at the level of the individual (that is, the sex tourist and his conception of the Other), but it also permeates the societal mentality in the Global North. Thus, even anti-trafficking advocates frequently rely on the narrative of sexual exploitation of women and children being “more acceptable

82. *Id.* at 94–96.

83. Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1186–87 (2001). See also Kapur, *supra* note 20, at 6 (“Women in the Third World are portrayed as victims of their culture, which reinforces stereotyped and racist representations of that culture and privileges the culture of the West.”).

84. The reality, of course, is radically different from the Western man’s assertion that he is “helping” the other. For example, a Human Rights Watch report on trafficking in Bosnia and Herzegovina recounted the testimony of one girl found in a nightclub: “I have [had] 265 clients in 4.5 months. [A bodyguard] beat me when I didn’t want to work the first month [after the owners bought me]. [The owner] has never given me the money.” HUMAN RIGHTS WATCH, *HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION*, 18 (2002), available at <http://www.hrw.org/reports/2002/bosnia/Bosnia1102.pdf>. Victims of human trafficking, many of whom serve sex tourists, suffer enduring trauma as a result of severe physical, psychological, and emotional abuse. See, e.g., State Dep’t, Office to Monitor and Combat Trafficking in Persons, *Health Consequences of Trafficking in Persons* (Aug. 8, 2008) available at <http://www.state.gov/documents/organization/91537.pdf>.

over there" while cabining the actions of sex tourists as actions of a few "sick" men whose actions are seen as outside of Western culture, rather than a reflection of the sexism in Western cultures.

This dichotomous view of what underlies certain behavior and whether it is "cultural" is fed by, and in turn feeds, otherness. But as post-colonial legal theorists have detailed, "culture is not merely a negative or deplorable attribute of the Other, but is an attribute of the West as much as the rest."⁸⁵ In other words, the actions of sex tourists or sex tour operators from the West are no more or no less rooted in Western cultures as prostitution of certain individuals is a function of another culture. Aspects of society enable, and even encourage, each, and I submit otherness is a key component of the foundational societal structures that allow such abuses to persist.⁸⁶

85. KAPUR, *supra* note 34, at 5.

86. Exploitation of the Other in the Global South is fostered also by othering that occurs within the Global South. See Ratna Kapur, *The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion*, 8 THEORETICAL INQUIRIES L. 537, 547 (2007) (noting that in the 1990s Hindu Right pushed a conception of the "traditional woman" in India built on the virtues of "chastity, self-sacrifice, submission, devotion, kindness, patience, and the labours of love" and to distinguish those women from the Western women, street woman, or prostitutes); Chulandee Thianthai, *Gender and Class Differences in Young People's Sexuality and HIV/AIDS Risk-taking Behaviours in Thailand*, 6 CULTURE, HEALTH & SEXUALITY 189, 190 (2005) ("The value of virginity is strongly related to the cultural dichotomy whereby Thai women are categorized as either good . . . or bad"); Alicia Burke & Stefania Ducci, United Nations Interregional Crime and Justice Research Institute, *Trafficking in Minors for Commercial Sexual Exploitation: Thailand*, at 20, http://www.unicri.it/www/trafficking/minors/docs/dr_thailand.pdf (last visited Dec. 26, 2008) ("Studies show that the majority of girls in prostitution are from Northern Thailand. . . . Most vulnerable are women and children from ethnic minority groups These children are denied Thai citizenship and are viewed as having a lower cultural status than lowland Thais. Being underprivileged, having little education and little understanding of the dangers of leaving home, and with no alternative viable means of income, children from tribal groups often leave for or are lured to 'work' in urban areas and fall victim to prostitution."); International Organization for Migration, *The Ties That Bind: Migration and Trafficking of Women and Girls for Sexual Exploitation in Cambodia* 25 (2007) (while ethnic Vietnamese comprise approximately five percent of the population of Cambodia, ethnic Vietnamese women and children make up thirty percent or more of the trafficked population and almost one-third of the virginity sale); HUMAN RIGHTS WATCH, *CASTE DISCRIMINATION: A GLOBAL CONCERN* 18–19 (2001), <http://www.hrw.org/reports/2001/globalcaste/> (noting Dalits, or untouchables, constitute a significant portion of women forced into prostitution in rural areas or sold into urban brothels. Indeed, one lower

2. *Leads to Overlooking Extent of Problem "Over Here"*

As otherness acts to have Americans and other Westerners view the problem of human trafficking as "over there," the Western conception of the virtuous Self frequently leads to the conclusion, without examination, that "such things would never happen here."⁸⁷ In fact, human trafficking occurs in the United States and other countries in the Global North, yet the West's "excessive focus on minority and Third World sex-subordinating cultural practices . . . diverts one's gaze from the sexism [and other forms of discrimination] indigenous to United States culture and politics" that might lead to the exploitation of some.⁸⁸ Thus, the second important way in which otherness distorts views on human trafficking is to lead most Americans and other Westerners to overlook the extent of the problem in their own country.⁸⁹

Sexual exploitation of women and children takes place in the United States and other Global North countries. Domestic trafficking networks exist in the United States to feed the demand of the commercial sex industry and

caste in particular, badis, is viewed by members of higher castes as a "prostitution caste."). For a historical perspective, see Pyong Gap Min, *Korean "Comfort Women": The Intersection of Colonial Power, Gender, and Class*, 17 GENDER & SOC'Y 938, 944 (2003) (noting that during WWII, the Japanese military used Korean women in military brothels differently from Japanese women, treating the former far worse).

87. I frequently lecture on trafficking and commercial sexual exploitation of children, and the most common reaction I get from U.S. audiences is total disbelief that "something like that could happen here." See also Michael C. Davis, *Human Trafficking*, 20 HISPANIC, Sept. 2007, at 46, 47 ("Human trafficking is something thought to occur in other parts of the world.").

88. Volpp, *supra* note 83, at 1204–05. Volpp details three other deleterious effects: "First, it obscures the degree to which many 'Third World women's problems' are rooted in forces beyond one's individual community, so that structural forces shaping cultural practices are hidden from view. Second, it directs attention away from issues affecting women that are separate from what are considered sexist cultural practices. Third, by positioning 'other' women as perennial victims, it denies their potential to be understood as emancipatory subjects." *Id.*

89. See, e.g., RICHARD J. ESTES & NEIL A. WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA, AND MEXICO 39 (2001), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/sext/rade/upennsec90701.pdf> (reporting that commercial sexual exploitation of children as young as nine years old dates back at least until the late-nineteenth century).

exploitative labor settings.⁹⁰ However, the narrative in the United States on human trafficking suggests that the problem is “over there.” First, U.S. reports typically report that 600,000 to 800,000 individuals—most of whom are women and children—are trafficked across international borders annually.⁹¹ When intra-country trafficking victims are accounted for, the number of victims increases to between two and four million annually.⁹² The fact that the international number is often cited without the intra-country number ignores the majority of the victims of these abuses. Aside from overlooking the large numbers of domestic trafficking victims around the globe, focusing on the international number serves to enable the U.S. public to

90. See, e.g., ECPAT-USA, WHO IS THERE TO HELP US?: HOW THE SYSTEM FAILS SEXUALLY EXPLOITED GIRLS IN THE UNITED STATES: EXAMPLES FROM FOUR AMERICAN CITIES (2005), available at <http://www.ecpatusa.org/pdfs/whoIsTheretoHelpUs3.pdf>. A University of Pennsylvania study concluded that approximately 300,000 children are commercially sexually exploited every year. See ESTES & WEINER, *supra* note 89, at 143–45.

91. See, e.g., 2005 Trafficking Report, *supra* note 4, at 20 (“[O]f the estimated 600,000 to 800,000 people trafficked across international borders annually, approximately 80 percent are women and girls and up to 50 percent are minors.”); see also UNODC, *supra* note 63, at 80 (finding children comprise half of transnational trafficking victims).

Despite recent focus on human trafficking, there is a dearth of reliable data. See e.g., Haynes, *supra* note 4, at 342. The clandestine nature of the activity contributes to the problem, but other issues affect data collection, including lack of anti-trafficking legislation in places, definitional issues in legislation (e.g., some law defines trafficking as applying only to sexual exploitation, and thus does not count labor trafficking), lack of enforcement, misidentification or lack of identification of victims, victim reluctance to self-identify, lack of coordinated data collection systems, and conflation of trafficking with other issues such as migration and smuggling. UNODC, *supra* note 63, at 43–44; see also Kinsey Alden Dinan, *Globalization and National Sovereignty: From Migration to Trafficking* 58, 71, in *TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS* (Sally Cameron & Edward Newman eds., 2008) [hereinafter *TRAFFICKING IN HUMANS*]; Haynes, *supra* note 4, at 342–44.

92. INT’L LABOR ORGANIZATION, A GLOBAL ALLIANCE AGAINST FORCED LABOUR 14 (2005), available at <http://www.yaleglobal.yale.edu/pdfs/globalalliance.pdf> (“The estimated minimum number of persons in forced labour at a given time as a result of trafficking is 2.45 million.”); U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* 23 (2004), available at <http://www.state.gov/documents/organization/34158.pdf> (“Estimates that include global intra-country trafficking in persons range from two to four million.”); see also FRANCIS T. MIKO, *Summary*, in *CRS REPORT FOR CONGRESS, TRAFFICKING IN PERSONS: THE U.S. AND INTERNATIONAL RESPONSE* (2003), <http://www.usembassy.it/pdf/other/RL30545.pdf> (“[T]here are even higher estimates ranging 4 to 27 million for total numbers of forced or bonded laborers.”).

conclude that it does not happen “over here.”

Second, arguably the most well known report in the United States on human trafficking, the U.S. government's annual *Trafficking in Persons Report*, reports on 170 countries but does not review the United States, feeding public perception that the problem is elsewhere.⁹³ As a government report, it also represents the collective voice of the nation and forms the basis for government action.⁹⁴ Additionally, to the extent that we hear about human trafficking in the United States, it is most often in the context of reports of women and children being trafficked into the United States. Although trafficking of persons into the United States certainly has a U.S. nexus, such a narrative still suggests that the problem is “over there” but is now reaching U.S. borders. While international trafficking of persons into the United States must be addressed, it is distinct from the problem of domestic trafficking, which receives far less attention, but has essentially no nexus with “over there.” Pimps, for example, frequently transport prostituted children from city to city within the United States, to avoid law enforcement and ensure that these young girls and boys know no one in their new setting and thus are totally dependent on the pimp.⁹⁵

Trafficking and exploitation of individuals within the United States and other countries in the Global North also occurs in various labor settings. The market for domestic workers is one such site. Large numbers of middle- and upper-class individuals in Western countries employ domestic help, many of whom are from developing countries.⁹⁶ In this

93. See 2008 Trafficking Report, *supra* note 63. Although it is true that the State Department does not typically address domestic affairs, this annual report furthers the public belief that the problem is “over there.” The U.S. has produced this annual report since 2001. The 2008 report was the first that discussed U.S. efforts at all, but did so in a single page with essentially no critical analysis and describing the United States as only a “destination country” further suggesting the problem is beyond U.S. borders. *Id.* at 51.

94. For example, it can lead to U.S. government sanctions against other countries. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, sec. 107, § 7107, Pub. L. No. 110-457, 122 Stat. 5044, 5049–50.

95. See, e.g., ALEXANDRA PRIEBE & CRISTEN SUHR, HIDDEN IN PLAIN VIEW: THE COMMERCIAL SEXUAL EXPLOITATION OF GIRLS IN ATLANTA 20 (2005), available at http://www.womensagenda.com/Child_Prostitution.pdf.

96. See Lizzy Ratner, *Domestic Workers Unite*, THE NATION, Jun. 13, 2008,

setting, we observe familiar narratives that portray the Self as virtuous while neglecting the Other's experience. Employers describe how they believe they are "helping" their domestic workers (some of whom may have been trafficked), based on an assessment that their workers are better off than they had been in their countries of origin. This analysis employs an othered conception of life "over there" and focuses on the comparative economic standing of the employee, while ignoring the role of the Self.⁹⁷ Representative of the disconnect is that significant numbers of employers, while seeking to help their domestic workers, oppose basic rights for them such as the right to a minimum wage.⁹⁸ Thus, while the magnanimous Self believes he/she is "rescuing" the Other, the actual Self may be benefiting from the further exploitation of the Other.⁹⁹

In other words, even when exploitation is close to home, the narrative of otherness operates, consciously or subconsciously, to obstruct our view of the exploitation that occurs locally, including when we partake in it. Thus, domestic workers for families in New York City or Los Angeles, for example, may be perceived as having been

<http://www.thenation.com/doc/20080630/ratner> ("The Census Bureau estimates that there are currently 1.5 million domestic workers [employed] in the United States, . . . and anecdotally, this number is rising.").

97. Bridget Anderson, *A Very Private Business: Exploring the Demand for Migrant Domestic Workers*, 14 EUR. J. WOMEN'S STUD. 247, 255 (2007) ("So power is clothed in the language of obligation, support and responsibility, rather than power and exploitation.").

98. Bridget Anderson, *A Very Private Business: Migration and Domestic Work*, at 19, Center for Migration, Policy and Society, Working Paper No. 28, Univ. of Oxford (2006), available at <http://www.compas.ox.ac.uk/publications/Working%20papers/wp-06-28.shtml> (reporting seventy percent of employers thought workers should not have a right to join a trade union and fifty-two percent thought workers should not have a right to minimum wage).

99. Thus, also overlooked is the privilege inherent in being part of the dominant group. See, e.g., CHARLES R. LAWRENCE & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 74 (1997) ("[T]hose Americans who benefit from white privilege can continue to reap the benefits of that privilege while denying any moral responsibility for the suffering of others."); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 301 (1990) ("[T]he rhetoric of innocence avoids the argument that white people generally have benefited from the oppression of people of color, that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways."). Some employers of domestic workers do provide fair wages and good working conditions for their domestic workers, but as Anderson's research reveals many do not. See Anderson, *supra* note 97, at 259.

exploited while in their home country, but the fact that their exploitation might be continuing in the United States goes unseen. And the fact that domestic trafficking rings are run by Americans and exploit Americans does not fit with our conception of the Self, and thus mention of their existence is met with disbelief.¹⁰⁰ This manifestation of otherness makes it easier for traffickers to exploit significant numbers of individuals in the United States and other Western countries and for the rest of us to neglect their plight.

3. *Results in Recognition of Only a Narrow Set of Victims*

One other key problem emerges from the persistent othering of certain individuals. Even among individuals in the United States (or other Global North countries) who are aware that the problem exists “over here,” misperceptions often persist about who within our borders is a victim of trafficking. Typically, victims are seen as women and children in visibly abusive situations who are rescued by law enforcement.¹⁰¹ Others, such as those who escape on their own or who may have violated a law during the time he or she was trafficked, often are not seen as victims but as opportunistic migrants who may or may not have encountered difficulty along the route.¹⁰² These perceptions exist among individuals as well as in the collective conscience expressed in narratives about victims of trafficking. Several scholars have described this phenomenon as the over-reliance on the “victim-subject” in trafficking.¹⁰³ In the United States, for example, the iconic human trafficking victim has the following traits: “(1) the victim is a woman or girl trafficked for sex; (2) law enforcement assesses her to be a good witness; (3) she cooperates fully with law enforcement investigations; and (4) she is rescued instead of escaping from the trafficking enterprise.”¹⁰⁴ The focus on this profile results in

100. Overlooking the Self's role is not exclusive to the West. See, for example, Thailand where the public attention focuses much more on foreign men coming to Thailand for sex tours than on the significant local demand. Todres, *supra* note 70, at 895.

101. Haynes, *supra* note 4, at 346.

102. *Id.*

103. See, e.g., Kapur, *supra* note 20, at 5–7; Srikantiah, *supra* note 4, at 195–204; Haynes, *supra* note 4, at 356–59.

104. Srikantiah, *supra* note 4, at 187.

governments overlooking boys (and men) who are trafficked, those trafficked for labor purposes, women and girls who escape on their own instead of being rescued, and those who may not make good witnesses or perhaps because of prior traumatic experiences are hesitant to cooperate with law enforcement. In other words, numerous victims go unidentified because they do not fit into the dominant view of what a victim should look like, a view built on distorted perceptions of the Other and the Other's culture.

To summarize, it is evident that othering operates on an ongoing basis and that it shapes the "conventional wisdom" or understanding of human trafficking. What is described as an "understanding" of human trafficking is in fact a narrative of the dominant discourse on the problem. This dominant discourse fails to give voice to marginalized populations and frames the issue in a way that reinforces the perception of the Self (the dominant social and political group) as virtuous and engaged in no harm and the problem as located "over there" with the Other and its culture. In turn, legal responses to human trafficking, discussed in Part III, are developed based on this otherness-distorted understanding of the Self, the Other, and the causes of human trafficking.

III. LEGAL RESPONSES TO HUMAN TRAFFICKING

Having discussed how otherness operates to misshape the prevailing understanding of the incidence of human trafficking, I now turn to examining the impact of otherness on legal responses to human trafficking. This section begins by analyzing international law, highlighting first the historical roots of otherness in anti-trafficking law at the international level and later exposing its continued presence in modern international conventions on human trafficking. I then review U.S. law as a case study of how national law is imbued with otherness. Examining anti-trafficking law with an awareness of the effects of otherness enables us to understand better why the law to date has had relatively little impact on the incidence of human trafficking.

Law is presented as objective reality.¹⁰⁵ Today, the "rule

105. Burt Neuborne, *Spheres of Justice: Who Decides?*, 74 GEO. WASH. L. REV. 1090, 1101 (2006) ("We like to believe that both the law and the facts are objective realities that can be unearthed by careful, principled investigation.");

of law” is advanced as a necessary component for just societies.¹⁰⁶ Inherent in that push is an assumption that law is objective and just. We know that this is often not the case. After all, law governed Nazi Germany, entrenched apartheid in South Africa, and protected the institution of slavery in the United States and elsewhere. Whether it was anti-Semitic laws of 1930s Germany, racist laws of South Africa’s apartheid era, or Jim Crow laws in the United States, the law has been utilized throughout history to institutionalize the views of those in power that certain individuals count as whole persons, while others are something less than human.

In more recent history, scholars from various disciplines have demonstrated that law is shaped by, and reflects, human biases.¹⁰⁷ Legal systems were built on bifurcated conceptions of the dominant group and the subaltern. During colonialism, liberal ideals of equality under law flourished in Europe but did not extend to the majority of the colonial empire. The Other was not envisioned as part of the population to whom the equality ideal applied. Ratna Kapur explains, “[t]he liberal project could reconcile promises of universality with exclusions in practice through a clear and persuasive logic. Rights and benefits were linked to the capacity to reason, and the capacity to reason was tied to notions of biological determinism, racial and religious superiority, and civilizational maturity.”¹⁰⁸ Thus, systematic exclusion through law was accepted as applied to some.

Even when the intent to exclude was not explicit, the dominant discourse or regime operated to establish legal structures that further entrenched the privileging of some and exclusion of others. Thus modern international law, while frequently well-intentioned, reflects a predominantly

see also Chibundu, *supra* note 35, at 82 (“Law, no less than history, is written by the privileged.”).

106. Simon Chesterman, *An International Rule of Law*, 56 AM. J. COMP. L. 331, 332 (2008) (“At the United Nations World Summit in 2005, Member States unanimously recognized the need for ‘universal adherence to and implementation of the rule of law at both the national and international levels’ and reaffirmed their commitment to ‘an international order based on the rule of law and international law.’ The rule of law has been embraced across the political spectrum”) (footnote omitted).

107. See, e.g., Hernandez-Truyol, *supra* note 19, at 242–57 (describing the evolution and emergence of various schools of thought from legal realism to and including feminist legal theory, critical race theory, LatCrit theory, and others).

108. Kapur, *supra* note 86, at 541.

Western conception of rights.¹⁰⁹ Moreover, as feminist legal scholars have described, “international law’s [historical] insistence on the centrality of the state . . . [operates to overlook] many of the most prevalent forms of female injury and oppression.”¹¹⁰ The public/private dichotomy has the same effect at the national and local level, frequently to the detriment of women and children.¹¹¹

As a result, the Other has to contend with, and fight to overcome, both ongoing systematic exclusion and the historical legacy of institutions and systems built without consideration of his or her voice or interests. So, for example, law that excludes the private sphere may appear facially neutral, but in practice may operate to deprive women of equality.¹¹²

In other words, throughout history, societies have developed legal systems that simultaneously promote equality for some and permit, or even promote, enslavement or exploitation of others. Given this legal framework, the persistence of the phenomenon of human trafficking is not that surprising.

Shortcomings in the development of law do not mean that law serves solely as an obstacle. Law can lead the evolution of societies toward greater inclusiveness and accounting of the needs of all persons.¹¹³ Attempting to foster such progress, the international community, dating to the early twentieth century, has proffered legal measures aimed at combating human trafficking. The efficacy of these legal developments, however, is compromised by the failure to account for the impact of otherness.

109. Mutua, *supra* note 41, at 204 (“[T]he human rights corpus, though well-meaning, is fundamentally Eurocentric . . .”).

110. Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J.L. & FEMINISM 345, 349 (2002).

111. See Christina Holder, *A Feminist Human Rights Law Approach for Engendering the Millenium Development Goals*, 14 CARDOZO J.L. & GENDER 125, 134 (2007) (“Feminist legal theorists fault the state-centric approach to human rights law for its male bias, claiming that international human rights institutions are populated by males who exclude from mainstream debate issues that are outside their experience, particularly rights violations that occur in the private sphere—such as domestic violence, food security, and access to drinking water—which are of critical importance to women heads of households.”).

112. Johanna Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 FORDHAM INT’L L.J. 289, 319 (2008).

113. See *supra* note 57 on law’s role in shaping consciousness.

A. *International Legal Responses to Human Trafficking*

In the past decade, the international community has launched major initiatives aimed at combating human trafficking. It has promulgated two significant international treaties on the issue—the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Trafficking Protocol),¹¹⁴ and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (CRC Protocol).¹¹⁵ This effort has been coupled with other international treaties—e.g., the Rome Statute of the International Criminal Court, and ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor—that, while not focusing only on trafficking, recognize the grave nature of the offense of human trafficking.¹¹⁶

These legal measures have been supplemented by major international and regional policies and programs that reinforce the international legal requirements set forth in the new multilateral treaties.¹¹⁷ Together, these steps evidence a commitment by the international community to address this

114. See Trafficking Protocol, *supra* note 64.

115. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000) [hereinafter CRC Protocol]. The CRC Protocol is one of two optional protocols to the U.N. Convention on the Rights of the Child, the most widely ratified international human rights treaty (193 countries are party to the CRC; only Somalia and the United States have yet to ratify the CRC).

116. See Rome Statute of the International Criminal Court, arts. 7(1)(c), 7(2)(c), July 17, 1998, 2187 U.N.T.S. 90 (The Statute of the ICC includes “enslavement” in its definition of “crimes against humanity” and defines enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour (ILO No. 182), arts. 1, 3(a), June 17, 1999, 2133 U.N.T.S. 161 (obligating States Parties to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency . . . [including] all forms of slavery or practices similar to slavery, such as the sale and trafficking of children.”).

117. See, e.g., Council of Europe Convention on Action against Trafficking in Human Beings, ETS No. 197 (2005); Inter-American Convention on International Traffic in Minors, Mar. 18, 1994, 79 O.A.S. T.S., 33 I.L.M. 721.

modern form of slavery.

The important issue is the degree to which these measures have been effective. These new developments, while they reflect something of a renewed focus on human trafficking, have not emerged out of a vacuum. Instead, they build upon—intentionally or not—the historical approach to trafficking. I do not intend to revisit the entire history of international legal developments on human trafficking here; other scholars have provided such histories.¹¹⁸ Instead, in this article, I highlight the most salient elements of the historical development, features that evidence the presence of othering and exclusion to the detriment of particular populations. Following that, I return to the most recent legal developments to examine the same questions.

1. *Historical View*

In examining the historical development of international legal measures to combat human trafficking, two key concepts emerge. First is that from the outset the aim was not to guard against the trafficking of all persons, but rather only white women (and girls). While that has long since been remedied formalistically in international law on human trafficking, its legacy has not. Second, the historical development of the law evolved to understand trafficking as fundamentally linked with prostitution. Though numerous individuals are trafficked for prostitution, the linkage between the two has led, in many instances, to overlooking the extent to which persons are trafficked for other forms of exploitation.

To begin, the early international treaties on human trafficking focused on “white slave traffic” and preventing “procuring of women or girls for immoral purposes abroad.”¹¹⁹

118. See, e.g., Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L L. 1, 6–15 (2004); Chuang, *supra* note 70, at 74–78.

119. See, e.g., International Agreement for the Suppression of White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45; International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 416; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271; see also Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT'L L.J. 163, 165–172 (1994)

The International Agreement for the Suppression of White Slave Traffic of 1904 and the International Convention for the Suppression of the White Slave Traffic of 1910 evidence by name that international concern was only for white women and girls.

When used in these early conventions, the term "white slave" was not new. It was first used in the earlier part of the nineteenth century to refer to English factory workers, but fell into disuse until it was resurrected in 1870 by Victor Hugo.¹²⁰ In a letter to the British social reformer Josephine Butler, Hugo wrote, " [t]he slavery of black women is abolished in America; but the slavery of white women continues in Europe.' "¹²¹ Thus the world's concern was only white women and girls. Accordingly, the 1902 Paris Conference, which led to the 1904 treaty, focused on "traite des blanches" (or "trade in whites") in discussing the importance of abolition of the international trafficking in women.¹²² Women of color, as well as men and boys, were not on the liberal agenda.

In 1910, delegates to the Madrid Conference finally questioned the label, noting it failed to cover women of color.¹²³ However, the conference decided to keep the white slave term "because it had become a household word."¹²⁴ While public awareness campaigns and social movements depend on easily recognizable slogans to carry their message and enhance the likelihood of their success, this decision demonstrated that increasing the chance of success of a campaign to protect white women was of greater value to the international community than calling attention to the fact that women of color (as well as men and boys) were being exploited. In all likelihood, that exclusion does not happen with such ease unless those being excluded are considered less important—a devalued Other. Subsequent treaties, such as the 1921 International Convention for the Suppression of

(providing a more detailed review of the early development of international law on trafficking).

120. Demleitner, *supra* note 119, at 165 (quoting Hugo Black letter).

121. *Id.* at 166. Apparently Hugo and others believed that mere act of adopting the Reconstruction Amendments meant that slavery of black women ended and only white women now suffered harm.

122. *Id.*

123. *Id.*

124. *Id.*

the Traffic in Women and Children, made incremental progress by abandoning the term "white slave traffic" and by including children of both genders.¹²⁵ However, this history of overlooking devalued populations continues to play out today.

The second historical lesson is that the linking of trafficking and prostitution led to overlooking the extent to which persons are trafficked for other forms of exploitation. Following the early international treaties on human trafficking, the next landmark step occurred in 1949, with the adoption of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.¹²⁶ The 1949 Convention superseded the prior conventions of 1904, 1910, 1921, and 1933, consolidating international law on the issue.¹²⁷ Until the recent efforts of the past decade, the 1949 Convention stood as the primary international treaty on trafficking.¹²⁸ While the 1949 Convention represented a step forward by being the first gender-neutral convention on trafficking and by dropping the requirement that trafficking have an international nexus to be a crime, it also focused solely on trafficking for purposes of prostitution and failed to cover labor trafficking. Conventions developed to combat forced labor were seen as distinct and not employed in the trafficking context.¹²⁹ Thus, reinforced by an otherness-driven notion of the iconic victim-subject, the

125. See International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415, *amended by* the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children; Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

126. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271, [hereinafter 1949 Convention].

127. 1949 Convention, *supra* note 126, art. 28.

128. Other international efforts were undertaken between 1950 and the 1990s, but until 2000 no new treaty was adopted specifically on trafficking. Some treaties adopted in the interim did include trafficking-related provisions. See Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, art. 6, 34 U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979) [hereinafter CEDAW]; Convention on the Rights of the Child, G.A. res. 44/25, art. 35, annex, 44, U.N. GAOR 44th Sess., Supp. No. 49 U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC]. For discussion of international efforts during the interim period, see, for example, Bruch, *supra* note 118, at 8–14.

129. See Bruch, *supra* note 118, at 10 ("There was no real attempt to use the broader slavery and labor treaties that existed to respond to the problem of trafficking.").

law on human trafficking came to neglect those trafficked for work in sweatshops or on farms, as domestic servants, for forced marriages, or for use in armed conflict.

The legacy of these two historical developments—exclusion of certain populations of color from protection in the early years, and linking trafficking only to prostitution—is reflected in the new law emerging today.

2. *Current Law*

Today, the international legal framework on human trafficking—set forth in greatest detail in the Trafficking Protocol and the CRC Protocol¹³⁰—requires states to combat human trafficking through: (1) criminalization and prosecution of acts of trafficking, (2) development of trafficking prevention programs, and (3) provision of assistance to victims of trafficking.¹³¹ A review of current law reveals important manifestations of otherness. Although the drafters of this international law were well-intentioned, othering persists at the subconscious level and still has an impact on law.¹³² Thus, the dominant understanding of human trafficking and the current construct of the international system combine to incorporate otherness principles into law, further entrenching an approach that ultimately hampers efforts to combat human trafficking.

First, the strongest obligations under international law are tied to the first requirement, that of criminalization of acts of trafficking. While prevention must be the ultimate goal, international legal obligations to prevent human trafficking are comparatively weaker. For example, Article 5 of the Trafficking Protocol includes the following mandatory language: “[e]ach State Party *shall adopt* such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in [the Protocol’s definition of

130. As of February 6, 2009, 125 states were party to the Trafficking Protocol and 130 states were party to the CRC Protocol. See U.N. Treaty Database, <http://treaties.un.org/Pages/ParticipationStatus.aspx> (last visited Feb. 6, 2009).

131. See, e.g., LeRoy G. Potts, Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT’L L. REV. 227, 239–43 (2003); Todres, *supra* note 70, at 886. This three-pronged approach is sometimes referred to as the “three P’s”—prosecution, protection, and prevention. Potts, *supra*, at 230.

132. See *supra* note 25 and accompanying text.

‘trafficking in persons’].”¹³³ In contrast, while Article 9 of the Trafficking Protocol requires that states parties “shall establish comprehensive policies, programmes and other measures” to prevent human trafficking, it immediately weakens that obligation by setting forth that “States Parties shall *endeavour to undertake* measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.”¹³⁴

Similarly, with respect to assisting victims of trafficking, the Trafficking Protocol requires only that “[e]ach State Party shall *consider* implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons.”¹³⁵ Juxtaposed against flat obligations to criminalize acts of trafficking, the weaker language on prevention and assistance express a lesser commitment. This lesser expectation or obligation under international law to assist those have been harmed or are at risk of harm has two important results. First, as states seek to implement or comply with international law, they have focused their resources on complying with obligations to criminalize trafficking and have done less to assist vulnerable populations as less is required. In other words, to the extent a state intends to comply with international law, it knows it can fulfill its obligations even with minimal efforts with regard to assisting victims or developing prevention measures. Second, as mentioned above, law has an expressive function—reflecting a societal expression of what is valued—and thus international law that expresses a lower priority on assisting marginalized persons reaffirms the otherness-shaped perspectives and values held by citizens.¹³⁶

Some critics might maintain that there are “practical” reasons for the different levels of obligation in these two protocols that form the core international law on human trafficking—e.g., it is easier to pass legislation to criminalize an act than to ensure victims receive assistance.¹³⁷ First, my

133. Trafficking Protocol, *supra* note 64, art 5 (emphasis added).

134. Trafficking Protocol, *supra* note 64, art 9(1)–(2) (emphasis added).

135. Trafficking Protocol, *supra* note 64, art 6(3) (emphasis added).

136. On the expressive function of law, see *supra* note 31.

137. Though the obligation to prosecute can hardly be said to be easy or not require resources. In fact, in most countries, a fraction of traffickers, at best,

focus here is on what law the international community has agreed to and the mandatory or non-mandatory nature of particular provisions. When the international community decides on a lesser obligation for a particular step, it articulates the view that it is acceptable for states to exert less effort implementing those provisions. Second, the assertion that it is easier to criminalize trafficking than assist victims relies on a comparison of unequal outcomes. Both areas require states to adopt laws or regulations—in the case of the former, criminal law; in the case of the latter, laws or regulations that establish and support assistance programs. Laws to assist victims can be adopted with the same ease as new criminal law provisions. Ensuring full implementation of each law—that is, ensuring that all who violate anti-trafficking laws are punished and all who are victims are provided assistance—is a separate issue, and it is unclear that achieving the former is any easier than achieving the latter. Certainly there are generalized questions about the enforcement mechanisms of international law,¹³⁸ but that does not fully explain why the international community agrees on the one hand that the elimination of human trafficking requires action on three fronts (protection, prevention, and prosecution) but creates law that permits states to do less vis-à-vis the two steps that would assist marginalized communities.

Other proponents of maintaining differential obligations might suggest that criminalization ties to negative rights, whereas prevention and assistance to victims likely involve positive rights that require resources, and thus the language was intended to provide flexibility for resource-constrained states.¹³⁹ In fact, civil and political rights require resources

are ever prosecuted. See, e.g., Sonia Merzon, *Extraterritorial Reach of the Trafficking Victims Protection Act*, 39 WASH. INT'L L. REV. 887, 897 (2007). See also *infra* note 159.

138. See *infra* note 159 (discussing the low number of prosecutions in the United States). On enforcement of international law generally, see for example Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551 (2004).

139. The suggestion that resources are not needed for civil and political rights enforcement but are needed to ensure economic and social rights presents a false dichotomy. See Judy Fudge, *The New Discourse of Labor Rights: From Social To Fundamental Rights*, 29 COMP. LAB. L. & POL'Y J. 29, 50–51 (2007)

just as economic, social, and cultural rights do.¹⁴⁰ Moreover, had the treaty required that states *shall implement* measures to assist victims, such language would not have dictated a level of resources, but would have made it impossible for a state to “consider” but ultimately reject measures to assist victims of trafficking. Mandatory language also would have had the expressive function of stating that assistance to victims and prevention measures carry the same import as criminal statutes. Therefore, while both of these explanations for the lesser obligations on prevention and assistance may raise important questions about how international law is implemented, they do not sufficiently explain why parties to the Trafficking Protocol need only “consider” implementing measures to assist victims or why a state could not accept a flat obligation to develop prevention measures, especially if the obligation does not (as above) demand specific levels of resource commitments.

When mapped on the otherness-shaped understanding of human trafficking, the differential obligations make more sense. Flat obligations to criminalize fit with the dominant understanding that the problem primarily is a relatively small number of deviant actors who need to be punished (and the dominant group can be the savior by punishing those deviants). Lack of prioritization of assistance to victims and prevention also fits with an understanding of human trafficking that is based on a world view that does not fully value the trafficked Other.

This lesser valuation of the Other in current international law on the issue also is reminiscent of the tiered priorities of the early treaties aimed at ending the white slave trade. In 2005, the Council of Europe adopted a treaty to

(“The argument that civil and political rights do not require the expenditure of resources, whereas social rights do, is only tenable in situations in which the focus of social rights is on the obligation to fulfill, and civil and political rights are observed on the primary level of the duty to respect. However . . . some civil rights require state obligations at all three levels, and most economic and social rights can be safeguarded by non-interference and the duty to protect.”); Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOK. J. INT’L L. 689, 712 (1998) (“Civil and political rights are neither self-generating nor free of costs; they ‘need legislation, promotion and protection and this requires resources.’”) (footnote omitted).

140. For example, ensuring the right to counsel requires states to fund public defender offices, and ensuring the right to vote requires resources to hold regular democratic elections.

combat human trafficking.¹⁴¹ Its focus is on trafficking of persons in Europe, where a larger percentage of the victims are white. In the Council of Europe treaty, Member States agreed to stronger language on prevention and assistance to victims.¹⁴² Thus states that had participated in the drafting of Trafficking Protocol and CRC Protocol just a few years earlier now were willing to make a stronger commitment to the victims of trafficking. It is possible they had learned more was needed. It is also possible that the distance between Self and Other was perceived as not as great and therefore those states related more to the European victim and were motivated to do more.¹⁴³

Further, under the current international legal regime on human trafficking, what is "generally-accepted" as the international definition of trafficking is enshrined first in a protocol to a treaty on organized crime.¹⁴⁴ That organized crime is involved in, and benefits from, human trafficking is not to be denied, but this placement reflects a narrow conception of the issue as caused by a limited number of deviants who bear no connection to the Self. This narrow focus has led to an emphasis on prosecutions, rather than other methods of combating the human rights abuse, such as supporting and strengthening vulnerable communities and understanding and addressing the reasons behind the demand for exploitative services. By focusing on prosecuting bad actors, the dominant group reinforces its self-perception as savior, even while providing little real assistance to most trafficking victims or those who might be at risk of being trafficked.

141. See Council of Europe Convention, *supra* note 117.

142. *Id.* art. 5. While perhaps only symbolic, it is notable that in this new convention provisions on prevention and assistance precede those on criminalization.

143. Some scholars have raised similar questions about differential responses by the Global North to suffering in the Global North versus suffering in the Global South in the context of genocides. See, e.g., Ziyad Motala, *Africa: Isolation and Marginalization*, 94 AM. SOC'Y INT'L L. PROC. 228 (2000) (discussing the international community's slower response to the genocide in Rwanda as compared to that in Bosnia).

144. For the text of the generally-accepted definition, see *supra* note 64 and accompanying text. The two most recent major international conventions on human trafficking define human trafficking using the same language. See Trafficking Protocol, *supra* note 64, art. 3(a) ("trafficking in persons"); Council of Europe Convention, *supra* note 117, art. 4(a) ("human trafficking.").

The placement of anti-trafficking provisions within the framework of a treaty on organized crime also suggests that trafficking occurs solely because of organized crime, which diverts our attention from the role played by each of us in society in tolerating the societal conditions that facilitate this trade in persons. The reality is that the problem of human trafficking goes well beyond the actions of underground organized criminal networks. Yet the Trafficking Protocol relies upon definitions in the underlying Convention on Transnational Organized Crime, and thus it addresses only those acts of trafficking that are transnational in nature and involve an organized criminal group.¹⁴⁵ These definitions serve to limit the scope of the Trafficking Protocol, leaving intra-country trafficking beyond the treaty's reach, even though it harms a greater number of victims.¹⁴⁶

Finally, the historical focus on sex trafficking at the expense of victims of labor trafficking is evidenced here as well. Not only has international law given less attention to labor trafficking, discussions of trafficking and prostitution have often led to a conflation of the two. As a result, questions and discussion of consent are imported into dialogue on trafficking.¹⁴⁷ Proposals and critiques of the definition of human trafficking have led, in some instances, to a conflating of the terms trafficking, smuggling, migration, and even prostitution.¹⁴⁸ The definitional questions are

145. Trafficking Protocol, *supra* note 64, art. 4 ("This Protocol shall apply . . . to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences."). Although the Protocol's definition of organized criminal group is fairly broad, the failure to cover intra-country trafficking is leaves a major gap in coverage.

146. Recall that the best estimates suggest 600,000 to 800,000 persons trafficked internationally but a total of two to four million are trafficked once intra-country trafficking numbers are included. See *supra* note 92.

147. For a discussion of "consent issues" see, for example, Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137, 156 (2004) (arguing the current definition which focuses on force or coercion implicitly brings in the question of consent). While Balos is correct that in some instances the burden of demonstrating force or coercion might lead to having to prove non-consent, stripping that from the definition of human trafficking raises other questions Balos does not address—mainly without any element of force or coercion, trafficking and smuggling, and possibly migration, are conflated.

148. See Chuang, *supra* note 70, at 66–67.

further complicated as a result of the narrow perception of the iconic victim-subject. Also, the conflation of terms has led many individuals to understand human trafficking to mean only sex trafficking. The result is that individuals who might want to migrate are denied agency, while victims who are trafficked for labor purposes do not receive the assistance established for trafficking victims.

The above discussion is not intended to suggest that current international legal measures are all counter-productive. To the contrary, recent legal measures have led to positive developments in a number of instances. However, the actual progress would seem to be less significant than the dominant narrative suggests. This is due in part to the fact that mainstream conclusions are built upon an understanding of the issue that overlooks the impact of otherness. So, weaknesses in the law (e.g., lesser obligations on assistance and prevention; omitting labor trafficking in some instances; and failure to cover intra-country trafficking victims and others who do not fit the prototypical victim profile) go unchallenged. Understanding how otherness has infused our international legal responses to human trafficking can help bring to the forefront the gaps in the international legal regime. Similar benefits emerge from an analysis of the impact of otherness at the national level.

B. National Law on Human Trafficking—the U.S. Example

In numerous countries, there is heightened interest in anti-trafficking initiatives.¹⁴⁹ Trafficking in persons now receives mention in prominent national speeches, such as in the 2006 State of the Union Address by President George W. Bush.¹⁵⁰ And governments are adopting new anti-trafficking

149. The genesis of the renewed interest in human trafficking since the mid-1990s inevitably involves some speculation, and no one factor is solely responsible. Given the historical legacy of the issue, however, one must wonder whether it is tied somehow to the aftermath of the fall of the former Soviet Union and resultant increase in trafficking of women and girls from Eastern Europe and the former Soviet Union. Trafficking in developing countries was occurring at high rates prior to that time, yet it seems that the increased interest among Western countries occurred only after white women and girls from Eastern Europe and the former Soviet republics “appeared” on the international scene as victims. *See also infra* note 155.

150. *See* George W. Bush, President of the United States, State of the Union Address (Jan. 31, 2006); *see also* William J. Clinton, President of the United States, Memorandum on Steps to Combat Violence Against Women and

laws.¹⁵¹ In this section, I focus on the United States as a case study to illustrate how otherness affects national law on human trafficking.¹⁵²

The historical U.S. approach to human trafficking resembles the early international efforts discussed above and similarly incorporates a racialized and gendered othering into the law. One of the central components of federal law on human trafficking remains the Mann Act, which was originally known as the White Slave Traffic Act when adopted in 1910.¹⁵³ In its early years, the Mann Act came to be viewed as a means of “protect[ing] women who were weak from men who were bad.”¹⁵⁴ Thus, early U.S. efforts reflected many elements of othering, from racialized othering with its focus on “white slavery” to its reliance on the iconic disenfranchised victim-subject. While subsequent developments in U.S. law have addressed such explicit othering language, otherness-related structural issues in the law have persisted. In recent years, however, there has been a renewed commitment by the U.S. government to make progress in combating human trafficking. As a result, the U.S. federal government has adopted several significant pieces of legislation in the past decade, and at least thirty states now have their own law on human trafficking.¹⁵⁵

Trafficking in Women and Girls (Mar. 11, 1998).

151. See LexisNexis Rule of Law Center, LexisNexis Global Legal Survey: Human Trafficking Legal Survey (2008), http://www.lexisnexis.com/documents/pdf/20080714020154_large.pdf.

152. While this section focuses on the United States, similar patterns exist in other countries.

153. White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 826 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)); see also Jonathan Todres, *Prosecuting Sex Tour Operators in U.S. Courts in an Effort to Reduce the Sex Exploitation of Children Globally*, 9 B.U. PUB. INT. L.J. 1, 5–7 (1999) (discussing early Mann Act history).

154. *Denning v. United States*, 247 F. Supp. 463, 465 (5th Cir. 1918); see *United States v. Williams*, 55 F. Supp. 375, 380 (D. Minn. 1944).

155. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (amending various sections of the United States Code); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 19 Stat. 3558 (amending various sections of the United States Code); Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in various sections of the U.S.C.); Adam Walsh Child Protection and

The “modern” U.S. approach, which was formally launched with the 1998 anti-trafficking directive from President Clinton,¹⁵⁶ has been marked by several characteristics, each of which reflects an otherness-shaped understanding of human trafficking. The United States has relied upon a law enforcement model, targeted sex trafficking to a much greater degree than labor trafficking, and focused primarily on the international aspects of the problem.

First, developments in federal law—most notably, the Trafficking Victims Protection Act of 2000 and its subsequent reauthorizations in 2003, 2005, and 2008 (TVPA)¹⁵⁷—have followed a law enforcement model. While law enforcement is a necessary component of combating human trafficking, the belief in a heavy emphasis on law enforcement as a means to eliminating human trafficking is rooted in otherness-shaped beliefs that the cause is just a few “bad” actors that need to be

Safety Act of 2006, 109 Pub. L. 109-248, 120 Stat. 587 (to be codified at 42 U.S.C. § 16901). In addition, thirty states have adopted anti-trafficking laws. See Suzanna L. Tiapula & Melissa Millican, *Identifying the Victims of Human Trafficking*, 42 PROSECUTOR, March 2008, at 34, 37 n.14.. One might fairly question why the United States took a particular interest in human trafficking in the 1990s. There is at least some evidence that U.S. action tied to the increase in human trafficking in Europe, following the fall of the Soviet Union. Congressional testimony leading up to the TVPA focused on the surge in trafficking in the former Soviet Union and Eastern Europe, even though it simultaneously acknowledged that “trafficking had been a problem for many years in Asia” and that trafficking from the Soviet Union and Eastern Europe represented a small percentage of the overall total. See *Briefing on the Trafficking of Women and Children in the United States and Europe*, Commission on Security and Cooperation in Europe, 106th Cong. (1999) (testimony of Rep. Chris Smith), (noting about 4000 of the 50,000 women and children trafficked into the U.S. annually come from the former Soviet Union and Eastern Europe); 145 CONG. REC. S7835-06, S7843 (1999) (statement of Sen. Wellstone) (discussing in detail women trafficked from the Former Soviet Union, while mentioning more briefly that then-First Lady Hillary Clinton had reported on young girls being sold by their families in Thailand).

156. See MIKO, *supra* note 92, at CRS-8. The U.S. adopted the Three P’s approach—prosecution, prevention, and protection. *Id.*

157. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (amending various sections of the United States Code); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 19 Stat. 3558 (amending various sections of the United States Code); see also Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in various sections of the U.S.C.).

caught. Similar to the international framework, developments in U.S. law have accorded more weight to the prosecution component than to protection or prevention.¹⁵⁸ Thus, a major emphasis of the federal legislation was increased penalties for trafficking and commercial sexual exploitation of adults and children. Although the heavier sanctions represent a positive step toward recognizing the grave nature of these crimes, and have an expressive function, these measures alone are insufficient. Thus the strong emphasis on law enforcement as the answer has done little to reduce the incidence of trafficking, in part because a very small percentage of traffickers have been prosecuted and because tougher criminal sanctions do not address root causes of vulnerability of particular populations.¹⁵⁹

One subset of crimes that has received significant attention is that of sex tourism. Federal legislation has been strengthened to facilitate prosecutions of sex tourists on their return home.¹⁶⁰ While holding sex tourists accountable for

158. See *supra* notes 134–36 and accompanying text. See also Jayne Huckerby, *United States of America*, in GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 230, 247 (2007) (“The U.S. equates its prosecutorial focus with a ‘victim-centered’ approach to trafficking: ‘. . . we believe the US Government approach—one that prioritizes catching perpetrators to put them out of business and cease to exploit other victims—is a victim-centered approach’ [quoting a 2005 US report to the OSCE]. However, its prosecutorial focus often runs counter to the rights of trafficked persons.”) When the U.S. reported to the U.N. Committee on the Rights of the Child in May 2008 on progress implementing the CRC Protocol, the U.N. Committee asked about prevention efforts, to which the Department of Justice representative replied “the U.S. takes prevention seriously. That’s why we seek heavy penalties for traffickers.” [Author was present at the U.N. Committee hearing in Geneva in May 2008.]

159. For example, as of 2006, at the time of the Mid-term Review, there had been “over 50 indictments and 29 convictions of U.S. citizens involved in child sex tourism.” United States, *Response to List of Issues from U.N. Committee on the Rights of the Child, in consideration of its Initial Report under the Optional Protocol to the CRC on Sale of Children, Child Prostitution, and Child Pornography*, at 7, U.N. Doc. CRC/C/OPSC/USA/Q/1/Add.1 (Apr. 2008). The limited number of convictions is not a criticism of U.S. government’s goal of prosecuting traffickers. Law enforcement and prosecutors specializing in combating trafficking are deeply committed to their work. However, many of them would admit that, given resource constraints and other limitations, at best law enforcement can only catch a percentage of those who violate the law.

160. See 18 U.S.C.A. §§ 2421–2424 (West 2008). The United States is one of a number of countries that has adopted legislation criminalizing sex tourists’ actions; others include: Australia, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, New Zealand, Norway, Sweden, and the United Kingdom.

their exploitative actions overseas is laudable and acknowledges in a limited manner that certain Americans contribute to the problem, this step reflects the perception that the problem is caused by a select number of aberrant men who travel overseas to engage in such illegal acts. Thus this law-enforcement centered approach overlooks more effective ways of addressing the exploitation of persons through human trafficking, instead relying on a narrative that has the virtuous Self rescuing victims from deviant others.

Finally, a key component of the Trafficking Victims Protection Act is that the United States conduct an annual review of other countries' progress in combating human trafficking, ranking countries in one of three tiers, with a third-tier ranking potentially resulting in the United States freezing non-humanitarian aid.¹⁶¹ The clear message in this provision of the TVPA is that the problem is with Others (read: other countries) who are either incapable of or unwilling to take the necessary steps to "protect their women and children," so the United States will step in and "rescue" these women and children.¹⁶² Although there are issues with law enforcement in many countries (including those in the Global North) that need addressing, this step still echoes concepts of othering, because it relies on the narrative of the virtuous Self and the lesser Other.¹⁶³

The U.S. approach has also emphasized border controls.¹⁶⁴ The government has focused on "cracking down"

See Todres, *supra* note 153, at 4.

161. See *supra* note 94.

162. See Senate Concurrent Resolution 82—Relative to a Violation of Fundamental Human Rights, 144 CONG. REC. S1702-02, S1704 (1998) (statement of Sen. Wellstone) ("I want history to show that for the first time the U.S. Senate is going to make it clear that we are not going to be silent when it comes to the most brutal treatment of women and girls throughout the world."). This altruism, while commendable, reflects otherness-shaped thinking, as blame is placed on other governments while the exploitation of women and girls in the U.S. is not mentioned.

163. Moreover, U.S. evaluation of other countries measures progress largely by whether countries have strengthened criminal laws against human trafficking and sought to arrest, prosecute and convict traffickers. See 2008 Trafficking Report, *supra* note 63, at 45–46 (focusing on prosecutions and convictions).

164. Nepal took a similar approach, barring Nepali women from crossing the border unless accompanied by a male relative. See Svati P. Shah, *Distinguishing Poverty and Trafficking: Lessons from Field Research in*

on international organized criminal groups. These efforts also produce low numbers of arrests of traffickers and ultimately provide minimal tangible benefit to those persons susceptible to trafficking.

U.S. emphasis on prosecutions and border control builds on assumptions about both the perpetrators and victims. In each instance, what undergirds U.S. strategy is an otherness-tainted understanding that the problem is a few deviant sex tourists and international organized criminal networks and the victims must be women or girls from poorer countries who are rescued from sex trafficking by law enforcement.

Second, as mentioned above, the U.S. government's approach to human trafficking has prioritized the issue of sex trafficking over labor trafficking.¹⁶⁵ A number of scholars and advocates have voiced concern over this approach, noting that the emphasis on linking trafficking and prostitution ignores the significance of labor trafficking and the importance of addressing the root causes of all forms of human trafficking.¹⁶⁶ Again, this focus fits with dominant perceptions of the iconic victim, and has the negative effect of overlooking numerous individuals exploited in labor settings.

Finally, U.S. law has had an international focus. This is due to a number of factors, "including the perception of the quintessential trafficked person as a Third World female, sexualised and disempowered 'victim' moved across international borders."¹⁶⁷ U.S. laws aimed at sex tourists or international trafficking rings fit the model of the United States as savior "rescuing" women and children in developing countries from a few bad men or a so-called bad culture. One of the most often praised elements of the TVPA was the establishment of a new class of visa—the T-visa—for victims of trafficking. The T-visa enables victims (once certified by HHS) to receive assistance.¹⁶⁸ Although the T-visa represents

Mumbai, 14 GEO. J. ON POVERTY L. & POL'Y 441, 452 (2007).

165. See Huckerby, *supra* note 158, at 230.

166. See, e.g., Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 317, 320–21 (2007). In the 2008 TIP Report, the United States calls for greater attention to the problem of labor trafficking, but again focuses its call on the situation in other countries and not the labor trafficking occurring within its own borders.

167. Huckerby, *supra* note 165, at 231.

168. See 8 U.S.C. § 1101(a)(15)(T) (2008); 8 CFR 214.11; see also United

an important development, it also reflects that when U.S. law did go beyond the prosecution prong, it relied on the notion that the problem is “over there.” So much so that similarly situated domestic victims often did not have access to the same services.¹⁶⁹ All of these laws not only build upon concepts of otherness, but they serve to reinforce the idea that the problem is “over there” with the Other, and the Self, if at all involved, is so only as “rescuer.”

When viewed in the context of an otherness-aware understanding of human trafficking, we can understand both the rationale for these legal measures and the reasons why they fall short of effectively addressing all aspects of human trafficking.

C. *Enforcement of the Law*

The impact of otherness is not limited to legislation on human trafficking. Building on the otherness-rooted law, those seeking to enforce the law—from police, to prosecutors, to judges—further add their own, often subconscious, perceptions of the Other into the mix, frequently exacerbating the problem.

Many law enforcement officials exhibit “a particular type of myopia in which they only see a person as a victim if they, themselves, have rescued her.”¹⁷⁰ In fact, most victims are not rescued but rather find their own way out of a brothel, sweatshop, farm, or other exploitative setting, after suffering physical, emotional, psychological or sexual abuse, and eventually present at a shelter, health clinic, or other service provider.¹⁷¹

Prosecutors also have judgments to make, including whether a possible victim of trafficking will make a good

States, Initial Report to the U.N. Committee on the Rights of the Child, Concerning the Optional Protocol to the CRC on Sale of Children, Child Prostitution, and Child Pornography, ¶ 75, U.N. Doc. CRC/C/OPSC/USA/1 (July 16, 2007). Since the program began in 2001, HHS has sent Letters of Eligibility to 148 minors. See United States, *supra* note 159, at 3.

169. See SENIOR POLICY OPERATING GROUP ON TRAFFICKING IN PERSONS, SUBCOMMITTEE ON DOMESTIC TRAFFICKING, FINAL REPORT AND RECOMMENDATIONS 8–10 (2007), available at <http://www.acf.hhs.gov/trafficking/SPOGReport-Final9-5-07.pdf> (detailing committee's findings on differences between assistance available to domestic and international victims of trafficking).

170. Haynes, *supra* note 4, at 349.

171. *Id.* at 351.

witness at trial. This assessment no doubt builds upon dominant perceptions about whom the public is likely to perceive as a victim.¹⁷² An individual who engaged in self-help, having escaped an exploitative environment, is less likely to be perceived as a victim. Consciously or subconsciously, this must play a role in assessing whether an individual is qualified by the government as a trafficking victim.¹⁷³

Finally, even judges are not immune; otherness is evident in judicial decisions. For example, a devalued conception of the Other is evident when a court dismisses an indictment against alleged sex tour operators, whose brochure advertized that their tours to Bangkok and Manila provided "introductions to lady companions throughout your stay as desired,"¹⁷⁴ because the court finds that the actions of a sex tour operator are no different than "if a travel agent advertises or tells prospective customers that Ireland is a good place to play golf, that England is a good place to see castles and Spain is a good place to attend bullfights."¹⁷⁵

Although this case might be presumed to be an outlier with limited precedential value, examining case law with an awareness of the impact of otherness reveals that such cases

172. See *supra* note 50.

173. See 8 U.S.C. § 1101(a)(15)(T).

174. See Toddi Gutner & Ron Corben, *Asian Sex Tours Are an American Business Too*, BUS. WK., June 17, 1996, at 46 (quoting Big Apple Oriental Tours brochure).

175. *People v. Barabash*, No. 16/2004AG, slip op. at 15 (N.Y. Dutchess County Ct. July 30, 2004) (order of Hon. Gerald V. Hayes). In *Barabash*, the State of New York sought to prosecute the owners of Big Apple Oriental Tours for "promoting prostitution." The court opinion suggests not only a devalued sense of the potential victims but also of the Philippines as a whole, as it questioned whether prostitution is illegal in the Philippines despite testimony from the Philippines consulate that it is. *Id.* at 14. Query whether a state court would dismiss without analysis or evidence to the contrary similar testimony from the U.S. government about federal law or the U.K. government about British law.

At the time of the indictment, New York Law did not explicitly refer to travel agencies and selling of travel-related services in the statute. It was amended subsequently so that "[a] person is guilty of promoting prostitution in the third degree when he knowingly... [a]dvances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others . . . a business that sells travel-related services knowing that such services include or are intended to facilitate travel for the purpose of patronizing a prostitute, including to a foreign jurisdiction and regardless of the legality of prostitution in said foreign jurisdiction." N.Y. PENAL LAW § 230.25 (McKinney 2007).

are not uncommon. In fact, such cases exist at the federal appellate level, which because of their precedential value, serves to reinforce skewed conceptions of the Other. The Ninth Circuit offers one example. In *United States v. Castaneda*,¹⁷⁶ three Filipina women lured to Saipan under false pretenses found themselves in a foreign country with little or no money and the legality of their presence in country tied to their place of employment, and were forced by their employer to provide sex to men in a night club; yet the Ninth Circuit remained skeptical.¹⁷⁷ The court questioned whether these women were coerced, noting "there wasn't a gun put to their head," and that they weren't forced to line up for selection by male customers but only "instructed" to do so.¹⁷⁸ Instead, the court suggests these women had other choices, including going to work illegally somewhere else in the hope of getting arrested, detained, and ultimately deported back to the Philippines for violating U.S. law.¹⁷⁹ The court's opinion

176. *United States v. Castanada*, 239 F.3d 978 (9th Cir. 2001).

177. *Id.* at 979–80. The women were offered, and signed, a one-year contract that paid a salary of \$3.05 per hour in exchange for a placement fee of 15,000 pesos (approx. \$500). *Id.* at 979. According to the plea agreement, when the women arrived in Saipan and began working at the club, they "were forced to line up for selection by male customers to accompany them to private 'VIP rooms' [where the women] were made to provide sexual services." *Id.* (quoting Plea Agreement). The defendant pled guilty to Mann Act violations but appealed her sentence. *Id.* The Ninth Circuit found the vulnerable victim enhancement inapplicable to Mann Act violations and vacated the sentence. *Id.* at 983. The dissent correctly highlights that the majority focuses on the original legislative history of the Mann Act, from 1910, which aimed to address transportation of "any woman or girl for the purpose of prostitution or debauchery, or with intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or give herself up to debauchery, or to engage in any other immoral practice[.]" ignoring the past twenty years of amendments to the Mann Act which suggest a much broader purpose." *Id.* at 984 (Silverman, J., dissenting); see also White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910).

178. *Castanada*, 239 F.3d at 982 n.8.

179. The Ninth Circuit stated:

The dissent also states that as a nonresident alien worker under Northern Mariana Islands law, "she could not work elsewhere." In fact, upon the filing of a valid labor complaint, a nonresident worker may be transferred to a new employer. If the women had left *Castaneda's* club to work illegally for a different employer, they would have been sent home. Either way, they were not, as the dissent suggests, "stranded in a foreign country" with no option to find a different employer.

Id. at 983 n.8 (citations omitted). Though I'm sure it was not the court's intention, it appears to suggest that "options" include illegal acts. Applied to

is striking for its lack of understanding of the experiences of individuals trapped in such situations.¹⁸⁰ The court appears to rely on the narrow, iconic victim-subject, and when these women did not fit that stereotype (e.g., no gun was pointed at their head), the courts rejects the possibility that they could be worthy victims.¹⁸¹

These and other cases¹⁸² reinforce the need to better account for the impact of otherness on legal responses to human trafficking. I do not suggest that we could eliminate Self/Other distinctions altogether but that we can mitigate the impact that conceptions of a devalued Other and glorified Self have on the evaluation of cases. To the extent that individuals or peoples are devalued or dehumanized, the legal process is compromised. Moreover, devaluation of victims' circumstances, experiences, and options in these cases reinforces and furthers the ongoing othering of certain peoples. When this othering is encapsulated in judicial opinions, the law reinforces a collective consciousness built on the Self/Other dichotomy.

In other words, from legislation, to law enforcement, prosecution, and ultimately judicial decisions, otherness permeates our legal efforts to combat trafficking and its

other situations, this would suggest a lawless society. But that is the key; there is no suggestion that such logic apply to other situations. Rather, the opinion represents foremost a lack of understanding of what individuals experience in exploitative circumstances and a tolerance for exploitation of the Other.

180. The court's suggestion that the women weren't "forced" to line up in order to be selected by men seeking sexual services because they were only "instructed" to do so would be laughable, if it wasn't so offensive. *See id.* at 983 n.8. These women were "instructed" by their employer. *Id.* If the court is suggesting that instructions from employers are merely optional, then it appears to be proposing a radical reconfiguration of the workplace.

181. Compare the more reasoned approach of Justice Brennan, writing that a situation of involuntary servitude may exist not only where there is legal or physical coercion, but that "certain psychological, economic, and social means of coercion can be just as effective as physical or legal means, particularly where the victims are especially vulnerable." *U.S. v. Kozminski*, 487 U.S. 931, 955 (1988) (Brennan J., concurring).

182. A full cataloguing of all cases would well exceed space limitations. But see also Sara Dillon's analysis of the Supreme Court opinion *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding portions of the Child Pornography Prevention Act of 1996 violated the First Amendment). "The idea that children might well have to pay with their lives for the protection of a freedom being imagined by the Court apparently does not deserve mention or the slightest consideration." Dillon, *supra* note 66, at 180. The issue in these cases is not the decision so much as the consideration, or lack thereof, of the Other.

attendant sex- or labor-related exploitation. Making significant, meaningful progress on these issues will take much more than just a continuation of current policies. The next section sets out considerations that, I submit, will foster a more effective approach to combating human trafficking.

IV. ACCOUNTING FOR OTHERNESS TO ADDRESS HUMAN TRAFFICKING

As discussed in the prior sections, otherness has the effect of shaping, and ultimately distorting, our understanding of the problem of human trafficking, which in turn leads to suboptimal legal responses to the issue. To begin to develop more effective responses to human trafficking, we must account for otherness in all aspects of anti-trafficking initiatives.

In recent years, new “mainstreaming” efforts are underway to foster gender equality and to fully account for the needs of children.¹⁸³ The Beijing Platform of Action launched a mandate for all governments and non-governmental actors to mainstream a gender perspective into all policies and programs.¹⁸⁴ As the ILO describes:

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres, so that women and men benefit equally, and inequality is not perpetuated.¹⁸⁵

Similar efforts have been advanced in the children’s rights

183. See, e.g., U.N. Office of the Special Adviser on Gender Issues and Advancement of Women, Gender Mainstreaming, <http://www.un.org/womenwatch/osagi/gendermainstreaming.htm> (last visited Dec. 27, 2008).

184. Fourth World Conference on Women, September 15, 1995, *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, U.N. Docs. A/CONF.177/20, A/CONF.177/20/Add.1.

185. ILO, Definition of Gender Mainstreaming, <http://www.ilo.org/public/english/bureau/gender/newsite2002/about/defin.htm> (last visited Dec. 27, 2008); see also World Health Organization, What is “gender mainstreaming”?, <http://www.who.int/gender/mainstreaming/en/> (last visited Dec. 27, 2008).

arena, including, for example, a children's rights sensitive approach to urban development.¹⁸⁶ The process involves contemplating the impact on children of any decision at any stage in urban planning and also involving children's perspectives in the process.¹⁸⁷

Drawing upon the principles of these and other efforts, I suggest that we need to develop a similar approach of mainstreaming the Other and the experience and voice of the Other. To be clear, mainstreaming does not suggest assimilation of views, but rather a full accounting and incorporation of the full range of perspectives of the Other. As a starting point and to facilitate the mainstreaming of the Other and greater awareness of the impact of otherness, I propose that the following seven questions be a part of any process for developing, implementing, monitoring and evaluating anti-trafficking law, policies, programs, or initiatives:

1. What impact will the law/policy/program have on subaltern communities?
2. How will the initiative address the Self's role in sustaining trafficking?
3. What impact do subaltern communities believe the initiative will have? What role will they have in developing the initiative?
4. Does the initiative account for both short- and long-term factors?
5. Does the initiative help the dominant groups come to better understand/know the Other?
6. Does the initiative reflect an appreciation of the common experience?
7. The "then what?" question.

Below I briefly discuss the value of each of the above questions in developing better responses to the incidence of human trafficking. Ultimately, these questions have utility in addressing other forms of exploitation, but I focus here on their impact on combating human trafficking.

186. See UNICEF, BUILDING CHILD FRIENDLY CITIES: A FRAMEWORK FOR ACTION (2004), available at http://www.childfriendlycities.org/pdf/cfc_booklet_eng.pdf.

187. *Id.* at 1.

1. *What Impact Will the Law/Policy/Program Have on Subaltern Communities?*

Developers of anti-trafficking laws, policies, and programs need to ask how subaltern communities and individuals will be affected. The impact of new anti-trafficking initiatives on historically disadvantaged individuals and communities, including persons of color, women, children, refugee and internally-displaced persons, and others, must be considered on an ongoing basis at every stage in the process.

So, for example, a legislative amendment that increases penalties for trafficking might be a welcome development, but ultimately it might have little or no impact on subaltern communities. I do not suggest that increasing criminal sanctions is not worthwhile given the grave nature of the human rights violations involved in human trafficking; rather if considered in the context of this question, such a step reveals itself to be insufficient.

As discussed above, government anti-trafficking programs have had a law enforcement approach, which fits well with current efforts to add further controls at the borders in current efforts to combat terrorism. Increased border controls limit the movement of people but do not address the conditions that exist at points of origin that lead individuals to seek to migrate. Increased border controls, in fact, might further constrain the populations they purport to help.

If meaningful progress is to be made, ultimately governments must address the reasons why individuals seek to migrate from their home communities. For many, lack of opportunity is a significant factor. Rural to urban migration over the past several decades is driven in part by declines in arable land and other conditions spurred by neoliberal economic policies.¹⁸⁸ Any new initiative must consider its impact on these communities and, for example, whether such initiative will increase pressure to migrate and, thus, increase vulnerability to trafficking.

Related to this, an assessment of the impact on the subaltern communities necessarily means asking the question of how bias shapes the initiative in question. For example, with respect to race-based bias, "[t]he question is not whether

188. See Shah, *supra* note 164, at 453–54.

race will be used, but how. Silence is concession to a use of race that will continue to blunt reform and stymie efforts to build a new movement for a fairer society.”¹⁸⁹ We have to acknowledge the ongoing othering of certain individuals, whether persons of color, women, the poor, or others considered outside the dominant political or social group. Ongoing othering also means that the privileging of some is continual unless we account for the impact on subaltern communities. And doing so requires asking not if but *how* bias against these communities is either addressed or further entrenched by a new initiative.

2. *How Will the Initiative Address the Self's Role in Sustaining Trafficking?*

Advocates working to combat human trafficking have called attention to the need to address the demand side of the equation.¹⁹⁰ Typically, however, demand-related issues are discussed only in the context of sex trafficking, and addressing demand is taken to mean holding customers of prostituted individuals accountable for the abuse and exploitation inflicted on the trafficked person. Again, while this step is important, it is not sufficient.

Addressing demand-side issues in a way that accounts for otherness means reexamining several commonly held beliefs. First, we need to rethink who is creating the demand and recognize that it is not only the pedophile or other sexually deviant outsider who creates demand, but rather the “everyman” (and on occasion female customers) when the issue is sex trafficking.¹⁹¹ Moreover, not only are individuals relevant in this consideration, but also societal factors. In other words, addressing demand for sex trafficking means examining broader societal views that promote the

189. Powell, *supra* note 37, at 360.

190. See, e.g., ECPAT-USA, ALTERNATIVE REPORT TO THE INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE RIGHTS OF THE CHILD CONCERNING THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION, AND CHILD PORNOGRAPHY 3 (2007), available at <http://www.ecpatusa.org/pdfs/AlternativeReportUSAFinal2007.pdf> (recommending the United States adopt a “proactive prevention program focused on the demand side of child sexual exploitation”).

191. See, e.g., *supra* notes 66–67 and accompanying text (detailing that most sex tourists are situational users and not stereotypical pedophiles).

acceptability of sexual exploitation and objectification of certain individuals.

Second, addressing demand means recognizing that trafficking is not restricted to trafficking for sexual purposes. Individuals are trafficked for a range of reasons, including forced labor. Who benefits from the forced labor? Essentially all of us who purchase goods made by companies that rely on or benefit from cheap, exploited labor.¹⁹²

It is certainly true that the individual who looks to purchase services from a prostituted individual is different from the individual who seeks to purchase a pair of basketball shoes in a department store. That said, it is similarly true that each of us may be reaping a benefit from the exploitation of others.

Finally, the role of the Self (or dominant group) on the supply side must be examined. When the root causes of vulnerability are examined, it must be asked what role the dominant group plays in entrenching inequality and heightening vulnerability of particular populations.

3. *What Impact Do Subaltern Communities Believe the Initiative Will Have? What Role Will They Have in Developing the Initiative?*

Much of narrative on human trafficking in the Global North relies on the perception of the Self as “rescuer” or “savior.” The current discourse on human trafficking tends to conflate poverty with lack of agency.¹⁹³ The resulting picture is that of a voiceless, helpless victim. That perception must change. Subaltern communities at risk must be involved in the development of initiatives. They offer insights that those who are part of the dominant power structure do not see or struggle to appreciate.¹⁹⁴ A student of international development can readily explain that sustainable development is only possible when the local community has been consulted with, has meaningful opportunity to

192. See Haynes, *supra* note 4, at 375 (“[A]ll people are complicit in the existence of human trafficking, because supply and demand do not simply exist; they are forces created through action and inaction on the part of state actors and interest groups.”).

193. Shah, *supra* note 164, at 442.

194. See generally Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008) (discussing differences in how whites and people of color perceive discrimination).

participate, and has bought in to the development plan.¹⁹⁵ Assisting communities at risk of human trafficking is similar. If those in the dominant power structure do not consult subaltern communities and allow them to shape solutions, anti-trafficking efforts will fail to realize their potential. Thus, if the United States and other Global North countries seek to improve their laws and programs on human trafficking, they must engage subaltern communities in the development of new law and policies.

Moreover, the first question above of how subaltern communities will be affected by a new law or policy cannot be answered solely by those in the dominant group in society. To do so runs the risk of preserving or reinforcing inequalities and marginalization while celebrating supposed progress.¹⁹⁶ In fact, each of these questions in this section must also be answered by the subaltern.

4. *Does the Initiative Account for Both Short- and Long-Term Factors?*

A number of scholars have highlighted the need for anti-trafficking initiatives to address both short-term and long-term factors.¹⁹⁷ Cameron and Newman write that efforts to combat human trafficking must account for both “structural” and “proximate” factors.¹⁹⁸ Structural factors include economic factors (e.g., globalization, poverty, market

195. Local community participation and buy-in is an essential component of any sustainable development project. See Ray Jennings, *Participatory Development as New Paradigm: The Transition of Development Professionalism* (2000), www.usaid.gov/our_work/cross-cutting_programs/transition_initiatives/pubs/ptdv1000.pdf; see also GUY BESSETTE, *INVOLVING THE COMMUNITY: A GUIDE TO PARTICIPATORY DEVELOPMENT COMMUNICATION* (2004).

196. See Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 644 (2008) (“[E]ven supposed transformation efforts may preserve existing hierarchies in a new guise, often with evolving rhetoric that sustains and legitimates hierarchy. As Kenji Yoshino observes, ‘[T]he status hierarchy may be preserved precisely because the rhetoric has changed, permitting social actors to tell a progress narrative that legitimates the status quo.’”) (citing Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 825 (2002)).

197. See Edward Newman & Sally Cameron, *Introduction: Understanding Human Trafficking*, in *TRAFFICKING IN HUMANS*, *supra* note 91, at 3; PAUL FARMER, *INFECTIONS AND INEQUALITIES: THE MODERN PLAGUES* 90 (1999); see also Todres, *supra* note 70, at 906.

198. Newman & Cameron, *supra* note 197, at 3.

economies, migration), social factors (e.g., inequality, discrimination and marginalization, prostitution), ideological factors (e.g., racism, xenophobia, gender and cultural stereotyping), and geopolitical factors (e.g., war, civil strife, conflict).¹⁹⁹ Proximate factors include: legal and policy aspects (e.g., inadequate national and international legal regimes, poor law enforcement, immigration laws, labor laws), rule of law (e.g., corruption, state complicity in supporting trafficking), and inadequate partnership between civil society and state (e.g., weak education campaigns, low public awareness, lack of state accountability).²⁰⁰ While I suggest that law and policy should also be considered a structural issue, Newman and Cameron's work draws important attention to structural issues in general. Anti-trafficking efforts must go beyond including only attempts to "rescue" individuals to address structural issues endemic to the problem.

This means reorienting the prevailing strategy from one that seeks only to prevent individuals from moving or being moved against their will across borders to one that prevents people from being moved against their will by addressing systemic issues and strengthening communities. As Newman and Cameron note, this does not mean ignoring proximate factors; both must be incorporated into anti-trafficking programs, policies, and law.²⁰¹

To date, insufficient attention has been centered on understanding why particular communities are more vulnerable to exploitation. Once the focus is shifted to underlying causes, we can begin to see, for example, that in conflict-affected countries, human trafficking "is also precipitated by the collapsed economic conditions . . . where women face extreme poverty, economic discrimination, and lack of sustainable incomes."²⁰² With limited or no resources, "women [and children] become easy prey for recruiters."²⁰³ Ethnic minorities are often particularly at risk, as

199. *Id.*

200. *Id.*

201. *See id.*

202. Lisa Avery, *The Women and Children in Conflict Protection Act: An Urgent Call for Leadership and the Prevention of Intentional Victimization of Women and Children in War*, 51 LOY. L. REV. 103, 110 (2005).

203. *Id.*

discrimination marginalizes and heightens vulnerability.²⁰⁴

Addressing structural factors also means looking at economic, social, and cultural rights, as they are crucial to strengthening communities. Lack of health rights, education rights, labor rights and other economic, social, and cultural rights push members of communities deeper into poverty and more risky situations. Fully valuing all rights requires overcoming the Western conception of a hierarchy of rights and the view that civil and political rights are more important than economic, social, and cultural rights.²⁰⁵ Structural issues—poverty, discrimination, lack of fulfillment of economic and social rights, and so on—present not just in day-to-day practices and relationships but also in the law.²⁰⁶ Accounting for short-term and long-term factors means reviewing current law to assess whether it fully accounts for both and building such a review into the development of future legal measures.

204. FARMER, *supra* note 197, at 90 (arguing in the context of Haiti that “[s]topping exploitative prostitution would require addressing poverty, gender inequality, and racism . . .”).

205. This is reflected most obviously in U.S. willingness (albeit reluctant) to become a party to international human rights treaties that cover civil and political rights (e.g., ICCPR, CERD, CAT) but its persistent resistance to recognizing social, economic, and cultural rights domestically or participate in any international treaties that recognize such rights (e.g., ICESCR, CRC). See also Penelope E. Andrews, *Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 VILL. L. REV. 855, 880 (2000).

206. See Bond, *supra* note 112, at 290 (“The constitutions of a handful of countries in the African Commonwealth contain provisions that specifically exclude family and customary law from constitutional non-discrimination protection.”). For example, constitutional non-discrimination protections in Lesotho do not extend to “marriage, divorce, burial, devolution of property on death or other like matters.” LESOTHO CONST. §18(4)(b) (1993); see also HUMAN RIGHTS WATCH, DOUBLE STANDARDS: WOMEN’S PROPERTY RIGHTS VIOLATIONS IN KENYA 16–24 (2003), available at http://www.sarpn.org.za/documents/d0000333/P313_Kenya_Report.pdf. Yet we know, for example, that lack of inheritance laws leads to property grabbing—the rapid claiming of property of a deceased individual before the authorities can ensure that assets are distributed to the rightful beneficiaries—which in turn leaves many women and children vulnerable to poverty and exploitation, including ultimately in some cases being trafficked. See Joanne Csete, *Several for the Price of One: Right to AIDS Treatment as Link to Other Human Rights*, 17 CONN. J. INT’L L. 263, 268 (2002) (“[P]roperty grabbing’ has been widely documented against children orphaned by AIDS and widows of AIDS sufferers.”); see also WHO & UNICEF, ACTION FOR CHILDREN AFFECTED BY AIDS: PROGRAMME PROFILES AND LESSONS LEARNED 7 (1994).

5. *Does the Initiative Help the Dominant Groups Come to Better Understand / Know the Other?*

If the international community is going to make meaningful progress in reducing the incidence of human trafficking, then it needs to better understand what makes a particular individual susceptible to being trafficked. This includes understanding that there is not a single profile of "victim" but rather that there is diversity of background, experience, and position in society.²⁰⁷

Too frequently, law and policy are developed from a reliance on anecdotal evidence of a few compelling cases (which resonates with lawmakers because such examples play on otherness-shaped ideas of the victims).²⁰⁸ Women in developing countries are often represented as "thoroughly disempowered, brutalized, and victimized: a representation that is far from liberating for women."²⁰⁹ This stereotype "recreates the imperialist move that views the native subject as different and civilizationally backward. The image that is produced is that of a truncated Third World woman who is sexually constrained, tradition-bound, incarcerated in the home, illiterate, and poor."²¹⁰ While it is true that many victims of trafficking have been disempowered in important respects, it is also true that other victims present very differently. Anti-trafficking strategies that assume all victims are "similarly oppressed" can have the unintended result of "perpetuating the exclusion of the very constituency they claim to represent, through cultural, religious, or sexual 'Othering.'"²¹¹

Human trafficking needs to be understood in the larger context of movement of persons globally, as "[i]n most cases

207. See Kapur, *supra* note 20, at 6.

208. See Charles G. Lord, Lee Ross & Mark Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 2098, 2098 (1979) (finding that people are inclined to accept "confirming" evidence at face value while subjecting "disconfirming" evidence to critical evaluation).

209. Kapur, *supra* note 20, at 18.

210. *Id.* For discussion of the "victim subject" in the context of violence against women, see *id.* at 18–22.

211. KAPUR, *supra* note 34, at 4. Kapur stresses, "[a]n engagement with the postcolonial world on issues of law, culture, and sexuality cannot be viewed primarily through a lens that constructs the Other exclusively in terms of his or her disadvantage." *Id.* at 10.

(including most cases of trafficking) this movement is motivated at least in part by the search for greater economic opportunity.²¹² Yet current protection-based legal responses continue to “reinforce assumptions that women’s movement is coerced and primarily for the purpose of sexual exploitation, and that women themselves are helpless victims, incapable of choosing to move.”²¹³ The fact that some men, women, or children might seek to move does not mean they cannot be trafficked. In fact, they still can. Law aimed at combating human trafficking must account for the fact that many individuals who are trafficked may have had an initial desire to migrate.²¹⁴

A more sophisticated understanding of subaltern communities and their experience is crucial to combating human trafficking. As Gayatri Spivak writes, “there is a distinction between the superficial desire to ‘learn about’ the Other and the desire to ‘know’ the non-West through conscious and assiduous study and participation.”²¹⁵ The dominant group must come to *know* the Other. This means hearing the diversity of voices and experiences of the Other, and hearing the experience of those trafficked so that the dominant group may come to better understand the impact of its actions on the marginalized.²¹⁶ Thus, at every stage of

212. Dinan, *supra* note 91, at 58.

213. KAPUR, *supra* note 34, at 9.

214. See Dinan, *supra* note 91, at 71.

215. KAPUR, *supra* note 34, at 5 (quoting Gayatri Spivak); see also Glibert Harman, *Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error*, 99 PROC. ARISTOTELIAN SOC’Y 315, 329 (1999) (“A greater understanding of the actor’s situation and how it contributed to the action can lead to a greater tolerance and understanding of others.”).

216. See Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 156–57 (1998) (“One important tool of feminist method has been the use of the personal narrative. As Professor Deborah Rhode has noted, ‘many feminist legal critics are . . . drawn to narrative styles that express the personal consequences of institutionalized injustice.’ It has been observed that personal narratives have the potential to perform functions that the dry reading of cases or empirical data cannot. Narratives can humanize a story, create empathy, and involve a reader emotionally in ways that other methods of describing a situation might never be able to do.”)(citations omitted); see also NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW (David R. Papke ed., 1991); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992); James R. Elkins, From the Symposium Editor, *Pedagogy of Narrative: A Symposium—Reflections on Storytelling and Narrative*, 40 J. LEGAL EDUC. 1 (1990); Darren Lenard Hutchinson, *Foreword*:

developing responses to human trafficking, a fundamental question must be whether the process is bringing us closer to *knowing* the Other.²¹⁷ By coming to know the Other, the dominant group is more likely to understand the impact of measures on marginalized communities and develop better ways to involve the Other in the development of anti-trafficking law, policies, and programs.

6. *Does the Initiative Reflect an Appreciation of the Common Experience?*

Nearly 150 years ago, Guiseppe Mazzini wrote that “[y]our first duties, first, not as to time, but as to importance—because unless you understand these, you can only imperfectly fulfill the rest—your first duties are towards Humanity.”²¹⁸ This call for a sense of the common experience has been obstructed by otherness, which serves to create a distance between the Self and the Other and to frustrate any

Critical Race Histories: In and Out, 53 AM. U. L. REV. 1187, 1207 (2004) (“Several Critical Race Theorists have utilized narratives in their research, personal or otherwise, and have urged legal theorists to incorporate narrative as a legitimate methodological tool.”).

217. A number of U.S. cities have adopted alternative approaches to punishing individuals who solicit prostitutes (e.g., john schools) in which customers must meet with and hear from a commercial sex worker to hear the other's experience. See, e.g., Michael Shively et al., *Final Report on the Evaluation of the First Offender Prostitution Program*, at iv–v (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/222451.pdf> (finding recidivism rates dropped significantly in San Francisco and San Diego following implementation of such program).

218. GIUSEPPE MAZZINI, *THE DUTIES OF MAN* 44 (Funk & Wagnalls Co. 1892) (1862). While Mazzini's language and thought reflected, in many respects, the nineteenth century European intellectual mindset, he also moved beyond that in recognizing the exclusion of at least one Other, by closing his famous book with a reminder to his fellow countrymen:

In bidding you farewell, I will remind you of another duty, not less solemn than that which binds you to achieve and preserve the freedom and unity of your Country. Your complete emancipation can only be founded and secured upon the triumph of a Principle—the principle of the Unity of the Human Family. At present day one half of the Human Family . . . is, by a singular contradiction, declared civilly, politically and socially unequal, and excluded from the great Unity. To you who are seeking your own enfranchisement and emancipation in the name of a Religious Truth, to you it belongs to protest on every occasion and by every means against this negation of Unity. The *Emancipation of Women*, then must be regarded by you as necessarily linked with the emancipation of the workingman. This will give to your endeavors the consecration of a Universal Truth.

Id. at 146.

development of a sense of a shared humanity. Instead, the Self and the Other are perceived as having little or nothing in common. To mitigate otherness' harmful effects, we need to bridge that gap and restore an understanding of the common experience. Martha Fineman has suggested this in writing about the "vulnerable subject" and arguing for reclaiming the term *vulnerable* to represent "a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility."²¹⁹ Acknowledging that vulnerability is universal, and only differs in magnitude and likelihood, means that it "cannot be hidden."²²⁰ Not only should this lead to a focus on institutional structures, it should help forge a better understanding of the common experience, feeding a desire to know the other, learn from the other, and to understand the impact of new initiatives on the other. And thus, the question must be asked of any new anti-trafficking initiative whether it reflects a sense of shared humanity, whether it addresses the experience of the vulnerable as we would want it addressed were we the vulnerable, as ultimately we all are.

7. The "Then What?" Question.

The final step is what I refer to as the "then what" question, which aims to provide a safety net in cases where the above questions do not result in a full accounting for otherness. When asked, we find that "solutions" often don't help but hurt, however well-intentioned.²²¹ Anti-trafficking initiatives in the Global North have, as described above, been shaped by the conception of the Global North as "rescuer." In these instances, the "then what" question is rarely asked. For example, when a victim of trafficking is "rescued," given

219. Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. LAW & FEMINISM 1, 8 (2008).

220. *Id.* at 10–11.

221. See Radha Iyengar, *I'd Rather be Hanged for a Sheep than a Lamb: The Unintended Consequences of Three-Strikes' Laws* (National Bureau of Economic Research, Working Paper No. 13784, 2008), available at <http://www.nber.org/papers/w13784.pdf> (finding three-strikes laws, which are aimed to protect society from criminals, increase likelihood that repeat offenders will commit more violent crime when they have two strikes already); see also Aaron Simowitz, *The Institutionalizing Effect of Criminalization: A Case Study of American Prostitution* (2008), available on SSRN (asserting that criminalization of prostitution had led to greater organization and institutionalization of the practice as an industry).

temporary shelter, and then repatriated to her home country, then what? If she returns to a community where there remain no opportunities for a life much beyond subsistence, then what? She is likely to look for other opportunities, as most of us would, and may be as vulnerable to exploitation as before. The same question must be asked when domestic victims of trafficking are removed from harmful settings and returned to their home communities.

The myopic view that “rescue” is the end goal often leads good intentions to produce bad results, and not only in the West. In 2005, the Indian province of Maharashtra adopted a new law banning dance performances in eating halls, permit rooms, and beer bars.²²² The law was justified on a number of bases, including protecting the dignity of women and protecting them from risk of being trafficked.²²³ While the law may have been well intentioned, “[f]orcing the women out of the bars would make them more vulnerable to being forced into sex work and subject to highly exploitative working conditions and violence.”²²⁴ Ironically, the U.S. government’s 2005 Trafficking in Persons Report commended India for adopting this law, reflecting its own failure to ask the “then what” question.²²⁵ Although the Bombay High Court struck down the law in 2006,²²⁶ this experience reflects the short-sighted approach that pervades many efforts to combat human trafficking; that is, simply take women and children away from “danger zones” and they will be fine. This approach fails to consider or account for what makes these individuals likely to find themselves in these circumstances in the first place or to provide social services and other programs necessary to empower trafficking victims to transition to a better life.

The “then what” question thus serves to ensure that, as we develop responses to human trafficking, we think through the implications of new laws and policies and their impact on communities and that we include a significant component that addresses structural issues and fosters sustainable

222. The Bombay Police (Amendment) Act, 2005 (Maharashtra Act No. XXXV of 2005), § 33A(1)(a) (2005).

223. Kapur, *supra* note 86, at 549.

224. *Id.* at 551.

225. See 2005 Trafficking Report, *supra* note 4, at 123.

226. Kapur, *supra* note 86, at 551.

development.

The above seven questions, I submit, offer a starting point for developing law, policies, and programs that facilitate mainstreaming of the Other and the views, desires, and experiences of the Other. As the prior discussion reveals, there is overlap in these questions. However, I view that as necessary. Many of the negative effects of otherness are difficult to root out because they are imbedded in implicit bias. As such, while there may be overlap in the above questions, they frame the issues differently, in such a way as to help elucidate the impact of otherness across multiple dimensions, so that new initiatives can address human trafficking in a manner in which the negative effects of otherness are minimized.

CONCLUSION

At the opening of this article, I described the *Lifetime* movie "Human Trafficking." Like many Hollywood films, in the end, the "damsels in distress" are rescued and supposedly all is okay now. That savior concept is ever present in current dominant narrative on human trafficking. It suggests that "rescue" is what is needed and when that is achieved, the job is done. The reality, of course, is that while getting an individual out of trafficking is an incredibly important step, the job has only just begun. So much more is needed in terms of short- and long-term assistance and programming. That is a much harder problem to tackle, one that demands that we look at root causes and also examine the role each of us plays—directly or indirectly—in supporting systems that allow exploitation of the Other to persist. It is only when each of us recognizes the true impact of otherness that collectively we can begin to move toward developing meaningful, sustainable solutions.

To develop effective responses to the problem of human trafficking, we need to transform our approach to this issue and related ones. As Kapur writes, "transformative politics can only emerge if we are willing to think from different locations and more creatively."²²⁷ Part of that requires truly

227. KAPUR, *supra* note 34, at 11. Doing so would require countering some engrained tendencies. See Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL.

getting to know the Other, hearing the voice of the Other, and allowing the Other to share in control of the process.

All of this will be deemed a tall task, even unrealistic, according to some. For the past several years, I have spoken at conferences and community programs about the need to address the root causes of human trafficking—including all forms of discrimination that involve othering. The most common critique is, “those are hard issues; they’ll take years to do anything about.” The critique is offered with an implicit suggestion that therefore we should focus on more “realistic” tasks, like increasing penalties for traffickers. I take the opposite view—overcoming discrimination and otherness are difficult, long-term projects, but that is all the more reason to start immediately. Traffickers have huge incentives; human trafficking is a multi-billion dollar enterprise.²²⁸ It won’t go away unless we take on these long-term challenges, as we continue to work on short term goals. Only by achieving meaningful progress on the systemic issues, including the operation of otherness, will we see a significant reduction in the incidence of human trafficking.

REV. 781, 783 (2004) (quoting G. Ichheiser, *Misunderstandings in Human relations: A Study in False Social Perception*, 55 AMER. J. OF SOCIOLOGY 39 (1949)) (“We tend to resolve our perplexity arising out of the experience that other people see the world differently than we see it ourselves by declaring that those others, in consequence of some basic intellectual and moral defect, are unable to see things ‘as they really are’ and react to them ‘in a normal way.’ We thus imply, of course, that things are in fact as we see them and that our ways are the normal ways.”).

228. See *supra* note 4.