

## **Contemporary anti-trafficking legislation in the United States**

This article details the passage and possible use of the Trafficking Victims Protection Act (TVPA), passed in the fall of 2000. Unlike previous legislation, which tended to focus exclusively on the sex industry, the Act's definition of trafficking has a wider scope, and also includes workers in sweatshops and other types of employment. Yet it manages to maintain a lurid image of the sex industry, both in its language and with its differential, even biased treatment of all forms of work within the sex industry. The differential treatment of the sex industry can be justified to some extent by the fact that not all sex work is legally deemed labor. However, the act fails to make the distinction between licit and illicit forms of sex work, thus potentially affecting the entire sex industry. Ramifications of this play out in the protections offered to victims, which exclude voluntary sex workers. This piece discusses the Act and some of the process that led to its passage. Additionally, it will cover the protections and assistance offered by the Second Violence Against Women Act (VAWA), which was attached to the Act as a rider. Other riders to this bill are not discussed.

### **Genesis of new legislation**

The Trafficking Victims Protection Act of 2000 (TVPA), was passed at a very specific time, a time of increased immigration,

increased publicity about trafficking in general and increased political action addressing violence against women. An early recent article addressing trafficking in women appeared in *The New York Times* January 11, 1998 and described the plight of Russian women in Israel. The pictures accompanying the article featured young, blond women. This and follow-up articles were remarkably redolent of the anti-semitism and xenophobia in the white slavery tracts produced a century ago (Donovan 2001, Connolly 1980: 60 and 116, Grittner 1990: 90, Langum 1994: 17-19). The term "white slavery" originally referred to wage labor and only later came to be associated with prostitution. White slavery was held to be a greater evil than black slavery (hence the distinguishing adjective) because white slaves "would grieve more" (Grittner 1990: 119). An earlier chapter discusses the racism inherent in the term, the history of previous "white slavery" panics and their impact on immigration policy. Alarm about white slavery is, however, far from being a thing of the past. Stories of Asian women trafficked into the U. S. to work in brothels and sweatshops never entirely disappear: the present political concern with trafficking, which ultimately led to the creation of new anti-trafficking legislation, is closely linked to the spread of media accounts of blonde, white women from Eastern Europe as victims of trafficking.

### **Passage of these Acts**

This discussion of contemporary American efforts to address trafficking in persons via legislation examines some of the issues discussed during the negotiating process, as well as the final documents. These issues include the hotly contested definition of trafficking and what level of protections and services should be provided to trafficked persons. Negotiations were often politically driven, with alliances formed and broken based specifically on these issues.

The history of recent bills that were initially introduced to address trafficking is long. These bills have gone through numerous versions and each has had great changes, ultimately becoming the Trafficking Victims Protection Act. Initial versions of the bill were drafted by Senator Wellstone, widely regarded as the most liberal member of Congress. The drafts were read by sex workers' and other advocates, including the International Human Rights Law Group and independent scholars. Their comments were well received. Based on these comments, trafficking was expanded in some versions to include labor abuses both within and without the sex industry. As other legislators became more aware and active, the definition again became contested. Some later versions of the bill saw the definition reduced once again to trafficking for sexual purposes. In the final version, the bill has two levels of traffic in persons, one specifically involving force and another involving

exclusively voluntary sex work.

This would seem to be a workable compromise but it is not without problems. By making a distinction that features extreme abuse on one hand, and sex work on the other, the bill implicitly classifies all kinds of sex work as abuse. Such a classification leaves the Act open to misapplication in much the same way as the Mann Act, which was used disproportionately against the women it was intended to protect. The appeal of this compromise for legislators, however, can be seen in terms of public relations: they were able to be seen to be taking a stand against trafficking while, at the same time, not seeming soft on crime and appearing morally "upright." The need for legislators to be perceived as morally "correct" is a major factor in promoting the specific treatment of the sex industry as different from other industries. This will be discussed in greater detail later in this chapter.

TVPA itself was not a controversial act and enjoyed wide popular and congressional support. Congress largely wanted to pass legislation in light of the growing concern with trafficking in persons and this version of the bill was amenable to many. It was in fact so amenable that lawmakers including Senator Orrin Hatch, one of the most conservative members of Congress, chose to sponsor the bill with Wellstone, which certainly facilitated the passage of TVPA with wide, bipartisan support.

One issue that was potentially controversial was TVPA's stance on labor. Conversations with the staff of Senator Strom Thurmond, another very conservative member of Congress, about this bill before its passage focused specifically on the labor aspects. The Senator and some of his colleagues were concerned not to pass a more general labor bill, preferring instead to address trafficking in persons as an issue involving only the most extreme abuses of labor so as to maintain the support of the business community.<sup>1</sup> Sweatshop owners have been charged with trafficking for ill-treatment of foreign workers; corporations who purchased from them, including such large names as Donna Karan and Gap, have been sued for back wages for unpaid sweatshop workers (*AsianWeek.com* 2000, *Sweatshop Watch* 2001). Other businesses anticipated similar threats if the bill were to become a more general labor bill. So long as TVPA was not viewed as a general labor bill, the only source of potential controversy was likely to come from riders attached to the bill.

TVPA had a dramatic passage, even though the bill itself was uncontroversial. The controversy surrounding the bill's passage was indeed the product of riders attached to the bill for political reasons.

Riders, in U. S. law-making, represent an opportunity to  
<sup>1</sup> Conversations with Thurmond's staff in my lobbying capacity with the Human Rights Caucus, 2000.

compromise or to stonewall. Attachment of riders to a bill typically indicates either that the bill to which riders are attached has a good likelihood of being passed – certainly a better likelihood than that of the riders which have been fastened onto it – or that there is a political compromise in the making. The riders attached to TVPA included the second Violence Against Women Act (VAWA), which was so uncontroversial as to be passed without amendment, and the much more hotly contested bill to forbid sales of alcohol on the Internet, sponsored by Senator Hatch. This latter was eventually removed after a great deal of debate, specifically in order to allow TVPA and VAWA to be passed. Had this rider not been removed, it could well have jeopardized the passage of TVPA and all its riders, including VAWA. While some of the bills attached as riders might have found another possible route through Congress, because TVPA was debated at the very end of Congress's 2000 session, VAWA and some other riders would have had no further chance of passage. As will be shown later, VAWA holds important statutes for trafficked persons.

### **Details of the Trafficking Victims Protection Act**

TVPA is far too long to address paragraph by paragraph. I will thus address only certain specific aspects of this law including the purposes and findings sections, the definition of trafficking and the protections conditionally offered to trafficked persons.

The Trafficking Victims Protection Act of 2000 (TVPA) opens with findings describing proliferation of the problem of trafficking in persons especially into the sex industry, and recognizes that there is no legislation specifically intended to combat this problem. It then lays out definitions, assistance to victims, penalties for traffickers and pertinent foreign policy. This chapter will give a brief summary of each of these sections, and discuss their implication and motivations.

### **Purposes and Findings**

The "Purposes and Findings" sections in TVPA offer insight into the trafficking framework used here. I am particularly interested in the ways this document addresses trafficking into the sex industry and how it has expanded the definition of trafficking away from the use of the Mann Act of 1910 with a broader definition that includes other industries. Even so, it maintains a somewhat lurid focus on the sex industry with its troublesome distinctions between "serious forms of trafficking" and "sex trafficking." A common understanding of this issue would probably hold any form of trafficking to be a serious violation of a person's autonomy.

Section 102 (b) (2) reads

Many of these persons are trafficked into the international sex trade, often by force, fraud, or coercion. The sex industry has rapidly expanded over the past several decades. It involves sexual exploitation of persons, predominantly women and girls,

involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services. The low status of women in many parts of the world has contributed to the burgeoning of the trafficking industry.

This rhetoric has little bearing on the direct effects of this legislation, but foreshadows the definition of trafficking and the conditions for protections and assistance to come later. The following paragraph, 102(b) (3) reminds us that "[t]rafficking is not limited to the sex industry" and "includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide."

The focus upon women and girls, as in the United Nations Optional Protocol addressing trafficking in persons, highlights a viewpoint in which women are duped victims of trafficking while men are possibly more criminal in their intent but less likely to be so duped. Some of this is reflected in statements which exclude men, such as "Approximately 50,000 women and children are trafficked into the United States each year" (from section 102 (b) (1)) and "Current practices of sexual slavery and trafficking in women and children are similarly abhorrent to the principles upon which the United States was founded" (from section 102 (b) (22)). The figure of 50,000 people in section 102 (b) (1) is from a CIA report (Richard) that includes men. The report also talks about trafficked men, but neither it nor the TVPA given any estimate of numbers.

Government offices are consistent in emphasizing women while downplaying the issue of trafficked men. The statements also clearly identify women and children as the people that the report writers and the drafters of the legislation had in mind. This paternalistic attitude has the side effect of rendering men invisible. Trafficked men are acknowledged to exist, but after this acknowledgement they are invisible in these reports and legislation. This echoes the United Nations Trafficking Protocol with its constant refrain, "especially women and children" and reflects the perception that trafficking is something that happens to women and children. In this view, women and children are necessarily victims, but men are not and can not be. The U. N. Crimes Commission completed two Optional Protocols, one addressing trafficking in persons, and the other addressing alien smuggling. The Trafficking Protocol was initially intended to address "Women and Children" and was only later amended to read "Trafficking in Persons, Especially Women and Children," while the Smuggling Protocol addresses men, women and children. The fact that it has no such coda, unlike the trafficking Protocol, may indicate that in the minds of its drafters, it initially addressed men.

This view of women and children as victims is further expressed in the consistent emphasis on the sex industry, which takes precedence over consideration of other, broader aspects of

trafficking. This is reflected in the TVPA's own categorical breakdown of trafficking into sex trafficking and serious forms of trafficking. The term "trafficking in persons" covers men and women and children, who may be trafficked for migration and labor purposes of all kinds (Asia Watch 1993, 1997a, 1997b; Richard 2000), but what captures the minds and imaginations of the media, the general public and policy makers remains the specter of women and children trafficked for purposes of sexual slavery. Such a simplistic and narrow view further disregards evidence that people trafficked are not necessarily or even usually involuntary or duped participants (Finkel 2001, Lin 1998, Kempadoo and Doezema 1998), that they work in many industries and that trafficked persons come in all genders.

## **Definitions**

Let us examine the definition of trafficking in persons used in the TVPA with the variety of experiences of trafficked persons and the focus on sex exhibited in the Purposes and Findings specifically in mind. The definition must be understood with reference to a consistent assumption within the act that commercial sex and the sex industry are not to be condoned or tolerated, much less approved, as in the Purposes and Findings. Thus each mention of trafficking includes sex trafficking and serious forms of trafficking, with aspects related to the sex industry preceding any discussion of

more general trafficking for recognized labor or services. This bias against the sex industry will be discussed at length shortly.

Section 103 (3) says "The term 'commercial sex act' means any sex act on account of which anything of value is given to or received by any person." Section 103 (8) defines severe forms of trafficking in persons as

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

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

This makes the use of force and/or deception a necessary condition for any activity to be considered a serious form of trafficking in persons. Considering employment more generally, this is entirely reasonable. In the absence of force or deception, advertising for or hiring an employee would not normally be considered criminal.

The drafters of the legislation were obligated to treat sex work as a separate case for practical reasons. A definition of "trafficking" that defines trafficking simply as forced labor must exclude prostitution, on the grounds that prostitution is not recognized as a form of labor. Accordingly, a double-headed definition that brings both recognized and non-recognized forms of labor (i.e. prostitution) under the single heading of trafficking is required.

While "serious forms of trafficking" address all situations of

abuse, "sex trafficking" was used to include all forms of sex work, licit or illicit. Section 103 (9) defines sex trafficking as "the recruitment, harboring, transportation, provision, or obtaining of a person for a commercial sex act." Such a definition seems overly broad. On the one hand, it can be applied – redundantly – to activities that are already defined elsewhere as criminal, such as "procuring another for prostitution." On the other hand, it could also be applied against non-proscribed activities, such as advertising for legal work in the licit sex industry (i.e. stripping), or marriages in which one party is guaranteed any kind of dowry, property, or gift upon marriage.

### **Why "serious forms" and "sex" trafficking?**

There are advantages and disadvantages to treating sex work including prostitution separately. If all sex work were recognized as labor in the U. S., a separate treatment would be unnecessary. So long as some sex work remains unrecognized, this exclusion is a very good legal reason to address the sex industry separately. The term "trafficking" refers to both the sex industry and to recognized forms of labor, making it legally necessary to address prostitution separately. If trafficking is defined as forced labor or labor in slavery-like conditions, the fact that prostitution is not a recognized form of labor would automatically exclude it from the definition of trafficking. Additionally, the exclusion of illicit sex work from

recognized labor creates a paradox, in that while illicit sex workers are actually working, they are unable to access the protections afforded by Occupational Safety and Health Standards, Workmen's Compensation, and this legislation.

The two-tiered definition of trafficking that includes all sex work, regardless of the presence or absence of abuse, greatly compromises sex workers' rights. It denies sex workers the autonomy to choose employment in the licit sex industry and potentially criminalizes all sex work, including even currently legal activities such as stripping and producing pornography. Workers in the licit sex industry do not consider themselves to be "trafficked persons" unless they are also subjected to violations such as coercion or slavery-like conditions. The stipulation of slavery-like conditions is in keeping with other labor-oriented laws and bodies including Workman's Compensation, unions such as the Exotic Dancers Alliance and Occupational Safety and Health Standards (OSHA) that apply to sex work. TVPA could potentially *remove* legal protections for workers in the licit sex industry. This is because the employment relationship in the U. S. is legally interpreted as a type of contract, and contract law mandates that contracts to perform illegal acts are void. If TVPA is used to prosecute licit sex industry employers for trafficking in persons, the licit sex industry may become illicit. OSHA and other protections are unavailable to

workers whose trade is legally proscribed.

The differential treatment of prostitution remains problematic. In the specific case of the TVPA, the separate treatment means that protections offered by the legislation are not available to people trafficked into prostitution. As an example, the option to sue employers for back pay – seen in other trafficking cases – is not available to prostitutes, because their "work" is not recognised as such. In cases involving prostitution, this is impossible because without recognizing prostitution as work, there are no legally recognized back wages. Therefore, in trafficking cases involving prostitution other strategies for prosecution are sought.

Recall that "serious forms of trafficking" include all situations involving children or physical violence. Victims of serious forms of trafficking are able to avail themselves of the protections and assistance afforded by this Act, while sex workers are defined as victims of sex trafficking, without the use of force, but excluded from any assistance or protections. As these would be voluntary sex workers, it is only in severe conditions that they would be deemed victims of "serious forms of trafficking." This is so widely defined as to include licit businesses advertising for strippers, dancers, and porn models. The problem is twofold: first, a person can elect to be a prostitute or sex worker, and still be a victim of trafficking (because working conditions are not acceptable, for instance). Sex

workers do not see themselves as victims unless there is abuse, but TVPA deems them victims. The second problem is the impact on others who are not trafficked, but possibly to be tried for trafficking, i.e. the owners and operators of technically legal sex industry operations that may be prosecuted under trafficking law for advertising for employees. This essentially punishes sex workers for their occupations.

Focusing only on the sex trafficking aspects of trafficking would be misguided and dangerous. The CIA report (Richard 2000) covers 18 cases, only half of which are related to sex trafficking. The TVPA's definition is broad enough to cover all these cases. Unfortunately, by continuing to treat sex trafficking as a separate case - and repeating the old sensationalist attitudes and "moral" distinctions applied to sex trafficking - it deprives people trafficked into sex work of essential protections. TVPA cannot remedy the omission of a criminal act from employment and labor protections. However, the specific inclusion of all sex workers in TVPA could have been used specifically to avoid just this legal exclusion. TVPA instead singles out the sex industry in a way that hinders the rights even of licit sex workers. The distinction made by the Act is essentially the old distinction, relying on archaic stereotypes, between good women to be rescued and bad women to be punished. It remains to be seen how enforcement will follow.

## **Protection, prosecution and punishment**

Trafficking in persons is a human rights violation of the highest order and is a crime composed of other crimes. All recent legislation against trafficking in persons is largely prosecution-oriented and protections and assistance for victims are linked to cooperation with prosecution efforts. Efforts to assist prosecution of criminals are a political asset; no politician wants to be seen as "soft on crime," least of all organized crime. Domestic anti-crime efforts include increased sentencing for some forms of trafficking. Because successful prosecutions require witnesses, some protections and assistance are made available to trafficked persons, although this does not enjoy the political support associated with more direct anti-crime measures (i.e. prosecutions of organized crime or drug dealers).

### **Punishment of individuals**

TVPA stipulates punishment for individuals involved in trafficking in persons. TVPA sanctions are applicable to people *suspected*, not yet convicted, of severe forms of trafficking in persons (section 111 (d)). This creates a category of people who are not "innocent until proven guilty" in American cliché but who may be punished without conviction. These sanctions may include denial of visas to enter the U. S. and seizure of assets within the U. S.<sup>2</sup> The

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<sup>2</sup> Seizure of assets is applicable to U. S. citizens as well as non-nationals.

consular office or the Attorney General have the responsibility of determining the individuals subject to the terms of the Act. Who will be sanctioned and what actions will be taken are to be determined by the President (111 (b) (1)). It would be impossible to use only convictions from other nations to determine whether an individual has committed the crime of trafficking in persons, as it has been noted that "[i]n some countries, enforcement against traffickers is also hindered by official indifference, by corruption, and sometimes even by official participation in trafficking" (section 102 (b) (16)). Unfortunately, this does leave open the possibility that the specific reports (sometimes classified, section 111 (b) (3)) to determine and designate suspects may be used with bias.

Section 112 strengthens laws addressing prosecution and punishment of traffickers, in some cases by amending existing laws. This includes adding separate sections, numbered 1589-1594, to Chapter 77 of title 18, U. S. Code. Section 1592 (a) (3), "Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor" makes it a crime punishable by up to five years imprisonment or a fine to confiscate, destroy or otherwise deprive a person of their travel documents "to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person ...."

This makes it a crime to withhold or destroy a person's passport or other documents. This is an aggravated form of theft and should be so treated. However this statute specifically refers to situations in which a person is not allowed to leave, situations in which a person's mobility is intentionally restricted. In some cases this would be akin to kidnapping. The statute goes further and links this restriction to the purpose of servitude and forced labor - in other words, slavery. This language, including "purpose" means that the "mens rea" or intent to force labor must be proven in court as well as the acts themselves.

Such action is more than appropriate to the crime of trafficking, which often involves the attempt to gain control over another by limiting their movements including theft or destruction of travel papers. It is the single most important aspect of this anti-trafficking legislation, as the serious forms of trafficking are already defined by other crimes, i.e. kidnapping, fraud and slavery.

Section 1593, "Mandatory restitutions," provides restitution to trafficked persons by payment of wages or losses incurred. This is an extremely important provision, but by specifying wages this excludes prostitutes, which is ironic in the light of the Act's focus on the sex industry. As previously discussed, prostitution is not recognized as labor and therefore not subject to payment of wages under the law. The Department of Justice has sought damages for

trafficked prostitutes in the Northern Mariana Islands.<sup>3</sup> It remains to be seen whether this will still be possible in light of this new legislation.

### **TVPA and the licit sex industry**

The definitions of trafficking given earlier are likely to have a potentially significant impact on the sex industry in both its illicit and licit forms. Recall that a "commercial sex act" means "any sex act on account of which anything of value is given to or received by any person" (section 103 (3)) and that sex trafficking is defined as "the recruitment, harboring, transportation, provision, or obtaining of a person for a commercial sex act" (section 103 (9)). This opens the possibility that trafficking law might be applied both to activities that are already criminal, such as pandering, and to activities which are currently legal, such as stripping. Only the sex industry is singled out for this exceptional treatment. No other industry is addressed as comprising trafficking in and of itself, not even those in which trafficking is a clear and documented problem such as sweatshop work and domestic labor (Richard). "[T]he recruitment, harboring, transportation, provision, or obtaining of a person" for a technical job, a trade, or menial labor, would never be considered trafficking without the additional condition of force or deception. This discrepancy highlights an anti-sex bias and a conflation of

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<sup>3</sup> Human Rights Caucus meeting with the Department of Justice, 2000.

prostitution and trafficking.

Sex trafficking as defined in this new law does not include coercion, and defines a commercial sex act as one in which there is any exchange or reward for any party. This is a very broad definition of commercial sex, broad enough perhaps to encompass casual sex and conventional dating wherein a woman is taken to dinner by a man, perhaps followed by sex. It could even include many marriages. In this way, it is a return to the original 1910 Mann Act, which was only amended by the sexually conservative Meese Committee in 1986 to apply exclusively to illegal activity rather than to the "immoral activities" referred to in the original language. The Mann Act was sometimes applied to people who were, to modern sensibilities, dating (Langum 1994). Outright prostitution, an agreed upon exchange of a specific amount of money for specific types of sex, was not made illegal until later.

Historical experience has shown that laws focusing on prostitution and sex work invariably have greater effect on women than men (Gilfoyle 1992, Hobson 1987, Walkowitz 1983). Laws addressing sex work are not conceived with male sex workers in mind, nor are they usually so enforced. Even the Mann Act, which purported to protect women, was extensively used against them (Langum 1994, Grittner 1990). I fear that this focus on sex will again be used against women and render trafficked men invisible.

How could the TVPA, affect the licit sex industry? Some strip clubs maintain apartments for use by traveling dancers. Would this suddenly constitute sex trafficking as harboring a person who will perform a commercial sex act? If so, this service for traveling entertainers could be punished by 20 years imprisonment. Such ambiguity should be addressed before grave unintended consequences occur. There is legal precedent for this in a case in which the owners of The Playpen, a New York City peep show, paid for the round-trip air tickets of two women from the Czech Republic to come and work for them in New York. The women worked as nude dancers. All their expenses were paid, and they were not held in debt bondage or servitude. Nevertheless, the owners were prosecuted (under immigration rather than trafficking law), and news coverage related the story of "Girls Forced to Dance Naked" (Grant and Soderlund 1998).

The definitions in the Act view any act of commercial sex as trafficking, based upon the attendant activities of finding clients or prostitutes. This could include advertising or working with a partner.<sup>4</sup> Given the severity of penalties for trafficking, the question of what constitutes a commercial sex act is of considerable importance, and here the law is unclear. Is a client who tips a dancer in a go-go bar paying for a commercial sex act? Might the distinction

<sup>4</sup>Some sex workers prefer to not to work alone because they believe it is safer to work with others.

be made in terms of the amount of clothing worn or not worn? Recently-enacted legislation in New York requires (formerly topless) dancers to wear tops. A conviction for the serious crime of trafficking might thus hinge on as small a detail as whether the dancer is topless or not. Dancers in some clubs use latex painted over the nipples to evade regulations requiring tops. Such points of detail become of enormous importance if they become relevant to determining whether a "commercial sex act" has taken place or not, and thus whether a client might be open to prosecution under trafficking law. The application of this statute to non-violent clients of voluntary prostitutes and other sex workers would be a travesty of justice. The recent innovation of "John School," in which men convicted of soliciting prostitutes are berated for a day and pay a \$500 fine (Nieves 1999) to have the incident removed from their records is positively lenient by comparison.<sup>5</sup>

As noted previously, it is even conceivable that – according to the letter of the law – certain marriages would fall within this definition, much as occurred under the Mann Act. Every religious conception of marriage includes sex, and much religious tradition about sex is aimed at ensuring the conception of children, which necessarily requires some form of sexual intercourse to take place.

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<sup>5</sup> Alternatively, could corrupt police officers and other law enforcement personnel who extort sex from women they arrest and charge with prostitution be tried as traffickers because they coerce sex from prostitutes? (Flynn 2001).

Marriage is so entwined with sex that in many states there is no possibility of prosecuting marital rape – rape within marriage is not a crime because marriage is assumed to guarantee sexual access. Following from this and from the terms of the TVPA, any marriage involving an exchange of presents for the accepted promise of the conjugal connubial bed could be viewed as trafficking. Anna Nicole Smith's marriage to an elderly billionaire, by which Smith became the heir to her husband's fortune, is one marriage that might possibly be prosecuted as an instance of trafficking (Jablon 2001). So is the prenuptial agreement of cinema stars Catherine Zeta Jones and Michael Douglas, by which Jones will receive \$1 million from Douglas for every year of marriage should the pair split up. Given the financial incentive<sup>6</sup> involved, should Mr Douglas thus be prosecuted for trafficking? Will the giving of wedding presents suddenly transform every marriage into a felony?

These are extreme, even seemingly absurd examples, but they expose the inherent absurdity of the law. By focusing on the notion of "commercial sex acts," the Act attempts to revive the age-old distinction – an unnecessary distinction – between “good” women and “bad.” The irony is that the application of the law’s own definition of commercial sex act might potentially transformed

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<sup>6</sup> Incentive here is ironic: the agreement was forged in order to avoid the situation of Douglas' recent divorce, in which he ceded \$44 million to his former wife. (Associated Press Television News 2000, Towndrow 2000)

some “good” (i.e. married) women into “whores!”

## **Protections and assistance to trafficked persons under TVPA**

Although there are grave flaws inherent in TVPA, there are some positive features of this Act. These include the protections and assistance provided for trafficked persons, limited though they are. Most protections and assistance granted to trafficked persons under TVPA are guaranteed only for the time necessary for prosecution and are geared towards law enforcement’s need for witnesses. The TVPA does not distinguish between U. S. citizens and foreign nationals, yet the protections are available only to foreign nationals. What happens to Americans trafficked within the U. S.?<sup>7</sup> Will they be offered witness protection? As a measure designed to promote cooperation with the authorities, this is unlikely to prove adequate, especially for foreign nationals: many people worried about eventual deportation will always fear retribution, both toward themselves and their families at home. The protections and assistance provided by the TVPA, section 107, include 5,000 visas annually, designated "T" visas (section 107 (2) (e)). These visas are only for those who cooperate with the prosecution, and only for victims of severe forms of trafficking (section 107 (b) (1) (A)). They are not offered

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<sup>7</sup> For example, U. S. national Jo Weldon discussed being trafficked to sell magazines for the Union Circulation Company of Texas. Union Circulation was closed down for this. Weldon discussed this in her presentation at the Beijing + 5 conference in New York, June 2000.

to trafficked persons who have entered the sex industry voluntarily (note that a person may choose to work in the sex industry, but then be deceived or coerced into working in ways or in conditions that are not of their choosing, and their freedom of movement or freedom to leave may be restricted: their original choice of activity may have been voluntary, but they are nonetheless victims of trafficking), but only to those who have been forced into either the sex industry or other labor. The allocation of 5,000 does not include visas for family members who may legally enter the U. S. (section 107 (2) (e) (2)). After five years residence in the U. S., the holder of a T visa may apply for permanent residency.

The Act itself uses the CIA figure of 50,000 women and children trafficked into the U. S. (Richard 2000), thus making visas available for one-tenth those who might possibly be eligible, subject to their meeting the criteria of the use of force and their cooperation as witnesses for the prosecution (see section 107 (b) (E)). Ten percent may be accurate and adequate for the numbers who meet these requirements, although in light of the sheer numbers reported by the CIA, 5,000 visas may prove inadequate to the task of ensuring credible witnesses for prosecution of all trafficking cases.<sup>8</sup> Successful prosecution of traffickers, however, depends crucially on the availability of credible witnesses. In

<sup>8</sup> This figure assumes that the government will not find the majority of trafficked people in the U. S.

recognition of this, the final version of the Act includes provisions that recognize witnesses as victims of crime and worthy subjects for protection, with a view to encouraging them to take the stand. Such assistance is exceptional as many witnesses are immigrants, often illegally in the U. S., and therefore very afraid of any arm of law enforcement agencies.

The fact that trafficked persons can be considered criminals as well as victims raises numerous complex issues. Protections for victims of crime are a political hot potato when the victims themselves may be criminals. In the case of trafficking in persons, victims may include illegal aliens and sex workers engaged in illegal activities such as prostitution. The legal response to such people may vary greatly: in some cases, their status as victims is recognized and their rights protected; in others, they may be subject to immediate incarceration or deportation.

Deportation and/or incarceration hinders the pursuit of justice by depriving prosecutors of witnesses and discouraging any cooperation with the authorities. For this reason, not only the definition of the crime of trafficking in persons, but also protection of the rights of victims is of great concern to advocacy groups. However, such issues do not usually fall within the political aims of legislators. Trafficked persons may be seen as undesirables, even more so than their traffickers as they do not have the advantages of

money or citizenship that traffickers may have.

Promoting adequate protections for victims of trafficking carries a political liability for politicians for two main reasons. The first has to do with immigration. At the time the TVPA was passed, the U. S. enjoyed some of the lowest unemployment rates in years, leading last year to the addition of 70,000 H1B visas for employment of skilled immigrants.<sup>9</sup> Moreover, the U. S. was itself founded on immigration, and the concept of migrating in search of a better life – as exemplified by current immigrants, especially illegal immigrants – is very much part of the national tradition. Despite this, current residents of the U. S. do not generally welcome new immigration. As a result, legislators do not willingly risk being seen as advocating overly open immigration policies (which may include providing protection for trafficking victims), or failing to do enough to protect U. S. jobs.

Secondly, legislators are afraid to be seen as "soft on crime." Protections and assistance for people who may have committed crime is still a difficult political issue. At the very least, trafficked people are likely to be guilty of having entered the country illegally; if they work in the sex industry, they may also have engaged in other activities that are currently classed as criminal. Reflecting this, the Act specifically excludes voluntary sex workers from the protections

<sup>9</sup> Consultation with Virginia Carstens, attorney with the Florence Immigrant and Refugee Rights Project, September 2001.

provided (section 107 (b) (C)).

The inherent bias of the Act (and its authors) against the sex industry is made clearer in the discussion of protections and assistance for trafficked persons. Protections and assistance are made available for “victims of serious forms of trafficking” without mention of the less serious form of “sex trafficking.” The provision of visas leading to permanent residency for those who act as witnesses for prosecution of traffickers includes a stipulation that the grantee "has, throughout such period, been a person of good moral character" (section 107 (b) (2) (f), appended as (1) (1) (B) to an immigration act, (8 U.S.C. 1255)). This is usually interpreted to mean that the applicant has committed no crimes during the U. S. immigration process and frequently prior to beginning the immigration process.<sup>10</sup> However, this can be used to deny these visas to sex workers. This implies that only those who have not chosen to be prostitutes or other sorts of sex workers will be eligible for any assistance and that no voluntary sex workers will be eligible for permanent residence. The double standard is evident: the law defines sex workers (voluntary or not) as victims of trafficking simply because they are sex workers; simultaneously, it denies them the right to protection – for the same reason!

The definition of trafficking itself reflects a double standard.

<sup>10</sup> Consultation with Virginia Carstens, attorney with the Florence Immigrant and Refugee Rights Project, September 2001.

Sex trafficking as defined by the Act involves no activity which would be considered a crime in the context of any other business, much less any activity that merits the same level of concern as any situation involving force, deception or coercion. No other business, from large corporations to the corner sandwich shop, could be penalized simply for advertising for employees. The underlying assumption is that the sex industry is inherently "bad" and "sinful." From that, as the language of the Act shows, those who participate in it voluntarily are also "bad," and less deserving – in fact, undeserving – of protection. The age-old distinction between "good girls" and "bad girls," between innocent victims and wilful participants, surfaces once again.

**What does this binarization signify for trafficked persons, sex workers and women in general?**

This binary system of classifying women as good or bad is ultimately a rehash of the long-standing and too familiar “madonna-whore” dichotomy. Ellen Willis compares sexual morality and its options for women to a “good cop-bad cop” scene, in which marriage, motherhood and traditional feminine roles function as the “good cop” while rape and the threat of it function as the “bad cop” awaiting women who do not toe the line. This kind of morality is what prompted Dierdre English (1984) to write that “[i]n the past, the community of women has often been hard on those who 'give

away' for free - or for money - what the rest trade for love and marriage" (480). This type of divisiveness is, sadly, still visible not only in general society but within feminism.

Throughout my experience with organizations addressing trafficking, reading feminist and law enforcement reports about the sex industry, the question that continually surfaces, whether merely hinted at or asked outright, is how to discern innocent victims forced into the sex industry against their will and subject to the lust of evil men, from evil, meretricious prostitutes and gold-digging sex workers untroubled by the nasty demands of male lust. This question could be more clearly stated "how will we know which ones to punish as whores and which ones to protect as martyrs?" This is what Gail Pheterson refers to as "the whore stigma" (Pheterson 1996).

At an April 2001 planning meeting for the United Nations Special Session on AIDS, one attendee, a member of the clergy, repeated that stigma about HIV and AIDS is tied to transmission, which is linked to sex and therefore to sin. Aside from the grave issue of HIV transmission, this sexual stigma also applies to sex work and other perceived immoral acts. The language of TVPA is a clear transformation of this moral outlook into legal language.

TVPA is a return to earlier, sexist values. Women have worked very hard to overcome this good/bad binarization but TVPA has

retained it. At the very end of the 20th century, a major piece of legislation still makes the separation between good women, who deserve protection and assistance, and bad, who will be jailed and deported. The limitations of either aspect, both madonna and whore, cannot compare to a freedom from this dichotomy in which women would be judged as people, referring to their achievements rather than their perceived sexual morality. This moral division is purely in keeping with the perception of women as in need of protection rather than empowerment. It is in keeping with an ideology that lumps “women and children” together as beings in need of protection, and one in which women who do not toe the line are to be punished for their infractions rather than seen as reasonable, self-determined adults. It is a patronizing, infantilizing, patriarchal and misogynist way of thinking. It is critical for feminists and their supporters to recognize from this kind of legislation how tightly linked sexuality and sexism continue to be.

Additionally, legislation and other writing that separates good women from bad along axes of sexual behavior is not only retrograde, but also ignores the economic realities faced by women. Women do not enjoy monetary parity with men: in the U. S., they earn on average about 20 percent less than men do, and the wage gap is often much larger in other places. This alone may make it worthwhile for a woman to consider migrating in order to earn

more. Differing economic opportunities between the sexes also make it more likely for women to be drawn into the sex industry – money is the most common reason for people to work in the sex industry.

### **The Violence Against Women Act of 2000**

At this point, I will leave my discussion of the TVPA to consider one of its riders, the Violence Against Women Act of 2000 (VAWA). This is the second VAWA, the first having been passed in 1994. VAWA focuses upon domestic violence and sexual assault and includes budget appropriations for projects and the construction of a database of networked projects and their services. The portion of VAWA pertinent to trafficked persons is far smaller than TVPA. However, a small portion of the second half of this Act specifically addresses immigrants in the U. S. and makes visas available for victims of crime and abuse, which is intended to include but not be limited to trafficked persons (Section 1513). Aside from the creation of visas and their attendant requirements, VAWA addresses the number of visas, and makes clear that the allocation specified includes only visas issued to immediate victims of a crime. Visas allocated to family members are not counted against this total, and there are provisions to allow entry of family members. People who obtain these "U" visas are to be informed by the government of non-governmental organizations that can help them. I will address these

provisions of the second VAWA exclusively, as the other topics, while interesting and important, do not touch upon the subject of trafficking in persons.

The presence of protections intended for trafficked persons in VAWA does reflect the conception of trafficking as something that happens to women rather than men, similar to domestic violence and sexual assault, the main focuses of this bill. The exact text from the findings in the section on "Battered Immigrant Women" is:

Immigrant women and children are often targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnaping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained. (Sec. 1513 (a) (1) (A))

Considering the reference to "[i]mmigrant women and children," it is interesting that the assistance made available under VAWA is gender neutral and without any reference to women and children, unlike the more restrictive TVPA or UNOP. It reads

The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a) (15) (U) (iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. (Sec. 1513 (a) (2) (A))

This hints at the intent to assist those who will aid prosecution; the

following paragraph is more explicit.

Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States. (Sec. 1513 (a) (2) (B))

VAWA was not intended to solely address trafficking in persons, but as a more general act to aid women, as listed in both quotes from the Act itself above. However, VAWA includes new aid provisions, and trafficking was cited, along with domestic violence and sexual assault, in the list of crimes VAWA is intended to redress. These provisions for assistance include 10,000 new visas, designated U, in addition to the 5,000 T visas allowed by the trafficking bill. Despite the fact that VAWA's title refers to women, the protections and assistance provided include no reference to gender, as demonstrated in Section 1513 (a) (2) (B) above. Therefore, any trafficked person is eligible to benefit from these visas. The visas, like the T visas created by TVPA, require certification, but this is made easier under VAWA. U visas are intended for people whose certification from the Department of Justice declares them someone who has been helpful, is or is likely to be helpful to prosecutions. This generally designates cooperation as a witness in efforts to

prosecute cases, here and as above in TVPA, trafficking cases.

Permanent residency is not generally made immediately available, but the Attorney General is given wide discretion in converting some of these visas to permanent resident status. Sec. 1513 (a) (2) (C) includes

this section gives the Attorney General discretion to convert the status of such nonimmigrants to that of permanent residents when doing so is justified on humanitarian grounds, for family unity, or is otherwise in the public interest.

Humanitarian grounds as described in VAWA include human rights issues and family members. Granting someone such a visa "in the public interest" could indicate that the person has cooperated with prosecutions. U visa holders are also eligible to apply for permanent residence after only three years, compared with the five year period for holders of T visas. These visas are to be "justified on humanitarian grounds" which renders them similar to asylum. Family members may also be eligible in conditions of "extreme hardship," such as the need for medical care.

Section 1513 (b) establishes the Humanitarian/Material Witness Nonimmigrant Classification U visa and Section 1513 (b) (3) (i) specifies the conditions for the granting of such visas. Whether an alien meets these conditions is at the discretion of the Attorney General. Conditions include having suffered physically or mentally as the victim of a crime (Section 1513 (b) (3) (i) (I)) specifically

addressed in Section 1513 (b) (3) (iii) (discussed below), which occurred on US territory (Section 1513 (b) (3) (i) (IV)), possessing knowledge of this criminal activity (Section 1513 (b) (3) (i) (II)), "the alien ... has been helpful, is being helpful, or is likely to be helpful" to authorities investigating or prosecuting criminal activity. These requirements can even be waived if "an investigation or prosecution would be harmed without the assistance of the spouse, the child, or, in the case of an alien child, the parent of the alien" (Section 1513 (b) (3) (ii)). These last two clauses quoted here render the U visa far more obtainable than the T visa created under TVPA.

### **Why VAWA is better for trafficked persons**

The absence of any attempt to identify voluntary prostitutes in order to prevent their obtaining visas is a big step away from the madonna-whore dichotomy present in TVPA. This is in keeping with a bill that focuses on crime rather than morality. Despite the very limited focus of this section of VAWA, I maintain that VAWA has a great deal to offer trafficked persons, and in some cases, far more than TVPA.

Section 1513 (b) (3) (iii) specifies that these provisions apply exclusively in cases of crimes, specifically the crimes of

rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation;

female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

The list of criminal activities is quite thorough and spans many schools of thought. This list includes not only trafficking but also a number of activities that could be deemed trafficking, such as peonage, involuntary servitude and the slave trade. Other activities that may comprise part of the crime of trafficking are included, for example, being held hostage, kidnapping, abduction, false imprisonment, blackmail and extortion. It is in keeping with some (but not all) feminist thought to include a wide variety of sexually oriented activities in this list, including sexual exploitation, which has no legal definition and is therefore unenforceable, and prostitution, which may be voluntary, alongside female genital mutilation, incest, rape and sexual assault. However, VAWA has no possibility of being widely applied in order to eliminate even the licit sex industry. Contrasting TVPA, VAWA does not emphasize any particular business but rather seeks only to aid victims of crime.

As VAWA's assistance and protections are restricted to victims of crimes without other stipulations of prosecution or punishment, unlike TVPA, it is sufficiently restrictive that the inclusion of prostitution in this list will not provide a means to attack the legal

sex industry and those who work in it. This is not to say that VAWA is immune to misapplication. However, VAWA does not suffer from the disempowering tendencies of TVPA because it offers protections without conditional morality or assistance to prosecution. This section of VAWA, like the protections afforded by TVPA, applies only to immigrants, and so it is again unclear what support is offered to trafficked persons who are U. S. citizens.

## **Conclusions**

Unlike VAWA, the trafficking bill makes a distinction between sex trafficking and other forms of trafficking that involve force or fraud (such as sweatshop labor or the case of deaf Mexican vendors in New York City). This distinction reflects the fact that trafficking happens in many varied industries, but it also exposes the sensationalism that still surrounds consideration of sex work, a sensationalism that is reminiscent of earlier "white slavery" panics. VAWA avoids making such moral distinctions and yet is able to assure the rights of trafficked persons. VAWA has brought feminists and legislators beyond categorization of women into good and bad. It is gratifying but unsurprising that it is a bill promoted by feminists has made this leap, rather than a bill motivated by sensationalist news coverage such as that described in "Girls Forced to Dance Naked" (Grant and Soderlund 1998) and seen in *The New York Times* January 11, 1998 front page article. Trafficked persons

involved in any aspect of the sex industry should seek VAWA's U visas, while only certain trafficked persons, specifically men and women uninvolved in sex work, should seek help under TVPA.

The TVPA presents a dichotomy between sex work in general and serious forms of trafficking, covering both but applying different responses. To make such a distinction is not only to enforce a specific moral agenda, but also to disregard the economic realities of a situation in which limited choices may lead to sex work being, at times, the best option available for some people. Grace Mitchell (2000) writes that women who choose to remain in the sex industry may be labelled as having "false consciousness," when their decision may actually be a conscious critique of other available opportunities. A change of work venue, for example from brothel to sweatshop, factory, or domestic service that results in lower wages, possibly longer hours and no better conditions is not necessarily a change for the better. "Whether a person is a high-class call girl, street prostitute or investment banker, the decision to enter into that work was not made independently of social, cultural, historical and technological influences ... intra-acting with individual agency." (Mitchell 2000: 10).

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