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WHAT HUMAN RIGHTS LAW OBSCURES: GLOBAL SEX TRAFFICKING AND THE DEMAND FOR CHILDREN

Sara Dillon*

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I. INTRODUCTION

The numbers of children trafficked for purposes of sexual exploitation are astonishingly large. Across cultures, children are in demand for use in a global sex industry.¹ Global trafficking, facilitated by the unleashing of economic forces and the erasure of national borders, reveals demand of a kind that challenges assumptions about humanity itself. Child sex trafficking can no longer be dismissed as a niche perversion or a psychological oddity. Rather, along with the child pornography industry with which it is intimately linked, it represents a mass tendency on the part of child-exploiters who are, for the most part, male.²

1. FRANCIS T. MIKO, *Summary of TRAFFICKING IN PERSONS: THE U.S. AND INTERNATIONAL RESPONSE*, para. 1 (2006), available at <http://www.usembassy.it/pdf/other/RL30545.pdf>.

Trafficking in people for prostitution and forced labor is one of the most prolific areas of international criminal activity and is of significant concern to the United States and the international community. The overwhelming majority of those trafficked are women and children. According to the most recent Department of State estimates, between 600,000 and 800,000 people are trafficked across borders each year. If trafficking within countries is included in the total world figures, official U.S. estimates are that 2 to 4 million people are trafficked annually. However, there are even higher estimates, ranging from 4 to 27 million for total numbers of forced or bonded laborers.

Id. The report also notes that “[t]he International Labor Office (ILO) estimates that there are some 12.3 million victims of forced labor at any given time. Of these victims, 80% are thought to be women and some 50% are thought to be under 18 years old.” *Id.* at 1.

2. Carole Smolenski, Coordinator, ECPAT-U.S.A., Testimony before the U.S. Senate Foreign Relations Subcommittee on Near Eastern and South Asian Affairs (Mar. 7, 2002) (transcript available at <http://www.amcostarica.com/031802.htm>) (testifying about the problem of child sex tourism as a sub-species of trafficking in persons). Smolenski testified as to the following:

As I will argue below, the commercial sexual exploitation of children must be seen as one of the most heinous forms of human rights violations. If *jus cogens*³ norms are meant to identify the most egregious human rights abuses, then child sex trafficking should be prominently identified as a *jus cogens* violation. Yet the international human rights community seems for the most part caught in a conceptual warp that focuses overwhelmingly on state violence against largely male political prisoners or, in the alternative, on victims of abuses suffered in the course of armed conflict. Needless to say, it is entirely appropriate that human rights law should devote attention to these violations. But the silence regarding the human rights violations that underlie sex trafficking is more than puzzling.

Many have pointed out that the concerns of women are muted, if present at all, in the development of international human rights principles, as violations of women's rights tend to take place in the "private" sphere.⁴ Domestic violence, honor killings, female genital mutilation, child marriage, and similar forms of "invisible" suffering are implicitly separated from the more "serious" public world of unlawful detentions and forced confessions.⁵ The demand for children's bodies, and the grotesque exploitation of the innocent, are even further banished from our vision of the "mobilization" of human rights law. The world of "international children's rights," on the other hand,

Child sex tourists are not just pedophiles, though pedophiles do abuse a lot of children. . . . Pedophiles share information among themselves about where to find vulnerable children around the world. . . . But there are other sex tourists who are not pedophiles. These are people, I should say men, because men are by far the majority of child sex abusers, these are men who wish to experiment by having children as sexual partners when they are in a situation where they believe this is acceptable behavior, for example, in a foreign country, with a racial group different from their own. . . . Sex tourists have a vast array of sex tours to choose from. A few years ago, *Business Week* magazine turned up 25 sex tour companies in the United States. The internet is filled with advertisements for sex tours to a variety of destinations.

Id. paras. 7–9, 12–13.

3. The term *jus cogens* refers to compelling or higher law. See *infra* note 51 and accompanying text.

4. See Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993).

5. See Hilary Charlesworth, *Feminist Critiques of International Law and Their Critics*, THIRD WORLD LEGAL STUD., 1994–95, at 13–14; Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 822–23 (2005).

sometimes appears to be a zone of platitudes where professional adults argue about the nature of ideal state policy towards children and their families.⁶

As far as international and domestic anti-trafficking laws are concerned, the focus is on facilitating prosecution of *traffickers*.⁷ While this is not a bad thing in and of itself, this emphasis obscures the question of how and why demand for children to sexually exploit is so pervasive and broadly based. With child sex trafficking, child prostitution, child molestation, and child pornography so widespread, we are faced with the prospect of acknowledging Everyman (representing all cultures and classes) as a bad guy.⁸ This conceptual mode is one with which international human rights law is ill-prepared to deal.

In this Article, I will take up several related problems. First, I will discuss the enormous and unmistakable nature of the demand for trafficked children. This demand is closely related to the demand for trafficked women, but one is not a mere subset of the other. There is no need to create a hierarchy of suffering; all forms of human trafficking are shocking. Sex trafficking in general is its own kind of abomination; sex trafficking of children offends a sense of humanity in a related but distinct way. It is perfectly possible to accept that the interests of women and children are frequently linked, or even identical, while acknowledging that human children are inherently dependent, and completely vulnerable in every sense.⁹ The official and unofficial

6. Despite the fact that children's voices are increasingly said to be heard when it comes to decisions that affect their fate, children are often still captives of cultures and ideologies. There is no coherent way to decide whether the professional "children's rights" bodies are speaking on behalf of children or not. Also, the general lack of attention paid by scholars to children's rights is indicative of the fact that they are considered to be secondary or marginal vis-à-vis other human rights questions.

7. Some national laws have also been reconfigured to facilitate prosecution of sex tourists. In the U.S. context, see Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003). However, the emphasis in the international anti-trafficking movement has been on trafficking as a branch of organized crime.

8. "Everyman" has come to refer to the "typical or ordinary human being." The roots of this term are in the medieval morality play of the same name. See Anniina Jokinen, *Everyman: An Introduction*, LUMINARIUM, July 8, 2007, <http://www.luminarium.org/medlit/intro.htm>.

9. Every international legal instrument relating to children, including, notably the United Nations Convention on the Rights of the Child, contains provisions that indicate the need for children to be protected as well as empowered. See, e.g., Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC]. Children are not adults; their ability to conceptualize, process and under-

numbers of children being trafficked for sexual exploitation are very large. There is no obscuring the fact that the market for child prostitution extends into all cultures and all walks of life. There is no question but that the most vulnerable women and children are the targets of traffickers. What makes the sex trafficking picture so complex is the number of geographical markets: the trafficking of teenage girls from Eastern Europe into Turkey, the Balkans, and Western Europe; the trafficking of Asian girls into the Middle East; the trafficking of Nepali girls into India. Sex tourism from Western Europe, the United States, Australia, and Japan into Southeast Asia and Latin America has unmistakable connections with historical geopolitical domination.¹⁰ But it is difficult to avoid the conclusion that, given the opportunity, men in every part of the world show a tendency to exploit the vulnerable, including the most vulnerable of all: children. There is no way around the knowledge that sex trafficking, which turns women and children into sex slaves, is now common practice in global terms; it also closely relates to other issues of domination, including sexual violence and child molestation. To treat child sex trafficking in purely legal or criminal terms is to miss the main story, which inevitably concerns the nature of demand.

Second, this Article will confront the features of modern international human rights law that make it more or less impervious to mobilization in response to violations against women and children. I will discuss the genesis of human rights law, its conceptual development since World War II, and its strong preference for identifying classes of “evil-doers” in the form of Nazis, torturers, or totalitarians (in other words, a separate class of people induced by propaganda or under the pressure of extreme nationalist impulses, or political perversions, to abuse and violate the rights of others). I will submit that human rights law has not

stand is less developed. Because children are generally perceived as being physiological and psychological works-in-progress, the will to dominate and abuse them has certain distinct properties. When examining the will to dominate and abuse on the part of adults (in this case, primarily men), the fact that children are so pervasively in demand is particularly troubling. It should be noted that the UNCRC, which contains traditional obligations to protect children based on this obvious vulnerability, also contains “empowering” provisions, such as those requiring that the developing child be granted freedom of access to information and conscience, for example.

10. See, e.g., Martti Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 *CRIME & JUST.* 133 (2006) (placing demand for prostitution services in historical and geographical context).

succeeded in squarely isolating problems related to gender—what I call “gender tendencies.” I use this term to avoid making accusations based on gender determinism. Despite sophisticated and long-running feminist critiques of human rights law on these grounds, gender-related human rights violations have remained in their “niche,” while (other) matters relating to armed conflict invariably get top billing.

Third, I will examine what recent legal initiatives—international and domestic—in the realm of human trafficking have achieved. It is my contention that these initiatives have, perversely, made it particularly difficult to encourage a genuine public reaction to the phenomenon of child sex trafficking, precisely because of an insistence that there be a unitary definition of human trafficking as the “new slavery.” While these insights—that all human trafficking has common elements of commercial buying and selling and exploitation—are interesting and important, putting all types of human trafficking, including forced labor, in one basket appears to have had a numbing effect. In particular, this approach has meant that the question of why there is so much demand for children to exploit has been banished from the discourse. It is a major problem that specialized law affecting child sex trafficking focuses on “human trafficking,” as such trafficking has many forms, each with complex motivations and modes of demand. Given the tendency to turn away from questions of demand in the first place, further distancing of the demand issue through legal instruments that facilitate prosecution of traffickers makes it even less likely that the demand question will rise to the forefront of global consciousness. It is not the traffickers who are the primary users of the trafficking victims. In that sense, public focus on that aspect of the crime being committed has an effect of obscuring the role of the underlying levels of abuse. The unpleasant reality of demand, especially demand for children to exploit, is the factor that has the capacity to generate sufficient interest in the plight of trafficked children.

II. WHAT WE KNOW ABOUT CHILD SEX TRAFFICKING: THE EMPIRICAL REALITY

For children without social protection in many parts of the world, the vulnerability to trafficking, and its devastating psycho-

logical and social consequences, is immense.¹¹ Study after study indicates that organized crime rings and local profiteers are eager to prey on any young person from whom profit can be derived.¹² It seems that there is no end to the number of people—largely, and perhaps exclusively, men—who are willing to pay to exploit children sexually. They will travel abroad for this purpose, or access the service nearer home. Even very young children are fair game.¹³ How these children end up, no one seems to be certain of, but since so many are used in prostitution,¹⁴ the inference should be that many die without anyone knowing what has happened to them. While it would be comforting to believe that the customers are all social deviants, this is patently not the case: ordinary men from all walks of life are exploiting both women and girls (and, in some cases, boys) as sexual objects. The numbers are likely in the hundreds of thousands.¹⁵ All cultures are represented.¹⁶

11. Studies addressing sex trafficking of minors implicate every geographical region of the world. For a small sample of available studies, see ECPAT EUROPE LAW ENFORCEMENT GROUP, JOINT EAST WEST RESEARCH ON TRAFFICKING IN CHILDREN FOR SEXUAL PURPOSES IN EUROPE: THE SENDING COUNTRIES (Muireann O'Briain, Anke van den Borne & Theo Noten eds., 2004), available at <http://www.ecpat.se/upl/files/72.pdf>, and UNITED NATIONS CHILDREN'S FUND [UNICEF], PROFITING FROM ABUSE: AN INVESTIGATION INTO THE SEXUAL EXPLOITATION OF OUR CHILDREN (2001), available at http://www.unicef.org/publications/files/pub_profiting_en.pdf.

12. See generally KATHRYN FARR, SEX TRAFFICKING: THE GLOBAL MARKET IN WOMEN AND CHILDREN (2004).

13. In practice, the age of children in prostitution is becoming progressively lower. Janice G. Raymond, *Prostitution as Violence Against Women: NGO Stonewalling in Beijing and Elsewhere*, 21 WOMEN'S STUD. INT'L F. 1, 1 (1998); see also *Children for Sale*, NBC NEWS, Jan. 9, 2005, <http://www.msnbc.msn.com/id/4038249> (reporting that children as young as 5 years old were being used in the sex tourism trade in Cambodia).

14. See INT'L HUMAN RIGHTS LAW INST., DEMAND DYNAMICS: THE FORCES OF DEMAND IN GLOBAL SEX TRAFFICKING 92 (Morrison Torrey ed., 2003), available at http://www.law.depaul.edu/centers_institutes/ihrli/downloads/demand_dynamics.pdf ("The use and trafficking of children and adolescents in the sex industry is widespread around the world and the U.S. is no exception. An estimated 10 million children worldwide are already involved in the \$20 billion-a-year sex industry, and this number is increasing by about one million each year.")

15. See INT'L HUMAN RIGHTS LAW INST., *supra* note 14, at 32 (reporting that estimates of the number of men who have ever purchased a woman for sex range from sixteen to eighty percent).

16. Extensive research and documentation supports this assertion. See, e.g., R. BARRI FLOWERS, THE PROSTITUTION OF WOMEN AND GIRLS 126–29 (1998); PAMELA PAUL, PORNOFIED: HOW PORNOGRAPHY IS TRANSFORMING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES 12–49 (2005); Marian K. Pitts et al., *Who Pays for Sex and Why? An Analysis of Social and Motivational Factors Associated With Male Clients of Sex Workers*, 33 ARCHIVES OF SEXUAL BEHAVIOR 353 (2004).

There are those critics who write that attention to sex trafficking as a distinct phenomenon is flawed¹⁷—in some sense, the very opposite of the position I take in this Article. One prominent argument is that trafficked children have found supposed favor with the political right, whereas other members of the cohort of vulnerability—economically marginalized women trafficked for labor purposes—are treated as illegal migrants and punished. While it is true that the political right has taken a particular interest in the issues of sex trafficking, and the trafficking of children in particular, there is no reason why concern over trafficked children as a distinct group should be presumptively attributed to this type of political motivation. There is also no logical reason why advocating for attention to the egregious violations of the rights of this group of children should preclude concern over repressive immigration policies, or the interrelationship between the two. Looking at the situation in the many countries where trafficking has been documented, one does not get the sense that the problem is invented or made up, or that external intervention has been very effective. To the extent that the problem is empirically verifiable, it is, as a mass phenomenon, extraordinarily troubling, notwithstanding the political or moralistic motivations of others who might be interested in the issue.

Human Rights Watch had this to say on the Tenth Anniversary of the Convention on the Rights of the Child:

Children around the world are sexually abused and exploited in ways that can cause permanent physical and psychological harm. . . .

. . . .

This grim picture is compounded by the use of children as prostitutes in countries throughout the world. An unknown but very large number of children are used for commercial sexual purposes every year, often ending up with their health destroyed, victims of HIV/AIDS and other sexually transmitted diseases. Younger and younger children are sought with the expectation that clients will not be exposed to HIV. Prostituted children can be raped, beaten, sodomized, emotionally abused, tortured, and even killed by pimps, brothel owners, and customers.¹⁸

17. See, e.g., Wendy Chapkis, *Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants*, 17 GENDER & SOC'Y 923 (2003).

18. HUMAN RIGHTS WATCH, *Sexual Abuse and Exploitation, in PROMISES BROKEN: AN ASSESSMENT OF CHILDREN'S RIGHTS ON THE 10TH ANNIVERSARY OF THE*

The nature of organized crime and the commercial sex industry makes precise figures hard to come by, but experts are able to give regional statistical breakdowns that demonstrate the enormous scale of the problem.¹⁹ It is estimated that one million children enter the world of commercial sexual activity every year, with the total number at any one time as high as ten million.²⁰ For example, one reputable group, End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT), points to widely differing unofficial estimates that the number of child prostitutes in Thailand alone is between twelve thousand and several hundred thousand.²¹ Whether the true figure is on the higher or lower end, the number is considerable. Twelve years ago, Human Rights Watch reported in detail on the tens of thousands of girls trafficked from Nepal into Indian brothels with the full knowledge and support of the Indian police.²² Film evidence confirms that these brothels are obvious to the general public, even if some of the youngest girls are hidden away.²³ In Brazil, the number of child prostitutes is estimated to be as high as five hundred thousand.²⁴ Child sex trafficking is on the rise in South Africa, where children are made available to local customers and international sex traffickers.²⁵ The litany of

CONVENTION ON THE RIGHTS OF THE CHILD (1999), <http://www.hrw.org/campaigns/crp/promises/abuse.html>.

19. See Brian M. Willis & Barry S. Levy, *Child Prostitution: Global Health Burden, Research Needs, and Interventions*, 359 LANCET 1417, 1417 (2002), available at http://www.popcenter.org/Problems/Supplemental_Material/trafficked_women/Willis&Levy_2002.pdf (providing estimates of the number of children prostituted in various countries).

20. *Id.*

21. See ECPAT.net, *Child Prostitution: Thailand*, http://www.ecpat.net/eng/Ecpat_inter/projects/monitoring/online_database/countries.asp?GetCategoryName=Prostitution&Submit=Show&arrCountryID=173&CountryProfile=facts&CSEC=&Implement=&Nationalplans=&orgWorkCSEC=&DisplayBy= (last visited Sept. 14, 2007) (profiling the range of government and NGO data on child prostitution in Thailand).

22. See HUMAN RIGHTS WATCH, *RAPE FOR PROFIT: TRAFFICKING OF NEPALI GIRLS AND WOMEN TO INDIA'S BROTHELS 1-2* (Sidney Jones & Jeri Laber eds., 1995), available at <http://www.hrw.org/reports/pdfs/c/crd/india957.pdf>.

23. See *THE DAY MY GOD DIED* (Andrew Levine Productions 2003) (documenting child sexual slavery). Information about the DVD is available at <http://www.thedaymygoddied.com/index.html>.

24. See Steve Kingstone, *Brazil Acts on Child Prostitution*, BBC NEWS, July 9, 2004, <http://news.bbc.co.uk/2/hi/americas/3879001.stm>.

25. See *S Africa's Child Sex Trafficking Nightmare*, BBC NEWS, Nov. 23, 2000, <http://news.bbc.co.uk/2/hi/africa/1037215.stm> (“[T]here are about 38,000 child prostitutes [in South Africa], with girls as young as four being sold to South Africans and foreigners for sex.”).

suffering by children at the hands of traffickers, pimps, and abusers is incalculable. The information, though incomplete and necessarily based on estimates, is readily available.

What general knowledge there is on the part of the U.S. public undoubtedly attributes child sex trafficking and child prostitution to economic and cultural conditions in far away places. Writers with knowledge of the subject, however, stress that there are no geographical limits to the problem,²⁶ implying that demand can be generated literally anywhere on earth. Of course, children become vulnerable to being prostituted when there are sufficient markers of vulnerability present: economic marginalization, family breakdown, and social chaos. There is good reason to believe that the demand for child prostitutes in the U.S. is among the highest; estimates show the U.S. as having the third-largest number of child prostitutes in the world.²⁷ In January of 2004, journalist Peter Landesman made the shocking assertion in a *New York Times* magazine article that there were thousands of children of all ages being trafficked through Mexico and into the U.S. for purposes of commercial sexual exploitation.²⁸ What made the Landesman article stand out was its intensity and vividness, purporting to tell the real-life stories of young children caught up in the nightmare of sexual slavery. The article describes sexual "safe houses" hidden in plain view in America's middle class neighborhoods, relates the opinions of various experts concerning how many victims of sexual slavery there are in the U.S. at any one time, and even quotes a senior State Department official as saying that "[w]e're not finding victims in the United States because we're not looking for them."²⁹

The State Department's annual Trafficking Report purports to present an empirical assessment of trafficking by giving countries a rating as to how energetically they are responding to

26. See, e.g., Laurie Nicole Robinson, *The Globalization of Female Child Prostitution: A Call for Reintegration and Recovery Measures Via Article 39 of the United Nations Convention on the Rights of the Child*, 5 *IND. J. GLOBAL LEGAL STUD.* 239, 243 (1997).

27. See Willis & Levy, *supra* note 19, at 1417 (estimating that three hundred thousand children are exploited through prostitution in the United States, more than in any other country except for India and, possibly, Brazil). The logical inference of this statistic is that the demand to have sex with children in the United States is high, and could be higher were it not for the criminal sanctions in place to punish the behavior.

28. Peter Landesman, *The Girls Next Door*, *N.Y. TIMES*, Jan. 25, 2004, (Magazine), at 30.

29. *Id.*

human trafficking.³⁰ Whatever the original good intentions, certain aspects of the report seem less than objective.³¹ In reading the report, one cannot avoid the sense that the ratings are in many cases politically motivated: Cuba and Venezuela occupy the lowest tier, Tier 3, while Japan is comfortably unobtrusive in Tier 2.³² The expectations set by the State Department are also skewed; passing legislation appears to be of great significance, whereas it is often the gap between laws passed and police performance that is most problematic in the human trafficking context.³³ While the report does take into account the actions of law enforcement, it is certainly too generous much of the time, in light of the fact that the frequency and intensity of prosecution that would be required is much greater than what one sees in most countries at present. Inadequacies in its rating system notwithstanding, at least the State Department has in recent years given some degree of priority to the issue of sex trafficking, and has begun an international dialogue on the question of national performance.

30. See U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 5* (2006), available at <http://www.state.gov/documents/organization/66086.pdf>. The Report divides countries into tiers numbered from 1 to 3, with Tier 3 as the worst and Tier 1 as the best. Tier 2 has an additional "watch list" subdivision. See *id.* at 46 for a complete listing.

31. See Gabriel Garcia, Research Associate, Council on Hemispheric Affairs, *The State Department Human Trafficking Report: Raw Ideology Rather Than Bona Fide Research* (June 28, 2006), <http://www.coha.org/2006/06/28/the-state-department-human-trafficking-report-raw-ideology-rather-than-bona-fide-research/>.

32. See *id.*

33. For example, the narrative explanation as to why Australia is in Tier 1 is stated as follows in the Trafficking in Persons report:

The Government of the [sic] Australia fully complies with the minimum standards for the elimination of trafficking. Over the reporting period, Australia passed important criminal code reforms that strengthened its domestic trafficking laws, namely defining the crime of debt bondage. Additionally, the government continues to be a regional leader in the Bali Process on People Smuggling, Trafficking in Persons, and Related Transnational Organized Crime. The government provides adequate resources to anti-trafficking efforts and works regionally to train officials and law enforcement on prevention and detection of trafficking-related crimes. Despite important gains, over the past three years there have been no convictions or punishment of traffickers, a key deterrent to trafficking crimes.

U.S. DEP'T OF STATE, *supra* note 30, at 62–63.

III. INTERNATIONAL HUMAN RIGHTS DISCOURSE: WHERE IS CHILD SEXUAL EXPLOITATION?

A. *Long-Standing Feminist Critiques of Human Rights Law*

It has been at least fifteen years since feminist scholars first pointed out that international law was not as universal or objective as it was purported to be.³⁴ Since that time, the international legal establishment has absorbed, albeit on a piecemeal basis, the feminist criticism that human rights law—more or less across the board—ignores the concerns of women as *they* experience violations of their rights.³⁵ However, presentation of the problem often remains polite, restrained, and theoretical.³⁶ Many articles note that “women’s concerns” are ignored or silenced, yet appar-

34. See Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991). In their path-breaking article, Charlesworth, Chinkin & Wright note the following:

The normative structure of international law has allowed issues of particular concern to women to be either ignored or undermined. For example, modern international law rests on and reproduces various dichotomies between the public and private spheres, and the “public” sphere is regarded as the province of international law. . . . At a deeper level one finds a public/private dichotomy based on gender. . . . The public realm of the work place, the law, economics, politics and intellectual and cultural life, where power and authority are exercised, is regarded as the natural province of men; while the private world of the home, the hearth and children is seen as the appropriate domain of women. . . . Traditionally, the two spheres are accorded asymmetrical value: greater significance is attached to the public, male world than to the private, female one.

Id. at 625–26.

35. See, e.g., Karen Engle, *Feminism and Its (Dis)contents: Criminalizing War-time Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778 (2005) (describing the view taken by feminists of their own influence on the contents of the statute establishing the International Criminal Tribunal for the Former Yugoslavia).

36. See, e.g., Hilary Charlesworth, *Not Waving But Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1 (2005) (arguing that the concept of “gender mainstreaming,” which was intended to bring gender issues to the forefront in the construction of international policy making, has in fact served to “deradicalize” the original message of gender inequality). Interestingly, Charlesworth delivers this critique in tones which are themselves polite and theoretical.

By contrast with many other writers, Catharine MacKinnon has been refreshingly explicit, combining intense academic rigor with vivid descriptions of universal crimes against women. See Catharine A. MacKinnon, *State of Emergency: Who Will Declare War on Terrorism Against Women?*, WOMEN’S REV. BOOKS, Mar. 2002, at 7; Catharine A. MacKinnon, *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, 98 AM. J. INT’L L. 325 (2004); Catharine A. MacKinnon, *Sex Equality under the Constitution of India: Problems, Prospects, and “Personal Laws,”* 4 INT’L J. CONST. L. 181 (2006); Catharine A. MacKinnon, *Women, Violence Against*, in 3 ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 1164 (Dinah Shelton ed., 2005).

ently avoid direct mention of the fact that “women’s concerns” are likely to be men’s endemic crimes against them.³⁷ Feminist writing clearly shows that violence experienced most often by women, no matter how systematic or obvious to officials in the states in which the women reside, is treated as a criminal (as opposed to a human rights) matter, to be dealt with by the respective state’s law enforcement.³⁸ Though their criticisms may often be overlooked, feminist writers have at least been able to develop critiques as challenges to the international human rights profession.³⁹ When it comes to the widespread violations of children’s rights, the principal problem is not how to divide or distinguish the concerns of children from the developing concept of women’s rights.⁴⁰ Rather, the focus must be on the invisibility of

37. It must be noted that the seminal article by Charlesworth, Chinkin & Wright is very clear as to what the imbalance of concern in international human rights law amounts to: the distinction between public and private actions. For example, when discussing the international definition of torture, as found in “all international catalogs of civil and political rights,” the authors write that “the description of the prohibited conduct”—that is, the torture—

relies on a distinction between public and private actions that obscures injuries to their dignity typically sustained by women. The traditional canon of human rights law does not deal in categories that fit the experiences of women. It is cast in terms of discrete violations of rights and offers little redress in cases where there is a pervasive, structural denial of rights.

Charlesworth, Chinkin & Wright, *supra* note 34, at 627–28.

38. *See id.* at 629 (“States are not considered responsible if they have maintained a legal and social system in which violations of physical and mental integrity are endemic.”); Hannah Pearce, *An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture*, 14 INT’L J. REFUGEE L. 534, 537 (2002) (“While the complexities of domestic violence and state responsibility is a problem yet to be resolved, there is a major incidence of sexual violence which is clearly outside the domestic arena of home and family and which to ignore as such greatly undermines a commitment to human rights. . . . Rape and other forms of sexual violence are used in a wide range of situations which has prompted ‘a critical need to place gender-based violence within the context of women’s structural inequality’ and where the claim of encroaching in the private sphere is a smokescreen used to avoid action.”).

39. *See* Ladan Askari, *Girls’ Rights Under International Law: An Argument for Establishing Gender Equality as a Jus Cogens*, 8 S. CAL. REV. L. & WOMEN’S STUD. 3, 11–12 (1998) (“In theory, international human rights are intended to be indivisible and gender-neutral agreements between the state and its peoples. However, in practice, this has translated into a relationship between the state and men. The international community of states finds or creates ways (loopholes such as public/private divisions, ambiguous terminology, etc.) to avoid or reduce its obligations to end gender discrimination. Issues at the core of human rights predominantly pertain to male (white, Western and liberal) concerns and experiences since men dominate the national and international legal orders and political structures.”).

40. *See* Jonathan Todres, *Women’s Rights and Children’s Rights: A Partnership with Benefits for Both*, 10 CARDOZO WOMEN’S L.J. 603, 612 (2004) (“Some feminists

children's rights, and the degree to which gross violations of those rights, particularly sex trafficking, compel us to be blunt. Being less able to speak for themselves than any other population, and inherently dependent upon adult action, the situation of trafficked children is addressed, if at all, in a confused and confusing fashion. Urgency demands an indecorous response as we confront the enormous global demand for children to exploit.⁴¹

B. *Human Rights Law and Its Skewed Emphases*

Without question, human rights law has taken as its focus the political crimes of the state against its own citizens.⁴² Many of the violations of the rights of women and children, therefore, are overlooked in international human rights law discourse, as they tend to take place in the home and the community, and continue to exist largely due to the complicity or indifference of the

have expressed concern that focusing on children will result in women being left even further behind. Perhaps some governments would use the cause of child rights to avoid having to pursue improvements in the lives of women. Governments that oppose human rights for women, however, are not likely to be strong advocates of human rights for children either If a government used the idea of children's rights or any other rights to impede the progress of women, that would be a clear misuse of human rights."). Perhaps Todres is simplifying matters, but it does seem that one can distinguish between women's rights and children's rights (that is, these interests are not identical and the interests may not interconnect in every situation) while keeping in view the obvious and necessary link between them.

41. Charlesworth, Chinkin & Wright addressed the topic of trafficking in their 1991 article, decrying the lack of international law responses to sex trafficking at that time. They wrote that

[t]rafficking in women through prostitution, pornography and mail-order-bride networks is a pervasive and serious problem in both the developed and the developing worlds. These practices do not simply fall under national jurisdiction, as the ramifications of the trafficking and exploitative relationships cross international boundaries. They involve the subordination and exploitation of women, not on the simple basis of inequality or differences among individuals, but as a result of deeply engrained constructs of power and dominance based on gender.

Charlesworth, Chinkin & Wright, *supra* note 34, at 630. This Article will examine whether or not the international law on the subject is properly framed.

42. See Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J.L. & FEMINISM 345, 348 (2002) ("[I]f human rights law has succeeded in replacing the old international law model of the sovereign state as black box with a somewhat more translucent model of the state, into which other nations may legitimately peer, human rights law has continued in other ways to insist on the state's centrality. For most of the past fifty years, human rights law has concerned itself solely with the question of what state agents may legitimately do to the people within their state's borders. State action has been the *sine qua non* of human rights law violations If security forces torture political dissidents, or a state media regulatory board arbitrarily shuts down opposition newspapers, we have 'clear' cases of human rights law violations.").

state.⁴³ Thus, states that do not practice severe political repression, but allow horrific levels of “privatized” human rights violations, often escape with their international reputations unscathed.⁴⁴ Where slavery is practiced by a state, directly condoned, or enshrined in law, we are appropriately outraged. But where slavery in the form of forced prostitution is allowed to flourish by a corrupt police force, the reaction of the international community is confused, diffuse, and unfocused on the human rights dimension of the problem.⁴⁵

With all of these “private” human rights violations—child marriage, infanticide, gendercide, sex trafficking, bride burning, bonded labor—the question of demand is key because it implicates human, particularly male, behavior generally and presents a great challenge to the determination of effective remedies. Political repression, the traditional preoccupation of international human rights law, is comparatively simple in that such repression reinforces the power of the ruling elite in a very direct manner

43. See Berta Esperanza Hernández-Truyol, *Out of the Shadows: Traversing the Imaginary of Sameness, Difference, and Relationalism—A Human Rights Proposal*, 17 WIS. WOMEN'S L.J. 111, 119 (2002) (“Because law regulates many activities in the public sphere but traditionally leaves the private sphere to individual control, much of women’s lives has been outside the scope of protection of the legal rules that govern the public sphere of men’s existence. Given such structural inequalities, the liberal state, offering its citizenry a panoply of negative rights—rights to be free from government interference—is unable to effect gender equality because it leaves intact the status quo.”).

44. See Brooks, *supra* note 42, at 348 (“[I]n this traditional understanding of human rights law, if thousands of men systematically beat or rape thousands of women, this is not a human rights abuse, unless the men are state agents acting on the orders of the state. If the men are merely ‘traditional’ fathers or husbands, using age-old methods of maintaining their domestic authority, we have, perhaps, a regrettable state of affairs, but no human rights law violation. Similarly, if thousands of women and girls are trafficked into sexual or domestic near-slavery, we have no human rights law violation, unless the trafficking is carried out by state agents acting in their official capacity.”).

45. There is a lively and probably unresolvable debate among writers on women’s issues as to whether any form of prostitution can be considered a matter of “free choice.” While irrelevant to the idea of child prostitution, as sex with children can never involve the consent of the child, many argue that adult women may indeed make a rational and informed choice that sex work is a valid way for them to pursue a livelihood. Brothel slavery is an extreme form of prostitution and may be seen either as one end of the exploitation spectrum, or as something altogether distinct from more “voluntary” forms of prostitution. This writer tends to feel that prostitution as a branch of the commercial sex industry is incompatible with free choice even by adult women, but this is a matter outside the scope of this Article. See Joyce Outshoorn, *The Political Debates on Prostitution and Trafficking of Women*, 12 SOC. POL.: INT’L STUD. GENDER, ST. & SOC’Y 141 (2005), for a discussion of the history of this debate.

and frightens would-be dissenters. It is far more complicated to confront both the motivation *and* cause of adult men's, and sometimes tangentially women's, violations of the rights of women and children, especially when additional subtextual arguments relating to cultural relativism and tradition are present.⁴⁶

Just as our enlightenment requires a "feminist critique" of human rights discourse, a children's rights analysis is necessary when it comes to mass and fundamental violations of the rights of children. However, here we face further problems, because the field of children's rights is characterized by adult disagreement over what approach to take to these rights. While virtually no one would argue that sexual trafficking of children does not constitute a severe violation of children's rights, there might well be disagreement as to the nature of the demand driving this activity. The line of least resistance is to leave the matter up to law enforcement. This monofocus risks the very real danger that prosecution fatigue,⁴⁷ coupled with the extreme generality of the

46. For a discussion of the vexed relationship between feminism, human rights and the cultural dimension, see Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1198 (2001) ("The relative status of women across communities is still used to assess the progress of culture. And the discourse of feminism versus multiculturalism assumes that women in minority communities require liberation into the 'progressive' social customs of the West. The idea that 'other' women are subjected to extreme patriarchy is developed in relation to the vision of Western women as secular, liberated, and in total control of their lives."). See also Pratibha Jain, *Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women's Rights in India*, 23 BERKELEY J. INT'L L. 201, 207 (2005) ("We ought to ensure that multiculturalist notions conform to universal human rights norms . . ."); Barbara Stark, *Women, Globalization, and Law: A Change of World*, 16 PACE INT'L L. REV. 333, 360 (2004) (arguing that when human rights activists protested the death sentence of a woman in Nigeria who had committed adultery, they prevented religious leaders in Nigeria from being able to change their positions about women's issues "without losing face;" noting further that "globalization is driving a gendered change of world that is in turn fueling a dangerous backlash").

47. See, e.g., *Child Trafficking on Rise Due to Weak Laws, Law Enforcement*, ASIAN ECON. NEWS, Mar. 13, 2000, available at http://findarticles.com/p/articles/mi_m0WDP/is_2000_March_13/ai_60067205 (reporting that some alleged traffickers escape prosecution in Bangladesh simply because overwhelmed courts cannot complete all prosecutions within the statute of limitations). Not surprisingly, a huge gap exists all over the world between the number of trafficking violations and numbers of trafficking prosecutions. See U.S. DEP'T OF STATE, *supra* note 30, at 54–264, for variations in how countries prosecute trafficking violations. For example, the report on Hungary states:

The Hungarian Government showed modest progress in its law enforcement efforts to combat human trafficking during the reporting period. Police conducted 28 trafficking investigations, and prosecutions of suspected traffickers increased from 21 in 2004 to 27 in 2005.

trafficking definition, will yield very poor results while child trafficking itself continues to rise. In this respect, the analogy to narcotics trafficking is an apt one.⁴⁸

Insofar as global law is overwhelmingly based on “freedom” as the operative concept, it is ill prepared to consider the relationship of our internationally recognized principles of freedom to the lives of the vulnerable or the doomed, the chief victims of “private” human rights violations. To unleash the genie of exploitative transnational demand via the process of globalization without any corresponding test for the effectiveness of local or national capacity to protect creates an entirely new level of danger.⁴⁹ The anonymity of exploitation, the suffering caused by the movement of human “commodities,” and the intersection of powerlessness and profit appear to guarantee that thousands of children will disappear into globalization’s underbelly, where there is no protection of any kind, despite the well-intentioned legal machinations of treaty drafters.

Where predatory behavior meets globalized freedom of movement, children are at particular risk. As is usual with

Data on convictions of traffickers were unavailable for 2005. Of the 42 reported convictions in 2004, 26 traffickers were sentenced to time in prison, five were given fines or ancillary punishments, and 11 traffickers received suspended sentences. The government provided training for its officials in how to recognize, investigate, and prosecute traffickers. In addition, government officials attended several NGO conferences. Hungary cooperated regularly with other governments in trafficking investigations; one notable investigation involved cooperation with Swiss and French law enforcement agencies and resulted in the arrest of several French traffickers in March 2006. The government also extradited two suspected Romanian traffickers to Romania, one suspected Romanian trafficker to Austria, and one suspected Hungarian trafficker to Hungary from Switzerland.

Id. at 135–36.

48. Various critiques of the war against drugs document its failure to produce tangible results. See, e.g., JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT* (2001); *THE NEW WAR ON DRUGS: SYMBOLIC POLITICS AND CRIMINAL JUSTICE POLICY* (Eric L. Jensen & Jurg Gerber eds., 1997).

49. See RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO: EXECUTIVE SUMMARY (OF THE U.S. NATIONAL STUDY)* (2001), available at http://www.hri.ca/children/CSE/Estes_Weiner_19sept01.pdf. Estes & Weiner write that

[t]he benefits of economic globalization, internationalization, and free trade have brought with them an unanticipated set of social problems. Among them is what appears to be a dramatic rise worldwide in the incidence of child exploitation. . . . Child pornography, juvenile prostitution and trafficking in children for sexual purposes have emerged as significant problems on the national, regional, and international stages.

Id. at 1.

“global law,” there are no precautionary or protective structures to counterbalance whatever stability is lost by the dismantling of regulatory borders.⁵⁰ The vulnerable are essentially at the mercy of an economic free-for-all that has its counterpart in a behavioral free-for-all that includes sexual exploitation of children on a mass scale. Unless this economic freedom actually leads to the promised “wealth creation” that can provide a substitute form of protection for children, those at the margins can expect little for the foreseeable future. It is difficult to see how a handful of prosecutions, reliant on criminal definitions of “human trafficking,” can turn this tide in any meaningful way.

C. *Looking for the Very Worst Violations?*

Inevitably, international human rights law, much like criminal law, works on a principle of hierarchies of heinousness. In a sometimes tragi-comic manner, writers on human rights seek to identify the “worst of the worst”—the most unforgivable, the most universal—in designating intolerable violations of rights. Those violations marked out as *jus cogens*, peremptory norms, involve actions so intolerable that no human being, state, or institution, could possibly argue for their permissibility.⁵¹ These violations are simply hands-down terrible, and must be universally condemned by the international community. At least, so we are told.

50. This phenomenon parallels global economic law, where strong and enforceable economic principles highlight the complete lack of global standards in the public interest. See Tim Dunne, *The Spectre of Globalization*, 7 *IND. J. GLOBAL L. STUD.* 17 (1999) (discussing the work of various theorists, including Richard Falk). Dunne writes that, according to Falk, “economic globalization itself is undermining the capability of many States to fulfill their obligations, especially with respect to welfare issues and social justice. According to the neo-liberal orthodoxy, supply-side macroeconomic measures will diffuse the benefits of economic growth to all sectors in society.” *Id.* at 32.

51. See David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 *DUKE J. COMP. & INT'L L.* 219, 228–29 (2005) (“Peremptory norms represent the top of the international legal hierarchy and take precedence over national law at the international level and other sources of international law. They protect the most compelling and essential interests of the international community as a whole and invalidate treaty law and other ‘ordinary’ rules of customary international law not endowed with the same normative force. Crucially, a peremptory norm permits no derogation and ‘supersedes the principle of national sovereignty,’ thereby creating a deterrent effect against contrary state practice that shapes and limits the legislative powers of sovereign nation-states with respect to the given principle.”).

However, even a cursory consideration of the true state of affairs in international law will reveal that there is another invisible, threshold barrier that keeps certain heinous violations from being brought front and center for an international condemnation bearing the “human rights” imprimatur. This barrier has to do with who the victim of the violation is, where the violation is located, and the circumstances of the violation. The most popular or sympathetic victim is the (presumptively, but of course not always, male) political prisoner. Of least interest are women and children who experience their violations in the “private” realm, even when the private realm involves major sins of omission and commission by an arm of government in particular states. Although, as noted, feminist writers continue to raise the issue of suffering experienced by women and children, the sum total of legal-professional activity is more comfortable defending traditional political rights against repression by the state.

By any objective measure, meaning quite apart from the reaction of the legal establishment, sex trafficking of minors is the worst of the worst when the measure of suffering is taken. As the result of a bizarre confluence of globalization, gender-tendencies⁵², tourism, expendable income, fractured cultures, tradition, and contemporary cultural nihilism, child sex trafficking forms the foundation of the most hideous, and possibly least acknowledged, human rights violation of our time. Significantly, child sex trafficking continues to be framed as a “niche concern” for international human rights law. Without discounting the post-colonial legacies of poverty and a systemic sexual exploitation, it is notable that India, with its tens of thousands of young girls trafficked into brothel slavery, is not held to account by the international community. This is true even though countries with significant levels of more garden-variety political repression are continually castigated in international human rights terms.⁵³

52. “Gender tendencies” is a phrase I devised to express the notion that all violations of a certain type are committed by men, without at the same time completely essentializing by gender or indeed condemning or implicating all men. I believe the male gender should take responsibility for these violations, in much the same way that a national state as a whole takes responsibility for abuses committed by the government of that state.

53. Many NGOs and U.N. agencies provide annual and interim reports on human rights violations and discussions of countries’ human rights records. *See, e.g.,* AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 2006 (2006), available at <http://www.amnesty.org/en/report/info/POL10/001/2006> (documenting human rights abuses in 150 countries); OFFICE OF THE RES. MOBILIZATION UNIT, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, ANNUAL REPORT 2005

When it comes to the sexual exploitation of children, there has been virtually no attempt to measure the extent to which states could prevent this, but do not.

I am assuming for purposes of this Article that it does matter whether a category of suffering is characterized as resulting on the one hand from a crime—intractable, deriving from poverty and corruption—or from a human rights violation, which by contrast implies the purposeful, even if tacit, approbation of an official apparatus. In other words, crimes may be seen as unexpected events to which the state apparatus can only respond after the fact; human rights violations are systemic problems concerning which the state could take preventive measures. At least in theory, crime may be seen as committed by social deviants, as opposed to human rights violations, which are part and parcel of a political and social system and serve the needs of a dominating class. Where the “class” to be dominated is primarily a gender (women and girls)—especially in the absence of unusual circumstances such as armed conflict—then it is highly unlikely that the dominating behavior will actually be termed a “human rights violation.” There is too much intention packed into the term; too much inclusion of the nation state; too much of the elite culture.

There is no lack of academic writing on the subject of human trafficking, sex trafficking, or even child sex trafficking. But rather than improving the situation by leading to general outrage, and in turn mobilizing the human rights establishment, it seems that this writing has had, through no fault of its own, a numbing effect.⁵⁴ While particular advocacy groups have mobil-

(2005), available at <http://www.ohchr.org/Documents/AboutUs/annualreport2005.pdf>; HUMAN RIGHTS WATCH, WORLD REPORT 2007 (2007), available at <http://www.hrw.org/wr2k7/wr2007master.pdf>.

54. A small sampling of law review articles on the subject of human trafficking from the past year alone includes the following: Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Antitrafficking in Persons Policy*, 14 TUL. J. INT'L & COMP. L. 269 (2006); Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403 (2006); Nancie Caraway, *Human Rights and Existing Contradictions in Asia-Pacific Human Trafficking Politics and Discourse*, 14 TUL. J. INT'L & COMP. L. 295 (2006); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006); Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137 (2006); Sara Elizabeth Dill, *Old Crimes in New Times: Human Trafficking and the Modern Justice System*, 21 CRIM. JUST. 12 (2006); Vanessa E. Munro, *Stopping Traffic? A Comparative Study of Responses to the Trafficking in Women for Prostitution*, 46 BRIT. J. CRIMINOLOGY 318 (2006); Brian Parsons, *Significant Steps or Empty Rhetoric? Current Efforts by the United States to Combat Sexual*

ized, there has been no corresponding mobilization of international officialdom around the issue of sex trafficking. Consistent with the problem of international human rights law favoring male concerns, the recently documented horrors of child sex trafficking have not mobilized the professional concern that alone makes international human rights law become concrete. It is apparent that human rights norms have an ameliorative effect to the extent that a multifaceted set of phenomena—from the public statements of governments to the creation of special tribunals—come together to create a sense of crisis. There seems little, if any, sense of international crisis or urgency on the question of child sex trafficking—except for “specialists” in this area. Instead, the problem is treated as unfortunate, like poverty; it is believed that trafficking will only be solved when “root causes” are addressed by the state in which the trafficking is taking place, but not at the insistence of other states.⁵⁵

D. *The Comforting Construction of International Human Rights Law: A Moveable Nuremberg*

It has been said that we are living in the Age of Rights.⁵⁶ But as international human rights law has developed and become professionalized over the past fifty years, it seems to have presented more comfort than challenge to powerful states. A standard view of the development of our contemporary international human rights begins with a return to the immediate post World War II period: the nation state in disgrace, traditional nationalism under suspicion, the construction of new international institutions on the immediate horizon, and institutions designed to prevent the resurgence of tyrants, a system capable of punishing the “enem[ies] of [] mankind.”⁵⁷ For the true believers, this was a monumental turning point in the conceptual development of international law. After the false start of the League of Na-

Trafficking Near Military Bases, 4 NW. U. J. INT'L HUM. RTS. 567 (2006). This is a random sample limited to a selection from one year; writing on the subject has been prolific for at least the past ten years.

55. See Chuang, *supra* note 54, at 160–63; Todres, *supra* note 40, at 617–19 (describing the social and economic context for sex trafficking in Southeast Asia).

56. See generally LOUIS HENKIN, *THE AGE OF RIGHTS* (1990) (discussing the development of human rights after World War II).

57. See, e.g., JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* (3d ed. 2006); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The “law of nations” has traditionally posited a role for itself in identifying and punishing those who work against the interests of humankind; the pirate, the slave trader, and in more recent times, the torturer.

tions, the new United Nations and international human rights law would ensure that nation states and their leaders would be called to account for their treatment of individuals—both inside and outside the national territory of those leaders.⁵⁸ If the Nazis represented the dark side of humankind, then prosecuting key Nazis would reveal the light. Unearthing the worst would bring out the best in *us*; compensation, in a sense, for the pain of knowing the worst that humanity is capable of. In terms of the species, it would be both an embrace of knowledge and a distancing. Final victory over evil would fortuitously provide the opportunity for putting ultimate prosecutorial goodness on display. International law would ensure that “never again” would be a living principle, treated with urgency, and made real through the creation of tribunals.⁵⁹

The language of the Nuremberg judgment insists that the tribunal was not created to pursue the aims of a “victors’ justice.”⁶⁰ The Nuremberg defendants, charged with “crimes against humanity,” were thus cast as the ultimate deviants: those who had relentlessly opposed “humanity.”⁶¹ Nuremberg became a

58. See PAUL KENNEDY, *THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS* (2006); *THE LEAGUE OF NATIONS IN RETROSPECT: PROCEEDINGS OF THE SYMPOSIUM* (1983).

59. The preamble to the U.N. Charter begins with a statement of intent: to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind; and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small; and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained; and to promote social progress and better standards of life in larger freedom.

U.N. Charter pmbl. The purpose of the U.N. and the limitations on interference with sovereignty are set forth in Chapter 1, Articles 1 and 2 of the U.N. Charter. See *id.* arts. 1–2.

60. See *The Nuremberg Trial*, 6 F.R.D. 69, 107 (Int’l Military Trib. 1946) (“The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.”).

61. The *Nuremberg* judgment explained that the crimes to be addressed within the course of the German war criminals’ trials were “crimes against peace, war crimes, and crimes against humanity,” the latter to include

“mode”—a political and legal structure familiar to virtually every American high school student. The operative messages were that evil doers could be put on trial, that one may not hide behind the nation state for protection, and, ultimately, that there is an international community with universal values molded into the form of law.⁶²

With Nazis as the prototypical men and women of evil, and the foil for the victorious, freedom-loving allies, it is a given that in the Nuremberg mode, we are always heroes. International human rights law flourishes when we appear to be heroes in carrying it out—especially when tribunals ensure a great deal of work for lawyers to do. By contrast, I will try to show that there are no organized, institutionalized, professionalized “human rights” when the violators of human rights cannot be constructed in political terms—when the actions implicate virtually an entire gender, or “gender-tendency,” and when the victims are neither noble political prisoners, nor sympathetic political minorities.⁶³ Victims tend to remain invisible when there are no heroic implications in effecting their rescue.⁶⁴

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Id. at 76–78.

62. See Elizabeth Borgwardt, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT’L L. 401, 408–09 (2005) (“Lieutenant Colonel Murray C. Bernays, the brilliant attorney and War Department official who drafted the original memo outlining the ‘conspiracy’ theory for the trial and punishment of Nazi leadership, wrote in a June 1945 letter to his wife, ‘Not to try these beasts would be to miss the educational and therapeutic opportunity of our generation.’ The defendants were considered to be singularly psychotic exemplars of a deeply disturbed dystopia, and discussion of their crimes was replete with imagery of disease and dementia.”).

63. This is precisely why certain violations of human rights, such as crimes of violence against women and children, are generally put down to intractable questions of culture, ignorance, or poverty.

64. In this sense, it is no accident that at least some of the groups most prominent in stubborn insistence on putting this issue before the public are “faith based”—note the discourse of the president of the International Justice Mission’s Gary Haugen, who combines religious zeal with intense moral outrage and activism around the issue of child sex trafficking. See, e.g., GARY A. HAUGEN, *GOOD NEWS ABOUT INJUSTICE: A WITNESS OF COURAGE IN A HURTING WORLD* (1999) (describing his religious faith and resulting activism on behalf of trafficking victims around the world). As there are no heroic implications for the generality of people, especially men, in pursuing actions against child sex trafficking, acting on behalf of God provides the necessary heroic rationale for some.

What is noteworthy in this notion of hero is that, despite recent developments in the expansion of concepts of international human rights law, new "violations" are only granted admission when they contain the potential for this self-congratulatory moment. Otherwise, they remain the "niche" concerns of specialized NGOs. Where violations of women's rights have been included, for instance with the acknowledgment of rape as a war crime, this remains largely limited to situations of public conflict that lead to resolutions by force⁶⁵—thus, the designation of winners and losers. In this sense, violations of women's rights may, but only under certain familiar conditions, become part of the political designation of the "enemies of mankind" without any threat to the hero.

E. *Human Rights Law and Its Function in International Consciousness*

In this sense, international human rights law has a role and function that is not limited to its norm-setting capabilities. To see international human rights law as being primarily about rectifying human rights abuses represents a fairly simplistic view of the matter. Rather, international human rights law is also a mirror for the moral regeneration and even self-congratulation of those devising the norms. Hence, despite the Nuremberg theory that post-conflict tribunals are not just about "victors' justice," but about applying pre-existing international law, there is nevertheless an element of "victors' justice" implicit in all international human rights norms.⁶⁶ International human rights law is a 'feel

65. See Engle, *supra* note 35, at 778–79 ("The ICTY's treatment of rape, of course, resulted from more than the work of feminist advocates. . . . [It] coincided with increasing support in general for an international criminal law . . . enforced through tribunals and courts. . . . As Theodor Meron, the current ICTY president, saw it in 1993: 'Indescribable abuse of thousands of women in the territory of former Yugoslavia . . . shock[ed] the international community into rethinking the prohibition of rape as a crime under the laws of war.' Moreover, it led to the consideration of rape as a violation against women qua women, rather than simply as a violation of men's property rights."); Theodor Meron, Editorial Comment, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425–28 (1993).

66. See, e.g., Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 252 (2007) (describing the inherent tendency of post-conflict war crimes tribunals to be perceived by some as based on "victor's justice"; that is, not impartial with respect to the selection of defendants).

good' phenomenon; as a secular religion, it creates a zone of holiness for those who understand its intricacies.⁶⁷

Human rights tribunals, and even the human rights norms themselves, separate the good from the depraved, the morally emulable from the rejected, the knight in shining armor from the "enemy of all mankind."⁶⁸ Where particular human rights violations are generally recognized, it is a reasonable bet that there is a "feel good" element involved for those devising, applying, enforcing and disseminating the norms. As for the lawyers who professionalize this process, there is inevitably the embedded question of whether there is work in it or not. Where human rights violations implicate the tendencies of the male gender in some generalized way, for instance, we can be sure that these norms will receive far less professional attention, recognition, and dissemination. *Jus cogens*, as currently conceptualized, lacks an objective measure; violations of such norms are attributable only to the behavior of the historically defeated.

It is significant that the institution that purports to be the world's first permanent "criminal" court has been opposed by the United States as being too much "challenge" and not enough "comfort."⁶⁹ The possibility of objectively defined, internation-

67. See Douglass Cassel, *The Globalization of Human Rights: Consciousness, Law and Reality*, 2 NW. U. J. INT'L HUM. RTS. 6, ¶ 43 (2004) ("Some go so far as to call human rights the new 'secular religion' of the 20th century. While that may be an exaggeration, human rights has become embedded in how educated citizens in most countries understand the world. It is a primary lens through which they view the relations of peoples to governments, individuals to societies, and minorities to majorities."). See also Tawia Ansah, *A Terrible Purity: International Law, Morality, Religion, Exclusion*, 38 CORNELL INT'L L.J. 9, 14 (2005) ("International legal discourse has in effect inherited the rationalism of the Enlightenment project and, to a large extent, it has attempted to repudiate the 'blood and soil' narratives that led . . . to so much conflict, death, and depredation.").

68. In the words of the *Filartiga* court,

In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.

Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

69. See Anna N. Astvatsaturova, Tracy M. Proietti & George S. Yacoubian, Jr., *The Case for Prosecuting Iraqi Nationals in the International Criminal Court*, 10 INT'L LEGAL THEORY 27, 51 (2004) ("The United States can either participate in its development or hinder the enforcement of international justice. Strenuous argument is made for the former, as any reluctance or refusal by the US to participate in ICC proceedings will give aid and comfort to the violators of international law.");

ally significant crimes skates too close to what a genuine international human rights tribunal would look like. While the crimes of interest to the ICC remain the familiar “war crimes,” and the Court does not focus on all human rights violations, it is significant that the first indictment was handed down for Joseph Kony, whose career has been notable for his horrific use and abuse of children in the Ugandan civil conflict.⁷⁰

F. *Intolerable Suffering, No Organized Response*

If international human rights law were simply an uncomplicated matter of justice, its objective would be to provide multilateral responses to mass violations of human rights where the *quantum* of suffering is most acute.⁷¹ In human rights law, there is always a great deal of discussion about whether the state has taken some action in violation of individual rights, but this con-

Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT'L L.J. 415, 415–16 (2004) (writing on the subject of the historical U.S. position towards war crimes tribunals, and the U.S. view of the ICC in particular).

70. See *Prosecutor v. Kony*, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony (July 8, 2005, amended Sept. 27, 2005). This critique takes full cognizance of the importance of the specialized tribunals on Yugoslavia, Rwanda, and Sierra Leone, which are very worthwhile. However, all of these post-conflict or “transitional justice” mechanisms remain within the Nuremberg model—condemnation of war crimes. This is true even where women’s concerns have come to occupy a place in this paradigm—i.e., the Yugoslav tribunal’s inclusion of rape as a war crime. See Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 841 (2005).

71. However, to focus mainly on the quantum of suffering, while de-emphasizing the type or source of suffering, is threatening to the fabric of international law. That is, state-sponsored (or at least state-related) torture can be dealt with multilaterally because it offers a problem that can be approached through existing structures; whereas diffuse, private forms of suffering, even if perpetrated in a repetitious manner, would lead to interventions in the workings of culture and economic life. This supposed stark difference is often more apparent than real and serves to separate out the relevant from the irrelevant victim. In another context, see the interesting critique by Holly Burkhalter who writes:

[C]onsider a crime that claims very large numbers of victims and yet where strategies to save any of them are almost unknown. The commercial sexual exploitation of children is a crime practiced with impunity in many countries that, particularly in the age of HIV/AIDS, results in the death of hundreds of thousands of victims. UNICEF estimates that two million children enter prostitution every year. Child prostitution is a clear violation of every country’s domestic law and flagrant offense under international law, yet these crimes are carried out in broad daylight, almost invariably with the complicity of local law enforcement.

Holly Burkhalter, *Preventing Genocide and Crimes Against Humanity*, 98 AM. SOC'Y INT'L L. PROC. 41, 42 (2004).

cept of state action could be expanded to include failures of the state to act in the face of obvious and widespread abuses.⁷² Where the violation depends directly on the complicity of a corrupt police force, for instance, a state response could easily be contemplated.⁷³ If not for a wish to maintain a narrow view of the type of suffering that belongs in the “human rights violation” box, there is no need to cling to a highly restrictive view of state action. The state action requirement is the line between “crimes” (largely of national concern) and “human rights violations” (of international concern). If child sexual slavery is maintained by the corrupt action of a state’s police force, well known and quite obvious to all, what more do we need to establish “state action?” But instead, state action as a concept has been used to ensure that human rights law remains firmly grounded in violations actively perpetrated by states or their immediate representatives. Where the state depends on the privatized wrongs of certain social groups, this fact is excluded from multilateral concern by the artificial imposition of a state action requirement.

By any measure, sex trafficking should be seen to meet the definition of a *jus cogens* violation due to the incalculable suffering caused, the clear analogies with both slavery and torture, and

72. See Brooks, *supra* note 42, at 352 (“Trafficking in women is possible only when state agents refuse to make preventing it a priority and refuse to engage in the collaborative international efforts necessary to stamp it out. If we use a more nuanced and expanded definition of state action—one that recognizes that willful blindness or deliberate inaction is just as much a state choice—many injuries that affect women in particular suddenly appear on our maps with startling clarity.”).

73. The European Court of Human Rights recognizes that though States “are free to choose the means by which they comply with Court judgments . . . there are nonetheless very clear *obligations of result* on States following an adverse judgment against it by the European Court of Human Rights.” Murray Hunt, *State Obligations Following from a Judgment of the European Court of Human Rights*, in EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS 25, 25–26 (Theodora A. Christou & Juan Pablo Raymond eds., 2005). The U.N. Executive Committee

[s]trongly encourages States, UNHCR, and all relevant actors, whether alone or in partnership, to strengthen action to prevent and respond to sexual and gender-based violence, in particular through carrying out their respective responsibilities for the introduction of standard operating procedures, the rigorous implementation of relevant UNHCR Guidelines and related measures highlighted by the Executive Committee . . . as well as through the active use of resettlement, when appropriate, to ensure protection and a durable solution for victims of sexual and gender-based violence.

U.N. Executive Comm., *General Conclusion on International Protection (NO. 99 (LV) — 2004)*, 17 INT’L J. REFUGEE L. 271, 274–75 (2005).

the open complicity of police forces in many parts of the world.⁷⁴ For that matter, there should be no need to analogize to slavery and torture, as if implying that these are more legitimate or resonant; sex trafficking (both the buying and selling of people and the use of those people by customers) is a specific and unique violation of rights. Child sex trafficking is an even more egregious example of this type of violation. The purpose here is not to feed into the notion that we should be devising formal hierarchies of suffering (e.g., first degree or second degree trafficking)⁷⁵, but to advocate for using the post-World War II human rights framework where the need is actually greatest.⁷⁶

There is no realm in which the gap between urgency and inaction is more dramatic than with regard to child sex trafficking. The problem is transnational, vicious, and horrifying. Nevertheless, it lacks the key ingredient that allows a human rights violation to rise to the top in terms of global consciousness and reaction: the perpetrator cannot be neatly identified as the Other. Instead of a Nazi, a Serb nationalist, or a Hutu tribe member worked up to a frenzy by hate-filled broadcasts, perpetrators of child sex trafficking are ostensibly ordinary men, from all walks of life and in all parts of the world. Small wonder that this has failed to "make it" in human rights law terms.

74. The contours of such an argument have been demonstrated in the context of domestic violence. See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 296 (1994) ("My thesis is that, when stripped of privatization, sexism and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence that have been prohibited by treaty and customary law and recognized by the international community as *jus cogens*, or preemptory norms.").

75. Current federal law defines the term "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.

22 U.S.C.S. § 7102(8)(A)–(B) (LexisNexis 2007).

76. In the anthropological sense, children occupy a special place, in terms of their lack of mature understanding and their need for protection. It is noteworthy that a sufficiently large number of men in a definable section of the commercial sex industry seek gratification from abusing and even torturing the most vulnerable human beings.

On the question of why certain kinds of crimes gain immediate attention and call for urgent action, while others languish unnoticed, Catharine MacKinnon has written:

Compare the response to September 11th with excuses for doing nothing about violence against women. As the roots of September 11th are uncovered deep in social and economic life around the world, in belief and identity, its acts as expressive as they are masculine, will the war on terror grind to a halt? Will it be said that some individuals are just violent, so nothing can be done? Will terrorism be seen as cultural, hence protected? Will the United States throw up its hands when it learns that Al Qaeda, like some pornographers and other sex-traffickers (sex their religion as well as their business) is organized in (what for men are) unconventional ways? Violence against women is imagined to be nonstate, culturally specific, expressive acts of bad apple individuals all over the world that is so hard to stop. Terrorism, which is all of these, is said to be so serious, there is no choice but to stop it, while seriously addressing threats to women's security is apparently nothing but a choice, since it has barely begun.⁷⁷

Building on MacKinnon's insights, we can foresee the fate of sex trafficking of children, since it is so easy to push this kind of trafficking into the realm of "perversion" and the unusual or unrepresentative. In fact though, even by the most conservative estimates, child sex trafficking is demonstrably not unusual.⁷⁸ MacKinnon's dramatic demonstration of the "problem ignored" has the same root whether women's or children's rights are concerned. But it should be recognized that the suffering of children is, if anything, even more invisible in international human rights terms than that of women, and the violation of trust even more shocking to the conscience. By any measure, child sex trafficking represents the very worst form of commodification and exploitation of humans. Yet the response—legal, academic and professional—is to treat it as largely unstoppable (at least in the

77. Catharine A. MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L L.J. 1, 18–19 (2006).

78. See, e.g., MIKO, *supra* note 1, at 1–2 (discussing the proliferation of trafficking); UNITED NATIONS OFFICE ON DRUGS AND CRIME, *TRAFFICKING IN PERSONS: GLOBAL PATTERNS* (2006), available at http://www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf; Child Exploitation and Obscenity Section, U.S. Dep't of Justice, *Child Prostitution: Domestic Sex Trafficking of Minors*, <http://www.usdoj.gov/criminal/ceos/prostitution.html> (last visited Sept. 15, 2007). See also THE PROTECTION PROJECT, JOHNS HOPKINS UNIV., *INTERNATIONAL CHILD SEX TOURISM: SCOPE OF THE PROBLEM AND COMPARATIVE CASE STUDIES* 24 (2007), available at http://www.kmk-studio.com/JHU/JHU_Report.pdf (estimating that two million children are being exploited by "sex tourism" alone).

immediate term) and unfortunate, resulting from poverty and organized crime—a morass of intractability.⁷⁹ The features of professional and political urgency in the face of this trafficking, except on the part of certain specialized NGOs,⁸⁰ are at best nominally evident in global discourse.

IV. BUT HASN'T THERE BEEN A PARADIGM SHIFT IN INTERNATIONAL HUMAN RIGHTS LAW?

A. *The International Human Rights Conventions for Women and Children*

As discussed above,⁸¹ many have written poignantly and convincingly that international human rights law tends to leave out the massive and pervasive violations of the rights of women and children. It has thrived on “-isms”: human rights law would be the anthem of those destroyed by Nazism and Cold War era totalitarianism. Human rights law has also turned the spotlight on mistreatment of both prisoners of war and civilians in the course of transnational wars, although this aspect of armed conflict is actually more accurately termed “humanitarian law,”⁸² perhaps signaling something a bit “softer” than human rights law. The conceptual nexus behind the rise of international human rights principles is that in the wake of World War II, the nation state lost whatever luster it had left, and the treatment by national governments of individuals would henceforth be the business of all. For the most egregious violations of the rights of individuals, nation states and their representatives would bear an obligation and liability *erga omnes*: international human rights

79. See Burkhalter, *supra* note 71, at 42–43 (“[B]ecause of the sheer volume of sexual trafficking victims and sexually exploited children and their proximity to even larger numbers of sex workers, the prospect of identifying, liberating, and rehabilitating children illegally held in prostitution is so daunting that there are almost no policies, strategies, and practices to save even some of these young victims.”).

80. See, for example, the International Justice Mission’s homepage, <http://www.ijm.org>, which features prominently a “casework spotlight” on sex trafficking, and emphasizes the egregiousness of sex trafficking and the urgency in addressing the widespread nature of the problem.

81. See *supra* notes 34–41 and accompanying text.

82. See, e.g., Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 445–46 (2007) (discussing the nuanced implications of the term “international humanitarian law”).

law rested on an implicit acceptance of (in practical terms, limited and conditional) universal jurisdiction.⁸³

Admittedly, this paradigm has, at least ostensibly, been extended over time from the political prisoner/prisoner of war model to other groups, such as women and children. One criticism of the argument being made in this Article might be that the contributions of recent decades are being ignored. Women's rights have been enshrined in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁸⁴ and the age of international children's rights was, to all appearances, set in motion with the United Nations Convention on the Rights of the Child (UNCRC) in 1989⁸⁵. Both the CEDAW and UNCRC are widely ratified⁸⁶ and require states parties to report on their progress in ensuring women's and children's rights. The major human rights NGOs, such as Human Rights Watch and Amnesty, concern themselves very clearly and insistently with violations of the rights of women and children.

Further, the template for implementing women's and children's rights is similar to other instruments setting out more general rights for all: the concern of the international community would trump and transcend the sovereignty of the nation state, bringing national secrets to light wherever rights were violated.⁸⁷ Champions of the women's and children's rights conventions wrote glowingly of the "new day" for women and children, in that the unique concerns these groups had would be met by the content of the new conventions.⁸⁸ However, despite these appar-

83. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 404 (1987); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788–89 (1988).

84. See Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

85. See UNCRC, *supra* note 9.

86. CEDAW has 185 States Parties, see <http://www2.ohchr.org/english/bodies/ratification/8.htm>, and the UNCRC has 193 States Parties; see <http://www2.ohchr.org/english/bodies/ratification/11.htm>.

87. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

88. The introduction to CEDAW itself states that

[a]mong the international human rights treaties, the Convention takes an important place in bringing the female half of humanity into the focus of human rights concerns. . . . [T]he Convention establishes not

ent advances, violations of the rights of women and children do not enjoy the same level of concern—jurisprudential, academic or empirical—as that enjoyed by the most professionally “relevant” victims of human rights violations.

CEDAW tends toward abstraction and a lofty moral tone; it declares that States Parties “condemn discrimination against women in all its forms,” a major proposition.⁸⁹ States are called on to legislate to ensure the full equality of women with men across a wide variety of political and social fields. With regard to trafficking specifically, CEDAW, Article 6 states: “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”; Article 7 focuses on the rights to vote and participate in governance; Article 10 takes up equality of access to education; Article 11 calls for the elimination of discrimination in employment; Article 14 draws attention to the “particular problems faced by rural women”; Article 15 says that States shall accord women equality before the law; and Article 16 calls for equality in marriage and family matters.⁹⁰ As with other conventions, there is a committee established to review reports submitted by States Parties.⁹¹ Even those who acknowledge its landmark status criticize CEDAW for its equivocal language, its apparent lack of absolutism and urgency, and its general diffidence towards state policy.⁹² Precisely because of the gap be-

only an international bill of rights for women, but also an agenda for action by countries to guarantee the enjoyment of those rights.

CEDAW, *supra* note 84.

89. CEDAW, *supra* note 84, at art. 2.

90. *See id.*

91. For a discussion of the CEDAW monitoring process, see Jessica Neuwirth, *Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of All Forms of Discrimination Against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RTS. J. 19, 24–27 (2005).

92. *See, e.g.*, Ann Elizabeth Mayer, *A “Benign” Apartheid: How Gender Apartheid Has Been Rationalized*, 5 UCLA J. INT’L L. & FOREIGN AFF. 237, 246–48 (2000) (“CEDAW . . . offers hortatory provisions, enjoining states to undertake various measures designed to eliminate all forms of discrimination against women. Article II, the central article in the Convention, affirms that states parties ‘condemn discrimination against women in all its forms,’ but goes on to state that they ‘agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.’ That is, there is prescriptive language indicating in the future that states are to take appropriate measures in the direction of eliminating gender discrimination, but there is no command that countries practicing gender discrimination must cease such practices forthwith and unconditionally. . . . When compared to the muscular denunciations of racial discrimination and *apartheid* [in

tween international conceptions of the relative importance of “public” versus “private” rights violations, CEDAW has not come close to achieving its stated goals.⁹³

The UNCRC has been ratified almost universally.⁹⁴ It resulted from a decades-long drafting process that reflected a strong child rights movement begun in the 1970s. It is a complex document, containing both “protective” and “empowering” provisions, and sees childhood as a universal phenomenon deserving of special assistance, and children as capable of participating in decisions about their own lives. The UNCRC has been praised as an epoch-making document, conferring a hitherto unheard of level of rights on all children; on the other hand, it is often dismissed as too abstract, idealistic, and remote.⁹⁵ Social conservatives in the West have denounced the UNCRC as a threat to the traditional family; third world activists have similarly vilified it as a threat to traditional structures of authority in developing world cultures.⁹⁶

Despite all this specialized norm production, women and children have not been embraced as “mainstream” by the international human rights establishment. The legal profession, so often guilty of taking social progress movements and draining the life force from them, has done so in this instance as well. When it comes to the rights of children trafficked for sexual purposes, it is fair to say that at the level of professionalized rights recognition, there is no concrete human rights dimension. This sort of viola-

other international instruments], the language in CEDAW seems reticent, even ladylike.”).

93. See Neuwirth, *supra* note 91, at 24 (“As of November 2004, 179 states have ratified CEDAW However, twenty-five years after the adoption of CEDAW, and almost forty years after the adoption of the International Covenant on Civil and Political Rights—both binding legal treaties—states still pervasively retain sex discriminatory laws.”).

94. See Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2 1990). All members of the United Nations except Somalia and the United States ratified the Convention. See Convention on the Rights of the Child: Status of Ratification, <http://ohch.org/english/countries/ratification/11.htm> (last visited Sept. 15, 2007).

95. See David M. Smolin, *A Tale of Two Treaties: Furthering Social Justice Through the Redemptive Myths of Childhood*, 17 EMORY INT’L L. REV. 967, 973–84 (2003).

96. See Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT’L L.J. 449, 451 (1996) (“[T]he CRC . . . confuses an understandable fear of state paternalism with an unwarranted fear of parental paternalism.”).

tion remains a problem about which one hears at specialized conferences, but only rarely in the corridors of power.⁹⁷

Some may object that there is no monolithic "human rights establishment," and that concerns manifest themselves at different levels and in different forums on an ongoing basis. The test I propose as to whether or not real attention is being paid by the international political and legal establishment to human rights violations is whether particular violations "make it" into high-level diplomatic discussions; that is, whether representatives of a country set down ultimatums and make threats of specific consequences for failure to improve the human rights picture. Violations of the rights of women and children, especially if they are not part of a post-conflict scenario, are almost never mentioned prominently at moments of diplomatic high seriousness. "Blame and shame" has many levels of perceived seriousness: the least serious is that found in the paper-pushing of U.N. committees; the most serious is in high level diplomatic maneuvering by powerful states. By this measure of concrete effectiveness, women's and children's rights scarcely exist; such issues as education for girls might be taken up by an American first lady on a foreign trip, but gendercide will not pass the lips of politicians as they discuss energy, arms or trade. For that matter, the most egregious of these violations are scarcely even taken up by the cautious U.N. Committees.

In other words, without a self-congratulatory payoff, international human rights law does not organize itself sufficiently around an issue or violation to make any substantial difference, thus leaving some hideous violations of rights essentially without redress. A specialized human rights convention does not in itself guarantee substantial change. It is the psychological and geopo-

97. It has long been the author's contention that the architects of social movements naturally wish to see the results of social upheaval enshrined in law. Social progress tends to demand legal protection, to ensure the survival of the political gain into the future. However, the law rarely, if ever, gives the social movement what it desires, as the legal establishment is ultimately responsive to those with whom it interacts on a constant basis. The technical complexity of law almost always means that by the time those involved in the movement realize that they are not getting what they sought, the energy of the movement has dissipated, never to be revived in the same way again. When applying this insight to the realm of international human rights, it elucidates why a genuine "response" to human rights violations depends upon the response having a strategic and self-congratulatory payoff for powerful states. Without such a dimension, human rights violations, however terrible, simply do not rate in the same way, and are thus relegated to the U.N.'s so-called "reporting" system.

litical payoff of human rights law that ensures pride of place for certain mainstream issues, primarily involving political violence by the state.

B. *The March of Norms and the Dream of Universal Jurisdiction*

Human rights norms without enforcement mechanisms may have some utility and may play some role in energizing grass roots activity and in shaming governments. However, the gap between norm generation and enforcement remains problematic at best and grossly hypocritical at worst (i.e. we care enough to identify the violation, but not enough to insist on the implementation of a solution). Although the international community remains fixated on crimes arising from armed conflict, there is adequate theoretical basis to allow for an evolution of human rights law that will include more areas of human concern. In parallel with this, there is clearly a new emphasis, however limited, on creating structures of enforcement for international norms, including human rights norms.⁹⁸ National statutes like the now eviscerated Belgian “universal jurisdiction” statute, and international initiatives such as the creation of the International Criminal Court, indicate a global push in the direction of tribunals prepared to try at least the most widely recognized crimes against humanity. This set of developments could potentially lead to calls for more tribunals to hear similar kinds of actions.⁹⁹

It is a genuine surprise when a state takes human rights so seriously that it is willing to put on trial virtually anyone alleged to be guilty of violating at least the “most important” of those

98. The World Trade Organization (WTO) has a Dispute Settlement Understanding (DSU): a standardized means of judgment and enforcement for any issue that falls under the WTO’s jurisdiction. For the text of the DSU, see http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf. The enforcement mechanism in Articles 21 and 22 of the DSU provide for prompt enforcement of decisions and interim options of either compensation or suspension of trade concessions. It is much easier to enforce rules in the economic realm because trade and money issues have been historically regulated and states have tangible and calculable stakes in ensuring that everyone follows the rules. Human rights norms, on the other hand, are not fixed, and many states do not see the value in creating structures to protect them. In fact, creating such structures may actually harm some states (or at least their corrupt power arms) in the short run.

99. The European Court of Human Rights (ECHR), for example, has the most highly developed jurisprudence on human rights violations, decoupled from national judicial structures. For a sense of the wide range of issues relating to children heard by the ECHR, see Bernadine Dohrn, *Something’s Happening Here: Children and Human Rights Jurisprudence in Two International Courts*, 6 NEV. L.J. 749 (2006).

norms. It is also clear that such attempts elicit fierce opposition by powerful states. As the European state in which the all-important city of Brussels is located, Belgium's statute, first enacted in 1993, gained a great deal of attention, both positive and negative. Although it was eventually watered down in the face of intense international pressure, Belgium's ambition in amending its criminal law was striking: its objective was nothing less than the possibility of prosecuting in Belgium those who had committed internationally recognizable war crimes. During its lifetime, the statute applied no matter what the nationality of the perpetrator or where the alleged crimes were committed.¹⁰⁰

C. *Theatre of the Absurd: The Sosa Case: Universal Jurisdiction for Occasional Use Only*

Legal discourse is often tragi-comical in ways not recognized in legal academia. This comedy derives from the striking disconnect between empirical "reality" and the legal methods that supposedly interact with, and contribute to the betterment of, that reality. The fact that American lawyers have focused so much attention on the eighteenth century Alien Tort Claims Act (ATCA), rather than on some kind of movement for the enshrining of a universal jurisdiction element in U.S. law, is the perfect example of this disconnect. The idea is this: Congress created a lean statute over two hundred years ago that seems to allow non-U.S.-national plaintiffs to proceed to U.S. federal courts with tort claims against someone (defendant pool unspecified) when that defendant has acted in violation of a treaty of the U.S. or the law of nations.¹⁰¹ Because this law was little used until the *Filartiga*

100. See Steven Cviic, *Belgium Drops War Crimes Cases*, BBC NEWS, Sept. 24, 2003, <http://news.bbc.co.uk/2/hi/europe/3135934.stm> ("Belgium's highest court has thrown out war crimes cases brought against former US president George Bush and current Secretary of State Colin Powell . . . [since] [c]hanges to the law made it almost inevitable that the cases against Mr Bush, Mr Powell and Israeli Prime Minister Ariel Sharon, would fail."). Cviic goes on to explain that "the law originally allowed Belgian courts to rule on crimes against humanity regardless of the nationality of the perpetrator or where the alleged offences took place," but that "the law was . . . controversial, with countries like the United States arguing that it simply provided an opportunity for campaigners to bring politically motivated cases." *Id.* As modified, the law "only applies if the victim or suspect is a Belgian citizen or long-term resident at the time of the alleged crime." *Id.*; see also Steven R. Ratner, Editorial Comment, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 888-89 (2003).

101. See Alien Tort Claims Act, 28 U.S.C. § 1350 (2007) [hereinafter ATCA] (stating that "[t]he district courts shall have original jurisdiction of any civil action by

case¹⁰² in 1980, and hence scantily interpreted,¹⁰³ it was unclear to virtually everyone how it should be, or was meant to be, used.

Enter upon the scene some enterprising public interest lawyers, who took the brief statute and imposed upon it a version of universal jurisdiction on the part of U.S. courts for egregious violations of human rights law to the extent the violations can be said to involve the “law of nations.” I applaud such uses of “found law”—analogous as they are to lovely found poems. But surely one could not say that this statute has the same effect as a statute consciously created on the part of any nation for the express purpose of pursuing international criminals who violate the human rights of others. One possible theory is that the “found law” gets the job done in the immediate term, raises awareness, and allows certain federal courts to huff and puff about the enemies of mankind, while also allowing conservative jurists to huff and puff about the dangers of the judiciary inventing rules about torts that violate the law of nations. Yet a handful of cases based on the ATCA have received a striking amount of attention. Why should this be? Because during the period in which the law can be used for human rights purposes, all of the ingredients are there—a forum, a dispute, a jurisdictional grant—quite without regard to the utter vulnerability of the statute, and hence the vulnerability of anyone who could be helped by its operation. Legal academics will keep writing about the ATCA until they are told to stop. That is, until the U.S. Supreme Court shuts the door on them.

The debate raged over whether the ATCA should encompass the evolving norms of international human rights law, such that any human rights principles found to be part of the “law of nations” could be part of a tort action by the alien plaintiff. On the other side, there were dire warnings of a chill in the operation of U.S. businesses abroad, as these businesses would avoid

an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

102. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

103. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the much anticipated decision that would indicate the future viability of the ATCA for public interest purposes, the Supreme Court determined that the causes of action capable of being heard under the statute today must be of a type as widely accepted and specific as the handful of violations of the law of nations, as perceived at the time the time statute was enacted. The Court states, “[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” *Id.* at 725.

any involvement with repressive governments.¹⁰⁴ All awaited the word of the United States Supreme Court on this matter, in the form of the *Sosa*¹⁰⁵ case. One possibility was that the Court would take a strict view that would essentially foreclose future ATCA cases. Instead, the Court struck an apparently brilliant balance between letting universal jurisdiction run wild, and closing down ATCA-based human rights-related cases altogether. Its decision is the soul of caution; but given the context, it is hard to see how this level of caution makes sense. The caution is rational, though, in light of the fact that international human rights law is a “handle with care” box: we want it around, but fear its being misused in ways that might turn the spotlight in the wrong direction. However unintelligible intellectually (if human rights abuses are stark and real, why be cautious about exercising jurisdiction over them?), the *Sosa* decision was the lawyer’s dream—plenty of work to be done in drawing lines between this violation of rights and that one. Cultural genocide? Well, no. Torture of a dissident by the police? Very likely! In the realm of scholarship on this topic, we will see what we have seen in the “trade and human rights/trade and labor” debate: a large number of law review articles arguing that the ATCA should be seen to encompass this violation or that.¹⁰⁶

If the human rights revolution has in fact occurred, then it is to be expected that universal jurisdiction should be popular in many and varied locales.¹⁰⁷ In the U.S. context, it seems strange

104. See Francisco Rivera, *A Response to the Corporate Campaign Against the Alien Tort Claims Act*, 14 *IND. INT'L & COMP. L. REV.* 251, 251 (2003) (“Multinational corporations, along with certain governmental, business, and trade sectors, have begun a full attack against the Alien Tort Claims Act . . .”).

105. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

106. See, e.g., Igor Fuks, Note, *Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 *COLUM. L. REV.* 112, 122 (2006) (“The key for any ATCA claim stretching significantly outside of the limited view of international law that existed in 1789 is conformity to two requirements set out by the Court: The claim must meet a threshold level of acceptance in the international community, and the claim must have specificity comparable to the original set of limited violations. Thus, the ATCA will recognize a cause of action beyond the list of violations of safe conducts, piracy, and ambassador law, so long as it is accepted by the international community and defined with the same degree of specificity that those violations had been. Precisely what that means for lower courts interpreting the statute in light of the Supreme Court holding remains unclear, as both of the requirements are rather vague standards as opposed to bright-line rules.”).

107. For a history of the universal jurisdiction concept, see Henry J. Steiner, *Three Cheers for Universal Jurisdiction—Or Is It Only Two?* 5 *THEORETICAL INQUIRIES L.* 199, 210 (2004) (“Over the last decade, particularly in the last five years,

at best to impute universal jurisdiction-like ambitions to a statute like the ATCA, without aspiring in the judicial interpretive context to anything like universal jurisdiction based on a *jus cogens* imperative. In short, if the human rights revolution has truly come, then appropriate jurisdictional responses should be made head-on and without hair-splitting equivocation.

V. WHAT'S OUT THERE IN INTERNATIONAL ANTI-TRAFFICKING LAW?

A. *Human Rights Norms: What's in a Name?*

Much international human rights law is characterized by the fact that it resoundingly articulates norms to be followed, without consistently identifying clear remedies for violation of these norms.¹⁰⁸ Many would argue that this disconnect between norm-setting and failure to enforce is acceptable, because the existence of the norm itself encourages local action by NGOs and ultimately has incalculable effects on the standards followed by national governments.¹⁰⁹ International human rights norms are thus “energizing” within societies where these norms are needed

universal jurisdiction has drawn far more public attention than during the preceding centuries when its primary targets were nonstate actors like pirates or slave traders. . . . Although casual explanations are rarely convincing for such general phenomena, surely a half-century of the human rights movement must figure among them.”).

108. There exist few international tribunals to address human rights violations. For post-conflict situations and war crimes, there have been some tribunals created, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. And for crimes against humanity and war crimes, the International Criminal Court is the permanent body set up to redress such violations. However, most human rights victims have little recourse. Most human rights treaties rely on a state “reporting system” for their enforcement. Several have optional protocols allowing for individual petitions, but state participation in these protocols is sparse. For a general description of the U.N. human rights treaty monitoring system, see Rachael Lorna Johnstone, *Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body*, 7 HUM. RTS. L. REV. 173, 175–78 (2007).

109. See Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 395 (2006) (“Transnational legal process theory, for example, posits that through repeated participation in the international system individual government officials and government agencies come to internalize and eventually adopt the international rule as a behavioral habit. The theory of governmental networks, claims that compliance results when transnational networks of governmental agencies (including judicial networks) work together to harmonize regulation, enforce law, and share information. Additional accounts rely on constructivist notions that ideas transform behavior and look to the power of transnational communities of interest and expertise on a particular issue, which share information and coordinate responses across state borders.”).

by activists. The norms also have the effect of embarrassing governments which have signed onto human rights commitments but failed to follow through on enforcement.

It would seem perverse to argue against the articulation of human rights norms, simply on the grounds that there is a lack of political will to create structures for their enforcement. What possible harm could the existence of norms do? As far as how these norms are articulated, human rights agreements are inevitably fought over line by line, quite as if norm articulation were in fact very significant. On the one hand, states want to preserve maximum freedom of interpretation and maneuver for themselves when such treaties are created. NGOs and special interest activists want to ensure both maximum effectiveness of the norm, if only in terms of how it is formulated, and maximum power of the norm over the ratifying state.

Human rights norms that are articulated in order to identify and describe the plight of off-the-radar-screen populations (like sex trafficking victims) are especially troubling, in that the likelihood of a rigorous response to the situation of the victims is particularly remote. Paradoxically, how this group is described in the human rights instrument may be influential with respect to public and governmental perceptions. In recent years, there has been a vigorous international discussion of the problems of "trafficking victims": those persons who are coerced into moving from one geographical location to another with the end result that their persons or their labor are exploited. The spread of awareness of "human trafficking" is a key development in international human rights law in our time, despite the lack of effective multi-lateral responses to the phenomenon.¹¹⁰

Having already argued above that the "Nuremberg effect" prevents sex trafficking victims from receiving the full benefit of mobilization by the international human rights apparatus, it might also seem perverse to quibble about how this group of victims is described: if they are doomed to inattention, then how they are publicly presented is not especially relevant. But this is

110. For a discussion of the "new slavery," modernly called "trafficking," see generally Winston P. Nagan & Alvaro de Medeiros, *Old Poison in New Bottles: Trafficking and the Extinction of Respect*, 14 TUL. J. INT'L & COMP. L. 255 (2006), A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN ST. INT'L L. REV. 809 (2005), and KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* (1999).

to put too bleak a face on things. While it is true that one should expect no rush to fully embrace the cause of sex trafficking victims from the human rights establishment, to describe “human trafficking” in broad, generic, non-graphic terms is the nail in the coffin. Whatever hope does exist relates to a dramatic rise in public awareness of the scope and scale of the suffering being visited on women and children—a grave challenge to our conception of being human. So long as vicious behavior can be linked to political or ethnic goals (the more conventional cauldron in which human rights violations occur), we are able to comprehend it as an aspect of “social construction” in the name of power. By contrast, it is much more difficult to make any sense of otherwise sane, grown men raping children in basements.

It is in the international and national instruments dealing with human trafficking that we receive an official view of the nature of this problem. It should be noted that existing anti-trafficking laws at the international and national level are only “quasi human rights” in orientation. As mentioned above, they are mainly criminal, focusing on international cooperation in the prosecution of traffickers. The general tenor of these laws is something like: Hey, there is something terrible and largely hidden going on out there, and it is a kind of modern day slavery. At its worst, it involves the sale of women and even children for purposes of sexual exploitation by organized crime networks. Prosecutors, react to these outrages! This is an ambiguous stance, as it avoids implicating officialdom in ongoing responsibility for these violations. And while “sex tourism” laws do increase penalties for the exploiters and make prosecution easier, the link between state indifference and the exploiter is never front-and-center.¹¹¹ At the most abstract level, however, it is not

111. These laws focus on the individual traveling to take part in “sexual tourism.” As part of the Violent Crime Control and Law Enforcement Act of 1994, the U.S. implemented Travel With Intent To Engage in Sexual Acts With a Juvenile, which stated that:

A person who travels in interstate commerce, or conspires to do so, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2245) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States shall be fined under this title, imprisoned not more than 10 years, or both.

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, § 160001(g), 108 Stat. 1796, 2037 (codified as amended at 18 U.S.C.A. § 2423(b))

uncommon to hear sex trafficking spoken of as a gross violation of human rights.¹¹²

At the international level, the 2000 Anti-Trafficking Protocol—to be further discussed below—is attached to the U.N.'s Organized Crime Convention, which means that the emphasis is on prosecution of those involved in one “branch” of organized crime, namely human trafficking.¹¹³ While there is nothing inherently wrong with this, and while the Protocol is in fact quite impressive in its sweep, it means that sex trafficking is not presented as a direct human rights violation in which the state is complicit. Rather, the state has the potential under the Protocol to become the “hero,” when it takes up the charge to criminalize human trafficking and to pursue traffickers. Trafficking remains part of that morass of intractable criminality that prosecutors would eliminate from the world stage if they could.¹¹⁴ The Pro-

(West 2007)). The law has since been amended to increase the maximum prison term from ten to thirty years. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21, § 105(a), 117 Stat. 650, 653–64.

112. In a well-publicized speech before the United Nations General Assembly in September 2003, George W. Bush stated that

[t]here's a special evil in the abuse and exploitation of the most innocent and vulnerable. The victims of sex trade see little of life before they see the very worst of life—an underground of brutality and lonely fear. Those who create these victims and profit from their suffering must be severely punished. Those who patronize this industry debase themselves and deepen the misery of others. And governments that tolerate this trade are tolerating a form of slavery.

President George W. Bush, Address at the United Nations General Assembly (Sept. 23, 2003) (transcript available at <http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html>).

113. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/Res/55/25 (Nov. 15, 2000) [hereinafter Protocol].

114. Many barriers prevent this level of prosecution, such as protecting and encouraging victim testimony and prioritizing enforcement of sex trafficking laws. Sadly, enforcement has “domestic limitations.” See Sasha L. Nel, *Victims of Human Trafficking: Are They Adequately Protected in the United States?*, 5 CHI.-KENT J. INT'L & COMP. L. 3, 3 (2005) (“[S]tates will need to do more than enact legislation that attempts to prosecute traffickers.”); Kathryn E. Nelson, Comment, *Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches*, 24 HOUS. J. INT'L L. 551, 575 (2002) (“The protection of victims is an essential element of a successful trafficking prosecution because authorities are less likely to prosecute without any witnesses.”); see also Hanh Diep, Student Article, *WE PAY – The Economic Manipulation of International and Domestic Laws to Sustain Sex Trafficking*, 2 LOY. U. CHI. INT'L L. REV. 309 (2005).

TOCOL purports to encourage contracting states to provide prosecutors with some extra “tools” to this end.¹¹⁵

B. *The Legal Construction of “Human Trafficking”: All Kinds of Everything*

With almost numbing regularity, articles are written on “the modern day version of slavery”: the buying and selling of women and children, and also some men, across borders for a variety of purposes. Sexual slavery, work in sweat shops and clandestine domestic servitude are all included in these examinations. Numbers in the hundreds of thousands are offered as rough estimates, and it is pointed out that no one really knows how many such persons are being “trafficked” across borders. Groups such as Free the Slaves and the International Justice Mission have taken up the cause of the enslaved, even engaging in daring rescue attempts. This movement, intended to raise awareness as to the phenomenon of trafficking, has coincided with the adoption of an international catch-all definition.¹¹⁶ It is unclear whether this sweeping idea of “human trafficking” will ultimately assist in eradicating the trade in human beings, or whether the overly broad definition will lead to concept fatigue and law enforcement exhaustion.¹¹⁷

115. Among its other features, the Protocol requires States Parties to cooperate in sharing information relating to human trafficking, and to improve the quality of their travel documents, in order to reduce the possibility of fraud. See Protocol, *supra* note 113, at arts. 10, 12.

116. The U.N.’s 2000 Trafficking Protocol defines “trafficking in persons” as follows:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Protocol, *supra* note 113, at art. 3(a).

117. While this Article argues that it is absolutely necessary to distinguish sex trafficking, particularly child sex trafficking, from other forms of trafficking in order to isolate and critique the demand side of the issue, others have argued the exact opposite. In describing the left-right alliance against global sex trafficking, Jacqueline Berman sees the focus on international sex trafficking, as isolated from other forms of human trafficking, as deriving from the shared point of view of Christian conservatives and leftist feminists that prostitution is bad, and that forced prostitution is worse. She writes scathingly that

The definition of human trafficking has as its mandatory element the idea of coerced movement. Whether through trickery or abduction, trafficking victims are brought against their will to a place where their labor or services are exploited. Children are trafficked into many industries, including the sex industry, through violent or other clearly illicit methods.¹¹⁸ Some degree of legal confusion begins to set in where the victims are older and pursuing economic goals voluntarily, but where the trafficker fails to deliver the promised employment. This type of trafficking requires that a distinction be drawn between it and ordinary economic migration.

The legal construction of human trafficking consciously encompasses many forms of exploitation: at one extreme, there are persons who are tricked into accepting jobs in another region or country, only to find that the work is more oppressive than was originally understood; at the other extreme is the buying and selling of children for purposes of sexual exploitation. I would argue that there is a contradiction between the desire to find a definition capable of accommodating such variety in forms of exploitation, and the likely effectiveness of international instruments purporting to raise awareness of all these crimes in one fell swoop. The unitary definition of human trafficking is undoubtedly illuminating. As a political proposition, the revelation that slavery never died is tremendously important. But this sweeping concept tends to overwhelm those aspects of sex trafficking that have the most troubling implications in terms of the motivations of the ultimate consumers. "Human trafficking" is too large a basket. In this sense, while a unitary definition has a certain ap-

[t]he fight of the [International Justice Mission] and other Christian groups against what they deem to be trafficking and forced prostitution is predicated on reducing all human trafficking to trafficking in women for the purposes of sexual exploitation, or simply, prostitution. Indeed, as one journalist explains, 'what's enthralled the media, the Christian right and the Bush administration is not the demanding, multi-layered narrative of migrants, but the damsels in distress, the innocents lured across borders' for the purposes of prostitution. In other words, their concern over human trafficking has become, in practice, a concern over what they deem sex trafficking.

Berman, *supra* note 54, at 274–75. I have taken the position that it is important to look at the demand for sex trafficking as a separate matter, especially in light of what this indicates about the nature of the limitless desire for domination. Children trafficked for sexual purposes, whatever the disparate motives of their advocates, are hardly seen as "damsels in distress" as Berman puts it, by anyone's standards.

118. See ECPAT EUROPE LAW ENFORCEMENT GROUP, *supra* note 11, at 10 (discussing various techniques used to lure girls into the sex trade).

peal, it may prevent us from receiving the full impact of revelations concerning the very large, seemingly insatiable market for exploitable children.

This Article questions whether the existing, broadly-based definition of “human trafficking” will lead to a greater mobilization of enforcement resources or public advocacy to assist exploited children. Almost certainly, it will not. Given the peculiar horrors of the situation, it would seem that a more specific focus on child trafficking for sexual purposes would be more effective, especially to the extent that one would be obliged to confront the question of motivation, not so much on the part of the trafficker, but on the part of the end “customer.”¹¹⁹ Other forms of destructive demand—for drugs or gambling, for instance—can be attributed to inherent human tendencies to addiction. This tendency lies dormant as potential in most people. Global sex trafficking and sex slavery, especially, but not exclusively, where children are involved, have no broadly understood explanation. With the underlying crime unexplained and unresolved, the treaty writers turn to the prosecution model. What we could learn from this phenomenon is that the will to dominate has no limits, and where the sexual torture of children is on offer, there are many thousands willing to accept. This is the underlying lesson that needs to be grasped and reacted to most urgently.

Several years ago, Samantha Power gave new coherence to our understanding of the phenomenon of genocide by presenting it as a globally understood “problem” with certain defined characteristics.¹²⁰ Power’s approach had the advantage of slotting into a preexisting receptivity of human rights law to the idea of post-conflict revelations. Some writers have attempted the same thing with regard to “human trafficking,” where it works rather less well, despite the illuminating characteristics of the technique.

Activist Kevin Bales has attempted such a synthetic characterization in the trafficking context, drawing attention to the resurgence of slavery—slavery itself, not slavery used as a device to

119. See Diep, *supra* note 114, at 309 (“The illegal sex industry and McDonald’s® are both driven by consumer consumption, subject to the economic principles of supply and demand.”).

120. See SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE x–xi (2002). Power achieves this unified approach by finding a common thread in how the U.S. reacts across time to genocidal events in the world. Although the context for Power’s book is very different, like Bales, she studies a human rights problem generically, with various horrific incidents linked through the “naming” of the problem: in Power’s case, genocide, in Bales’ case, slavery.

describe trafficking.¹²¹ In this view, trafficking is a method to accomplish the aims of slavery. In one sense, this is effective because it removes whatever comfort one draws from the fact of “trafficking” being shadowy, hidden, inscrutable. It also provides a call to action without any ambiguity.

Bales accomplishes a great intellectual feat by linking together various types of modern slavery. He notes that government corruption is a common feature, that there is a glut of expendable human beings ready to be plucked by the traffickers who feed the market for slavery, and that modern slavery is a form of international business. Agricultural workers, bonded laborers, sex slaves, domestic workers—any and all of these may become slaves if their will is taken away and the control exerted over them is total.¹²² Bales rightly identifies these commonalities, but there is danger in a presentation that sets out all such situations as variations on a theme. It is important to conceive of trafficking as one aspect of the will to enslave. Yet this abstraction cannot convey the particular suffering of child sex trafficking victims, nor can it generate debate on the identity of the “global customer” for sadistic sex as torture. Too much focus on the “greed” of the business owners obscures the matter of increasing demand for child sex slaves. This dimension—the sex consumer side—is not about greed, but rather about a kind of viciousness that is more difficult to comprehend.

The annual U.S. State Department’s “Trafficking in Persons Report,” compiled under legislative mandate,¹²³ also relies on an all-encompassing strategy in its approach to human trafficking. The report begins with a general discussion of human trafficking in all its forms, and then presents a country by country analysis, rating each country’s performance in making efforts to eliminate

121. See BALES, *supra* note 110. Bales’ essential proposition is that [s]lavery is a booming business and the number of slaves is increasing. People get rich by using slaves. And when they’ve finished with their slaves, they just throw these people away. This is the new slavery, which focuses on big profits and cheap lives. It is not about owning people in the traditional sense of the old slavery, but about controlling them completely. People become completely disposable tools for making money.

Id. at 4.

122. *Id.*

123. See U.S. Trafficking Victim Protection Act of 2000 § 104, 22 U.S.C. § 2151n (2006) (mandating that the State Department produce an annual report on human trafficking around the world).

such trafficking.¹²⁴ In Balesian terms, the 2006 report states that “More than 150 years ago, the United States fought a devastating war that culminated in the elimination of slavery in this country.”¹²⁵ It continues, “Although most nations have eliminated servitude as a state-sanctioned practice, a modern form of human slavery has emerged. It is a growing global threat to the lives and freedom of millions of men, women, and children.”¹²⁶ The State Department report is clearly sensitive to the matter of child sexual slavery and trafficking, despite the fact that it purports to present a broad brush picture of all forms of human trafficking simultaneously.¹²⁷ The 2006 report states that “In the 2004 Report, we used U.S. Government data that disaggregated transnational trafficking in persons by age and gender for the first time.”¹²⁸ It recounts the astonishing statistic that “of the estimated 600,000 to 800,000 men, women, and children trafficked across international borders each year, approximately 80 percent are women and girls, and up to 50 percent are minors.”¹²⁹ The majority of victims, the report continues, “were trafficked into commercial sexual exploitation.”¹³⁰ These figures, we are told, do not purport to include those trafficked within their own countries—another huge number of persons.¹³¹

C. *National and International Instruments on Sex Trafficking, Including Child Sex Trafficking*

There has been movement and action on the question of sex trafficking in recent years.¹³² It has been based on a perceived link between human trafficking with other forms of illicit conduct engaged in by organized crime syndicates, such as drug trafficking and money laundering, and has relied on a model of cooperative, internationally coordinated investigation and prosecution.

124. See U.S. DEP'T OF STATE, *supra* note 30.

125. *Id.* at 6.

126. *Id.*

127. See *id.* at 5.

128. *Id.* at 6.

129. *Id.*

130. *Id.*

131. See *id.*

132. See Katrin Corrigan, Note, *Putting The Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to Stop the Flow of Traffic*, 25 FORDHAM INT'L L.J. 151 (2001), for an analysis of U.S., E.U., and international legislation against trafficking. See also Nelson, *supra* note 114, at 557–77 (reviewing the history of international treaties as well as the legislation put forth by the United States).

This movement has been presented to the public as indicative of the fact that slavery is not dead, that human beings are bought and sold for a number of reasons, and that traffickers are brutal people who will stop at nothing to make a profit. It is small wonder, then, that the problem seems lurid and remote, rather than intimately bound up with the sexual behavior of our neighbors.

However laudatory these international and national anti-trafficking efforts may be, their design directs us to focus on the trafficker rather than the end user of the trafficked person. In this sense, focus on the *epidemic of demand* for the sexual slavery of women and girls is missing quite entirely. As indicated above, child sex trafficking brings us to the far reaches of the will to dominate. The structure of the international legal response to sex trafficking should not obscure this point. "The will to power" is a phrase used to capture the fundamental nature of the human need to dominate others, individually and more broadly; such a concept might be transposed onto the worldwide epidemic of sexual slavery and child abuse.¹³³ The will to utterly dominate women on the part of many men extends, as we can now clearly see, to the will to utterly dominate children, even though children have been placed by nature into the care of adults.

There is no convenient "ism" to which we can attribute this form of oppression. It is torture on a mass scale not born of any political ideology, but implicit in gender differences. There are many women involved in the trafficking of women and children for sexual purposes on the "administrative" side. But they are, one assumes, motivated by fear or greed or habituation. On the demand side, there stand tens of thousands of men ready to pay for the sexual enslavement of women, and of children. Is this most relevant in the social or biological or cultural sense? That is not to be decided here, but this Article argues in the strongest terms that it is in fact a completely relevant question.

133. The will to power—"Der Wille zur Macht," in German—is a phrase associated with German philosopher Friedrich Nietzsche, expressive of the will to dominate, to impose one's will on others, characteristic of human society. See Marc Weeks & Frederic Maurel, *Voyages Across the Web of Time: Angkarn, Nietzsche and Temporal Colonization*, 30 J. SOUTHEAST ASIAN STUD. 325, 334 (1999) ("[Nietzsche's] answer is a philosophy and aesthetics of the will: not a transpersonal, metaphysical will, but the individually expressed will of neo-Dionysianism to which Nietzsche ascribed the term 'will to power'. It is articulated as the will to dominate others and to dominate the social impulse in oneself, yet inevitably and ultimately it also expresses the will to defeat time—and the individual's death.").

D. *What Does a Unitary Definition Conceal?*

It is clear that the term “human trafficking” has become part of our political and legal lexicon in the past several years. Neither the concept, nor even the phrase, are new *per se*—indeed, the historical roots of trafficking are deep—but there is a new preoccupation with comprehending the scope and true meaning of “human trafficking.” The concern with trafficking as an issue of human mobility appears to be part of our current focus on the phenomenon of globalization.¹³⁴ Human trafficking represents the most extreme form of human commodification and commercialization, and the most audacious “market” of our time.

While mere financial acquisitiveness as a motivating factor (the trafficker’s motivation no matter what the context) is not especially interesting, the desire to trade in human beings for sexual purposes brings us face to face with profoundly craven human impulses. For child sex trafficking to occur on a mass scale naturally gives rise to unsettling speculation as to the nature of human desire itself. It is paradoxical that our attention has been captured by the idea of human trafficking, whereas our sense of the causes and of the empirical reality of sex trafficking is incredibly tenuous. Are far larger numbers of people being “trafficked” than ever before? If so, is this due to globalization? To the work of the devil? Or is it simply the case that the repeated articulation of the “human trafficking” concept has raised a collective awareness of what has always been, albeit with less of an international dimension?

To effectively confront sex trafficking, we must have some sense of whether the numbers are increasing dramatically and, if so, why. There is a danger that the sweeping unitary definition of trafficking could obscure the very thing we need to understand: why demand seems to be increasing so much. What is undeniable is that the appetite for women and children in the global sex industry is staggering and profoundly challenging to our notion of civilized existence. What is also clear is that the question of

134. See, e.g., Alison Cole, *Reconceptualising Female Trafficking: The Inhuman Trade in Women*, 12 *CARDOZO J.L. & GENDER* 789, 796 (2006) (writing that “[t]he causes of female trafficking are augmented by the spoils of globalisation, which provide traffickers with easy access to marginalised women in developing or transitional states”).

demand has remained beyond the pale of legal analysis; perhaps considered too difficult, imponderable, and unknowable.¹³⁵

Some might argue that law is not capable of concerning itself with the question of demand. Others might remain silent on the demand question, leaving conclusions to be drawn individually by thinking persons. In the sex trafficking context, analysis of the demand issue must include condemnation of all purchasers of trafficked sexual services, and more intensely when it comes to children and sex. What we know or understand about gender and domination has implications for how we approach culture, education and global public policy. Being aware of the number of men who are willing and able to cast aside nurturing of the young in favor of exploiting them provides vital insight into how our species should organize itself. A far larger number of men than might have been expected demand children to sexually exploit, and the human trafficking industry has found vulnerable children to meet that demand. Avoiding the demand question is especially galling when it comes to child sex trafficking, as we are then left with a definition focused on the "organized crime" of trafficking (which it undoubtedly is), a melding together of sex trafficking with other kinds of trafficking (demand confusion), and no sense of urgent and fervent intervention on behalf of the most profoundly injured victims.

A further problem with the unitary legal definition is that law in the global public interest rests on the mobilization of outrage. Too broad a definition of human trafficking might have the effect of diverting attention away from how to protect the most vulnerable against exploiters. Why traffickers want to locate persons to work in the forced labor industries is not inherently mysterious. But the relationship of sex trafficking and sexual slavery, particularly of children, to demand is of the most essential importance. Can demand be created or destroyed, or is it a constant? Does the normalization of child sexual exploitation, through such

135. See ALISON PHINNEY, WOMEN, HEALTH & DEV. PROGRAM, PAN-AMERICAN HEALTH ORG., TRAFFICKING OF WOMEN AND CHILDREN FOR SEXUAL EXPLOITATION IN THE AMERICAS 1 (n.d.), <http://www.paho.org/english/hdp/hdw/TraffickingPaper.pdf> ("The DEMAND aspect of sex trafficking remains the least visible. When demand is not analyzed, or is mentioned rarely, it becomes easy to forget that people are trafficked into the sex industry to satisfy not the demand of the traffickers, but that of the purchasers, who are mostly men. The insatiable demand for women and children in massage parlors, strip shows, escort services, brothels, pornography and street prostitution is what makes the trafficking trade so lucrative.").

channels as pornographic websites, coincide with the commercial networks characteristic of globalization? If so, yet one more of the ironies of global economic liberalization comes to the fore, responded to in legal terms through a well-intentioned method that obscures the essence of the phenomenon.

E. *The Lawyer's View: Go Ask a Psychologist*

It does appear that the demand for commercial sex, including that involving children, has almost boundless market potential, to the point where human trafficking is able to grow exponentially with sufficient access to vulnerable human beings.¹³⁶ Since determining the level of demand requires speculation, it is anathema to legal minds, as “humanistic speculation,” as opposed to technical rigor, appears to be increasingly rejected in legal academic circles. Nevertheless, it is clear that just as certain regions have come under the dominance of drug trafficking, global networks have developed between sex traffickers and their customers in a manner that takes the phenomenon from the margins to the mainstream of economic and social life. To the extent that trafficking often, if not always, occurs from poorer to richer countries, we must ask whether some pathology at work in the process of globalization is at the root of modern trafficking.

The villains of trafficking are diffuse and various, not confined to any culture or region. Trafficking depends on a unity of interest among the exploiters; the commercial motives of the transporters and organized crime figures are obvious, but the role of the ultimate sex exploiter or customer is less clear. It is the scale and scope of the problem that is most striking. Extreme instances of child trafficking may be found in countries like Nepal, where whole regions are known to supply young girls to brothels in India.¹³⁷ Cambodia may be classified as a state whose economy is in part dependent on offering underage sex to tourists as a “specialty.”¹³⁸

136. See, e.g., BALES, *supra* note 110, at 40 (discussing the growing market in Thailand for child sex slaves).

137. For background to this relationship, see HUM. RTS. WATCH/ASIA, RAPE FOR PROFIT: TRAFFICKING OF NEPALI GIRLS AND WOMEN TO INDIA'S BROTHELS (1995), available at <http://www.hrw.org/reports/1995/India.htm>. For a vivid presentation of the age profile of trafficking victims from Nepal to India, see the film *THE DAY MY GOD DIED*, *supra* note 23.

138. With regard to the pervasiveness of the Cambodian sex industry, see generally Abigail Schwartz, *Sex Trafficking in Cambodia*, 17 COLUM. J. ASIAN L. 371 (2004). The NGO World Vision, as part of its Child Sex Tourism Prevention Project,

It is unlikely that this “worst form” of exploitation will be met with the strongest forces of protection, as its many guises make a coherent response difficult. Public opinion in many countries rejects the victimhood of economic migrants and sex workers, holding them instead responsible for their fate; therefore, the ubiquitous opportunism of trafficking itself is often ignored.¹³⁹ Reliance on a unitary definition of trafficking for law enforcement and human rights purposes may have the perverse effect of lessening the emphasis on domestic (that is, local) demand, without which the public cannot come to grips with the true nature of the problem. Also characteristic of the mass global phenomenon of child sex trafficking is the abstract quality of much of the reporting on the subject, creating a clear disconnect between the nature of the suffering endured and the public sense of what is occurring.

One of the main reasons behind the drive to create a unitary definition of trafficking, and to analogize it to modern slavery, is the need to clarify the victimhood of trafficked persons. To the extent that trafficked persons could themselves be implicated in the act of illegal smuggling, the unitary trafficking definitions seek to remove this stigma of complicity and clearly separate the trafficker from the trafficked.¹⁴⁰ In that sense and to this extent, the search for a unitary definition acts as a historical corrective. However, ambitious conceptual extensions of this sort do not necessarily lead to the self-critical analysis required. Legal reform without self-examination is generally useless.

As explained above, from the law enforcement and immigration perspectives, a unitary definition removes the mark of culpability from victims of trafficking in that it does not distinguish between persons who are trafficked for sexual purposes and those trafficked for forced labor. It does not distinguish between those who initially gave some consent and those who gave none at all.¹⁴¹ The point of including economic migrants duped

states that it is estimated that one-third of all prostitutes in Cambodia are children. See World Vision, Child Sex Tourism Prevention Project, *Slavery in the 21st Century* (2006), http://domino-201.worldvision.org/get_involved.nsf/child/globalissues_stp.

139. See Kara Abramson, Note, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 475 (2003).

140. See *id.* at 483.

141. At the least, it would seem that the Protocol intended to make consent irrelevant in the vast majority of instances of sex trafficking. See Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual*

by traffickers, as well as children and those forced into the sex industry, is to create an efficient, easy-to-apply standard of victimhood that looks only at the crime of trafficking, without examining the motives or aspirations of the victim too closely. When creating a globally valid definition of “human trafficking,” the focus is on the act of using persons as contemporary slaves, whether for sexual purposes or not. It sweeps away the need to rely on pre-existing criminal modes under which to prosecute the trafficker. It sweeps away the requirement of separating out the worthy and the unworthy migrant, by returning the emphasis to the coercion used to effect the movement and exploitation of the victim. All of this is fine.

On the other hand, it is far less clear what we gain from a unitary focus on trafficking when it comes to human rights considerations. As mentioned above, there has been a great deal of writing on human trafficking as a “modern-day version of slavery,” whether we are talking about coerced or fraudulent movement of persons for purposes of domestic or industrial labor, for exploitation in the sex industry, or for some other form of servitude.¹⁴² There is a danger that the very amorphous quality of this approach will fail to resonate with potential advocacy groups, and consequently fail to bring attention to the plight of an ever-increasing number of persons living in fear, far from home, and being abused by a disparate and varied group of traffickers and exploiters. It is nearly impossible to think of a sustained movement for the protection of “trafficking victims” that will be focused enough to capture the popular imagination. To the extent that human rights law depends for its effectiveness more on the activity of NGOs than on specific institutional responses, there is a danger that sex trafficking victims will disappear under the abstraction of a legal formulation intended to be innovative, liberating and ultimately effective.

F. *Prosecution Fatigue*

At first glance, it would seem that this flurry of attention to the issue of human trafficking would necessarily lead to greater

Exploitation, 27 HARV. WOMEN'S L.J. 137, 161–64 (2004), for an important discussion of consent in historical anti-trafficking instruments. Balos notes that in the U.N. Trafficking Protocol, consent is irrelevant only when certain forms of coercion, including abuse of power or a position of vulnerability, are present. *See id.* at 161–62.

142. *See* BALES, *supra* note 110, at 4–5.

governmental commitment to prosecutions, and thus to reduced incidence of trafficking. However, if analogies to other kinds of trafficking serve any purpose, the “war on drugs” has not led to appreciably less drug use or narcotics trafficking,¹⁴³ and there is no ready relationship between official pontificating and reduced sexual exploitation of vulnerable persons, notably children. Finding a common link among disparate forms of trading in human beings may be satisfying from the point of view of globalization discourse, but it reveals little about the nature of demand—a demand which, after all, must drive the global sex industry.¹⁴⁴

With regard to demand, there are only two viable explanations. One is that demand for children and young women to use as sexual slaves has always been present, but that globalization, with its greater opportunities for human mobility, has created new possibilities to service the pre-existing demand.¹⁴⁵ The other is that along with the opportunities created by globalization, there is a concurrent rise in demand, brought about by readily available child pornography and the increased international communication of exploiters.¹⁴⁶ This might well bring us into the

143. See generally Bruce Michael Bagley, *US Foreign Policy and the War on Drugs: Analysis of a Policy Failure*, 30 J. INTERAMERICAN STUD. & WORLD AFF. 189 (1988).

144. See Balos, *supra* note 141, at 164 (writing on the “[c]ontinued [i]nvisibility of the [c]ustomer”). Balos notes the following:

As international documents increasingly focus on the woman’s consent to trafficking for prostitution, the male customer’s choice to purchase sex remains unexamined. Asking what exactly the customer is buying begins to explore the inequality endemic in trafficking for sexual exploitation. The customer’s purchase is an act that both stems from and perpetuates inequality and, therefore, is a violation of human rights.

The hesitancy of the international human rights community to address the customer’s role undermines efforts toward gender equality and entrenches the belief that men’s economic and social power entitles them to sexual access to women. The provisions addressing demand in recent international documents mark the tentative beginning of an acknowledgment that it is the *demand* for prostitution and commercial sexual services that is a central cause of trafficking for sexual exploitation.

Id. at 164.

145. See Schwartz, *supra* note 138, at 381–93, for a discussion of how globalization and technology advances have facilitated the trafficking process in Southeast Asia.

146. There are news reports daily concerning the sexual abuse of children. See, e.g., *Austria Uncovers Vast Child Pornography Ring*, INT’L HERALD TRIB., Feb. 7, 2007, available at <http://www.iht.com/articles/2007/02/07/news/austria.php> (“The Austrian authorities . . . uncovered a major international child pornography ring

zone of the unknowable, but any sound legal analysis—that is, analysis designed to create legal responses to these extreme violations of rights—will have to face the problem of demand, not merely treat “human trafficking” as an aspect of international organized crime.

VI. LAW AND ITS CATEGORIES: FREEDOM, DEMAND, AND EXPLOITATION

A. *Making Demands of Demand*

The real story behind child sex trafficking is of course that there is a market for it. This is a question of demand, a demand that is rendered more or less invisible by the manner in which the problem is legally described. That greedy persons wish to use the cheapest and most compliant labor possible is unsurprising, albeit distasteful. We know this from the history of slavery. We understand without great difficulty how child slaves are even easier to exploit than adult slaves. With the help of feminist analysts, we understand that the sexual exploitation of prostituted and trafficked women is symbolic behavior designed to reinforce power and control by one gender over the other.¹⁴⁷ Child sex trafficking, however, and the eagerness of tens of thousands of men to sexually exploit children who are, in effect, being tortured, confront us with a yet more troubling kind of demand. The analysis that works to some degree in the gender context does not work as well when it comes to the exploitation of children. It is harder to recognize any need to assert control when such obviously unequal relations are involved, and where one assumes there is some instinct of nurturing towards children, an instinct that could only be overcome by perversion. However, when the numbers indicate that this is not merely a question of “perversion,” but something far more endemic, there can be no

involving at least 2,360 suspects from 77 countries who viewed videos of young children being sexually abused.”). An Austrian police expert was quoted as saying that “[g]irls could be seen being raped, and you could also hear screams,” and noted that the children were aged 14 and under. *Id.* The report indicated that there were over 8,000 hits from 2,361 internet protocol addresses in 77 countries *over just a 24 hour period.* *Id.*

147. See Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 13 (1985); See also 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, 107–33 (2005); Jonathan Todres, *The Importance of Realizing “Other Rights” to Prevent Sex Trafficking*, 12 CARDOZO J.L. & GENDER 885, 889–93 (2006).

“human rights law” in this area without taking on the question of what drives such demand. The traffickers are motivated in large part by old-fashioned greed. It is the motivation of the *end users* that should command our analytical attention.

It is arguable, if not conclusively proven, that part of the rise in numbers of sexually exploited and trafficked children has to do with the proliferation of demand-generating phenomena, such as internet pornography.¹⁴⁸ Just as American case law has been unable to confront the destructive role of pornography for women in society, mainstream U.S. legal thinking has yet to address the likely demand-generating characteristics of child pornography. In *Ashcroft v. Free Speech Coalition*,¹⁴⁹ the U.S. Supreme Court treats the demand implications of child pornography—specifically, “virtual” child pornography—with an inappropriate narrowness.¹⁵⁰ Though invited to, and despite the extreme danger to children of not doing so, the Court refuses to examine the very real possibility that even virtual child pornography is contributing to a burgeoning demand for children to exploit. Because *Ashcroft* involved a challenge to federal legislation banning certain types of child pornography not resulting from the exploitation of real, as opposed to computer generated, children, it was the perfect opportunity to extend judicial concern for children

148. Catharine MacKinnon explains the link between pornography and demand for the “real thing” this way:

Pornography . . . further creates demand for prostitution, hence for trafficking, through its consumption. Consuming pornography is an experience of bought sex, of sexually using a woman or a girl or a boy as an object who has been purchased. As such, it stimulates demand for buying women and girls and boys as sexual objects in the flesh in the same way it stimulates the viewer to act out on other live women and girls and boys the specific acts that are sexualized and consumed in the pornography. Social science evidence, converging with testimonial evidence of real people, has long shown the latter.

Catharine A. MacKinnon, *Pornography As Trafficking*, 26 MICH. J. INT'L L. 993, 999 (2005). Not only is it an issue of online pornography, but also the online chat room which allows predators unlimited access to minors. *Dateline* puts the issue of on-line predators into perspective with its weekly “Reality T.V.”-themed special that captures online predators by luring them to a house with promises of sex with minors. The show has helped capture predators from all walks of life, from congressmen and military men to rabbis and teachers. See, e.g., *Dateline: To Catch a Predator* (NBC television broadcast Jan. 30, 2006).

149. 535 U.S. 234 (2002).

150. See, e.g., Danielle R. Dallas, *Starting with the Scales Tilted: The Supreme Court's Assessment of Congressional Findings and Scientific Evidence in Ashcroft v. Free Speech Coalition*, 44 WILLAMETTE L. REV. 33 (2007) (arguing that the Supreme Court in *Ashcroft* was overeager in its rejection of congressional considerations of potential harm to children generally because of virtual child pornography).

actually exploited in the production of child pornography to those who were likely to be exploited as a result of behavioral changes brought about in users of virtual child porn. This did not occur.

The historical inability of First Amendment doctrine to acknowledge the issue of pornography's effects has been frustrating in the extreme. When the topic is children, it is even more astounding to see how tightly bound up U.S. Constitutional norms are with the concept of "freedom," and how little judicial interest there is in protection of children. Indeed, the language used in the *Ashcroft* case borders at times on expressing sympathy for the child pornographer. Throughout the opinion, there is no serious discussion on the subject of danger to children generally, and no apparent interest in the possible link between the pornography and demand.

In *Ashcroft*, when the question explicitly arose as to whether the availability of child pornography on the internet was increasing danger to children, the Court acted as if there were no such dimension to the question.¹⁵¹ The possibility that the predators are encouraged by images and children pay the price did not figure into the Court's legal calculus. The emphasis was entirely on the rights of those engaging in "freedom of speech"—making the decision the worst parody of a mindset, judicial or otherwise, as described by Catharine MacKinnon with such precision. Pornography is, as she explains, in legal terms, either about the rights of its "users," or about their morality—what other men believe to be acceptable morally. In legal discourse, the dangerous psychological and behavioral effects on the users of pornography is submergéd.¹⁵² These effects lead to violations of the rights of those

151. See *Ashcroft*, 535 U.S. at 253–54.

152. Among Catharine MacKinnon's many writing on the effects of pornography on its victims and on women in general, see for example Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 796–97 (1991) ("Pornography has a central role in actualizing this system of subordination in the contemporary West, beginning with the conditions of its production. Women in pornography are bound, battered, tortured, harassed, raped, and sometimes killed; or, in the glossy men's magazines, 'merely' humiliated, molested, objectified, and used. In all pornography, women are prostituted. This is done because it means sexual pleasure to pornography's consumers and profits to its providers, largely organized crime. But to those who are exploited, it means being bound, battered, tortured, harassed, raped, and sometimes killed, or merely humiliated, molested, objectified, and used. It is done because someone who has more power than they do, someone who matters, someone with rights, a full human being and a full citizen, gets pleasure from seeing it, or doing it, or seeing it as a form of doing it.").

depicted, as well as other women and children. The reasoning shown in the *Ashcroft* decision makes plain that precious little of feminist writing on pornography's larger social effects has got through to the Court over the years.¹⁵³

What makes the case so interesting is that it involved a challenge to federal legislation that criminalized a subset of child pornography made to look like "the real thing," whereas in fact it did not involve the use of actual children. The relevant images were either computer-generated (and so not "real" human beings), or of over-18 actors who appeared to be younger than 18. Because the pornography in question did not involve actual "child abuse" in its production, the underlying question in the challenge to the legislation implicitly dealt with the effects of such pornography. The law had been passed in the first instance to reduce the volume of child pornography, on the rationale that it was harmful in ways going far beyond the actual use of a child for the specific purposes of making the pornography in question.¹⁵⁴ (That is, criminalizing possession of porn that did not involve "actual" child abuse could only be motivated by the belief that its possession could lead to the abuse of real children.)

Justice Kennedy, writing for the Court, explains that this legislation goes beyond the existing legal framework, in that under *Ferber*,¹⁵⁵ the Court had in the early 1980s distinguished child pornography as being uniquely unlawful—that is, not requiring a showing of obscenity—"because of the State's interest in protecting the children exploited by the production process."¹⁵⁶ But of course, where the images are not of "real" children, the Court does not see any *Ferber* justification for the ban. With naïveté or simple-mindedness or both, Justice Kennedy seems to hold up his hands, look around and ask, "If there are no real children involved, who are we sure is being hurt by this?" Some child pornography of the virtual kind might well fall under the *Miller*

153. In the wake of *Ashcroft*, there has been some discussion of what the formal research evidence shows regarding the causal link between child sexual exploitation and child pornography, as distinct from the specific harm to children being depicted. See, e.g., Neil Malamuth & Mark Huppín, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773 (2007).

154. See S. REP. NO. 95-438, at 5 (1977), as reprinted in 1978 U.S.C.C.A.N. 40, 43 (reporting legislative findings in connection with the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-428, 92 Stat. 7 (codified as amended at 18 U.S.C.A. §§ 2251–2260A (West 2007))).

155. *New York v. Ferber*, 458 U.S. 747 (1982).

156. *Ashcroft*, 535 U.S. at 240.

obscenity standard, he says, but much of it would not.¹⁵⁷ It is unclear how advocates for children could possibly prevent the “obscene” type from making it onto the internet.

Justice Kennedy reasons from a classical First Amendment position—as if First Amendment freedoms alone were sacred, and all other issues excessively complex, confusing, and subordinate.¹⁵⁸ Seeking the lawyer’s beloved “balance,” Justice Kennedy sums up the issue of child abuse in this way: “The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.”¹⁵⁹ And then, “In its legislative findings, Congress recognized that there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses. . . . Congress also found that surrounding the serious offenders are those who flirt with these impulses and trade pictures and written accounts of sexual activity with young children.”¹⁶⁰ But don’t worry, Kennedy soothes us, we are a “decent people” here, and know that child abuse is very wrong. His reference to “subcultures of persons” keeps the problem within the familiar construct of normalcy and inexplicable “perverts,” and concedes nothing to a link between the images and the behavior¹⁶¹.

In citing to First Amendment precedent, Kennedy makes some odd choices with his selection of quotations. Having noted that Congress may go ahead and make laws to protect children from abuse, he then takes the following from the *Kingsley* case: “Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech.”¹⁶² Justice Kennedy notes that in order for the Court to uphold the statute at

157. *Id.*; see also *Miller v. California*, 413 U.S. 15 (1973).

158. “The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.” *Ashcroft*, 535 U.S. at 244.

159. *Id.* (emphasis added).

160. *Id.* at 244–45.

161. Such a link is ignored despite its having been persuasively established by various experts: see, e.g., Michael C. Seto, James M. Cantor & Ray Blanchard, *Child Pornography Offenses are a Valid Diagnostic Indicator of Pedophilia*, 115 J. ABNORMAL PSYCHOL. 610 (2006) (documenting a link between pornographic images and pedophilic behavior); Neil M. Malamuth, *Pornography and Sexual Aggression: Are There Reliable Effects and Can We Understand Them?*, 11 ANN. REV. SEX RES. 26 (2000) (documenting a connection between pornographic images and sexual aggression).

162. *Ashcroft*, 535 U.S. at 245 (quoting *Kingsley Int’l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959)).

hand, virtual child pornography would have to be "regarded as an additional category of unprotected speech."¹⁶³ This step the Court is plainly disinclined to take, lest it interfere with someone's "freedom." The notion of "protected" speech in this context is particularly ironic.

It seems difficult to imagine that the statute as written could have led to a crackdown on *Romeo and Juliet*, or to *Lolita* being pulled from bookshelves. However, Kennedy obsessively focuses on these extreme cases in his opinion. By contrast, the potential danger to vulnerable children is mentioned only in passing and with the greatest skepticism. 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. It is exactly this disproportion of concern that is most troubling in the majority opinion. Stating that "our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young," Justice Kennedy returns again and again to the danger of repressing artistically or socially valuable material. Astonishingly, because virtual child pornography does not use "actual" children in its making, Kennedy goes on to assert that this legislation "prohibits speech that records no crime and *creates no victims by its production*."¹⁶⁴ Kennedy gives us no reason to believe that he has assured himself no victims are being created; neither does he display the slightest interest in that key question. The Court has no interest in speculation on dangers inherent in child pornography—which would be present regardless of whether the subjects were "real" children or not.¹⁶⁵ It is interested only in those persons it exists to protect: the holders of "rights," about whom Justice Kennedy speaks here in disturbingly heroic terms.

Kennedy asserts that "the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it," and that "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end."¹⁶⁶ But the government in this case was making the explicit argument that "virtual child pornography whets the appetites of pedophiles and encourages them to en-

163. *Id.* at 246.

164. *Id.* at 250 (emphasis added).

165. See ESTES & WEINER, *supra* note 49, on the phenomenon of organized child pornography. The size, scale, and geographical scope of such rings are striking.

166. See *Ashcroft*, 535 U.S. at 253.

gage in illegal conduct.”¹⁶⁷ To characterize this as “thought control” raises the use of virtual child pornography to the level of a political freedom. On what basis does the Court connect these dots so as to opine that “the right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought”? Perhaps the Court is merely imposing First Amendment boilerplate on the situation at hand. But the fit between virtual child pornography and “the right to think” seems particularly unsavory. The Court dismisses as a “remote connection” the pornography-behavior link asserted by the government.¹⁶⁸ The dismissive quality of the Court’s language seems callous at best.

As for the argument that the market for these two types of child pornography (real and virtual) is the same, such that virtual child pornography also enhances the market for images of real children, Justice Kennedy is breezily indifferent. It is his view that speculation to the effect that trading images of real children would be thereby encouraged is “somewhat implausible.”¹⁶⁹ “If virtual images were identical to illegal child pornography,” he writes, “the illegal images would be driven from the market by the indistinguishable substitutes.”¹⁷⁰ Who would risk prosecution to trade in the “real” images? he reasons.¹⁷¹ He returns to the *Ferber* theme that the creation of pornographic images using real children is a crime of child abuse; whereas, in the case of virtual child pornography, “there is no underlying crime at all.”¹⁷²

There was, of course, no need for the Court to focus on the *Ferber* holding as if it were the only possible basis for upholding a ban on virtual child pornography. It is often the case that while one legal argument suffices to allow a particular restriction, other justifications may allow for different restrictions. *Ferber* did not establish a total and exhaustive theory; rather, it presented one reason for allowing a state ban on sexual images made with real children, and there are a number of other rationales to support a ban on virtual pornography.

167. *Id.*

168. *Id.*

169. *Id.* at 254.

170. *Id.*

171. *Id.*

172. *Id.*

The "overbreadth" doctrine reads in similarly bizarre fashion in this context: "The overbreadth doctrine," writes Justice Kennedy, "prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."¹⁷³ As the opinion develops, concern for *Romeo and Juliet* fades away, and the Court seems to go so far as to advocate for the protection of virtual child pornography that involves graphic sexual conduct with underage persons, even if they are not "real." The Kennedy opinion gives no hint of discomfort with such images, nor any disgust, concern, fear, or even distance. Our precedents do not offer any sense of urgency in protecting children from violence and sexual exploitation, only the absurd focus on that pornography which involves a specific, underlying crime at the time of its making. The Supreme Court writes as if it has never heard of feminist views on the dangerous effects of pornography. The First Amendment rights of pornographers matter. These rights are "protected"; this speech is "protected." By contrast, the obvious vulnerability of children enjoys no natural "protection." They are on their own.

Justice O'Connor agrees with the majority with regard to images of people over eighteen that seem to be images of children; on *virtual* child pornography, however, she strongly disagrees. Not surprisingly, it is the social conservatives who join her in her dissent. She points out that "this Court's cases do not require Congress to wait for harm to occur before it can legislate against it."¹⁷⁴ She notes that the statutory language—banning pornography that "appears to be of a minor" may be read to indicate only images "virtually indistinguishable from" children in sexually explicit poses.¹⁷⁵ Approaching the statute in this way would mean that none of the off-the-charts examples provided by opponents of the statute would actually be covered by the statute. Invalidating a statute due to judicial overbreadth, O'Connor says, "is an extreme remedy, one that should be employed 'sparingly and only as a last resort.'"¹⁷⁶ She writes approvingly of the fact that Congress found pornography made with real children and "virtual" children posed equivalent dangers to children.¹⁷⁷

173. *Id.* at 255.

174. *Id.* at 264 (O'Connor, J., concurring).

175. *Id.* (O'Connor, J., concurring).

176. *Id.* at 266 (O'Connor, J., concurring) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

177. *Id.* at 263 (O'Connor, J., dissenting). As pointed out by Chief Justice Rehnquist, who agrees with Part II of the O'Connor dissent, the statute can be read so as

Noting that Congress had in mind a higher degree of protection for children in amending child pornography laws to include computer-generated images, O'Connor writes that

The Court has long recognized that the Government has a compelling interest in protecting our Nation's children. . . . This interest is promoted by efforts directed against sexual offenders and actual child pornography. These efforts, in turn, are supported by the [statute's] ban on virtual child pornography. Such images whet the appetites of child molesters, . . . who may use the images to seduce young children Of even more serious concern is the prospect that defendants indicted for the production, distribution, or possession of actual child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated.¹⁷⁸

What the Supreme Court majority in *Ashcroft* rejected was the legislative rationale that suggested a link between the pornography itself, in terms of its content, and harm to children, at least in the absence of a painstaking, inefficient case by case "obscenity" analysis. Congress was disallowed from assuming a link between the images of child pornography, however derived, and a risk to the well-being of children. It is ironic in the extreme that when Congress rewrote the child pornography laws, the *Ashcroft* lesson had been learned so well that the only legislative rationale put on display was the one related to assisting prosecution. Congress relied on the view most clearly expressed in Clarence Thomas's *Ashcroft* concurrence; that is, that technology could evolve to a point where prosecution for child pornography offenses could become nearly impossible, as defendants would argue that the images were not "real," but rather computer-gen-

only to expand the ban to "computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct," and that the statute "can be limited so as not to reach any material that was not already unprotected before the [statute]." *Id.* at 268 (Rehnquist, C.J., dissenting). He refers to the statute's definition of "sexually explicit conduct," which is a very specific one, including only "visual depictions of: [A]ctual or simulated . . . sexual intercourse, including genital-genital, oral-genital, anal-genital, or anal-anal, whether between persons of the same or opposite sex; . . . bestiality; . . . masturbation; . . . sadistic or masochistic abuse; or . . . lascivious exhibition of the genitals or pubic area of any person." *Id.* at 268 (Rehnquist, C.J., dissenting) (quoting 18 U.S.C. § 2256(2) (2000)). Given this definition, it is difficult to see what "speech" Justice Kennedy was so concerned about repressing.

178. *Id.* at 263 (O'Connor, J., dissenting). See Kate Dugan, Note, *Regulating What's Not Real: Federal Regulation in the Aftermath of Ashcroft v. Free Speech Coalition*, 48 ST. LOUIS U. L.J. 1063 (2004), for a discussion of the events leading up to *Ashcroft* and the Congressional response to that case.

erated or "virtual."¹⁷⁹ Prosecutorial difficulties may resonate as a justification for inclusion of virtual images in prohibitions on child pornography; at the highest level, harm to children did not.¹⁸⁰

It could be argued that *Ashcroft* is just one case, and that the Court had the unenviable task of balancing free speech rights with the need to protect children. However, the tone of the opinion seems to exceed what is necessary for the purpose of judicial balancing, and borders on denial of the possibility of generalized harm to children through the use of child pornography. One would have expected a greater expression of curiosity on this subject from the majority in *Ashcroft*, given the contemporary reality of child sexual exploitation in general, and child sex trafficking in particular.

VII. CONCLUSION: TRAFFICKED CHILDREN AS VIRTUAL VICTIMS

The phenomenon of child sex trafficking is a grim and conceptually challenging aspect of the huge global industry in human trafficking. It is part of this larger picture, but distinct from it as well. What distinguishes child sex trafficking is the issue of a demand that startles by being as commonplace, relentless, and fatally destructive as it is. If, as it would seem, thousands of persons, primarily, and possibly exclusively, men, are driven to purchase the sexual services of children wherever they are available, the legal establishment in every country should mobilize in support of urgent protective measures. There are implications for culture, education, and regulation of internet pornography. Broader understanding of this pernicious demand could alter the nature of how global governance issues are approached. Defining child sex trafficking as a violation of the human rights of children would extend our understanding of human rights violations in general, and liberate us from our narrow view of human rights law as variations on the theme of "victors' justice." National

179. See *Ashcroft*, 535 U.S. at 259 (Thomas, J., concurring).

180. It is worth noting that four of the five circuit courts hearing cases involving the ban on virtual pornography allowed the prohibition, largely on the grounds that protection of children is a legitimate interest of our government. See Dugan, *supra* note 178, at 1089 (stating the PROTECT Act of 2003 that followed *Ashcroft* "abandon[ed] the secondary effects and market proliferation rationales that accompanied the CPPA and instead emphasize[d] the perceived need to strengthen the Government's ability to prosecute child pornography offenders").

governments should be understood as having important obligations to suppress demand for and access to vulnerable children.

To date, anti-trafficking laws have not succeeded in making significant inroads into the global sex trade in women and children. These laws have not been completely unsuccessful, but they are limited in what they allow for and indeed what they teach us about the problem. Human rights law, I have argued, will not easily adapt to a recognition of something flawed and dangerous, not in one group of men, but in the gender at large. This is not a doomsday scenario, but rather an argument in favor of first recognizing the problem in its true content; and then treating it as a human rights matter without the possibility of national or ethnic winners and losers.

The abolition of plantation slavery stands as an event in the American historical memory that allows for the display of a better side—the separation of the deviant national self from a supposedly good and true national self. I have described how human rights law allows for a similar form of self-congratulation in the international context; that it is “bad guys,” under the influence of propaganda and the attractions of power, who violate the rights of others. Under the common myths of human rights law, these deviants are identified and ultimately punished.

Child sex trafficking does not offer that “cleansing” opportunity because the implications are too frightening. In that sense, the mainstream development of human rights law has, unfortunately, not been about the victim of human rights violations—it has been about the opportunity for those not implicated in the violation to display the better side of mankind. The existence of child sex trafficking holds up a mirror into which humankind seems disinclined to look. The problem of child sex trafficking is not political in any recognizable sense; it does not allow liberated man to rise free of totalitarianism. It implies a troubling tendency at the core of mankind, a will to dominate that fits nowhere into the Nuremberg or Balkan box.

A. *Can There Be a Sexual Truth and Reconciliation Process?*

The otherwise widely embraced concept of international justice seems not to reach as far as sexually exploited children. Where the underlying conflict that provides context for the violation is a highly gendered one—rather than a conventional internal or international one (for example, deriving from ethnic struggle)—it is hard to imagine any post-conflict structures of

“transitional justice.” It may be that gendered conflict is considered to be interminable. It may also be that child sex abuse and the contemporary trafficking that facilitates it are considered to be unknowable as to true origins and motivations. Child sex trafficking is one of the worst of all war crimes, but the nature of the war itself is at best a matter of speculation.