September 2006

Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge in the Fight against Human Trafficking and HIV/AIDS

Edi C. Kinney

Follow this and additional works at: https://scholarship.law.berkeley.edu/bglj

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38S17SS0N

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Gender, Law & Justice by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Appropriations for the Abolitionists:
Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS

Edi C. M. Kinney†

I. INTRODUCTION

Throughout the world, countless children, women and men fall victim to different forms of trafficking and forced labor each year.¹ Victims are trafficked across international borders as well as within their own countries, typically from

† B.A., Baylor University (1999); J.D. Candidate, Boalt Hall School of Law (2007); Ph.D. Candidate, Jurisprudence & Social Policy, University of California, Berkeley (2007). This article is based on dissertation research in Thailand and the Greater Mekong Sub-region, and is part of a larger project exploring contemporary social movements invoking women's rights as a tool for mobilization. Financial support for this project was provided through grants awarded from a Fulbright Fellowship, as well as the University of California, Berkeley. I express my gratitude to all the inspiring migrants, activists and public officials I met in Thailand for sharing their stories, experiences, and critiques of ongoing initiatives to combat human trafficking and forced labor. Many thanks to my ever-patient editors, Aimee Buckland and Elena Acevedo; to my supportive family and friends, and to the students and professors in JSP and Boalt Hall who have challenged me to explore the complexities and paradoxes of international movements for social and legal change.

¹. Press Release, International Labour Organization, ILO releases major new study on forced labour; says more than 12 million are trapped in forced labour worldwide, http://www.ilo.org/public/english/bureau/inf/pr/2005/22.htm (last visited Feb. 15, 2006) [hereinafter ILO Press Release] (reporting that forced labor is a “major global problem present in all regions and in all types of economy”). See also “A global alliance against forced labour,” Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005, International Labour Office, Geneva (reporting that nearly 10 million people are exploited through forced labour in the private economy, estimating that 2.4 million were victims of human trafficking). The report also provided the “first global estimate” of the profits from trafficked laborers to be approximately USD $32 billion each year (an average of US $13,000 each). Asia held top rank with over 9.5 million forced laborers, but the proportion of trafficked persons is less than 20% of all forced labor (compared to “industrialized and transition countries in the Middle East and North Africa,” where trafficking makes up over 75% of the total). The gender ratio is nearly equal among victims of forced labor in sectors including agriculture, construction, brick making and informal sweatshop manufacturing. However, children comprise 40-50% of all forced labor victims, and “forced commercial sexual exploitation entraps almost entirely women and girls.” The report specifically mentions the mutation of older forms of forced labor, such as debt bondage, which “frequently affects minorities - including indigenous peoples - that have long experienced discrimination on the labour market, and locks them in a vicious cycle of poverty from which they find it ever more difficult to escape.” Id.
rural to urban areas.² Although kidnapping or coercive migration sometimes takes place, many others migrate voluntarily in the hopes of securing a job, escaping abuse or political oppression, or simply moving to the big city as adventurous young adults—and subsequently become trafficked into exploitative working conditions.³ Others, particularly ethnic minorities or internally displaced persons lacking citizenship or legal status, may find themselves trapped and abused in private homes as domestic servants or in servile marriages; chained to their stations in cottage manufacturing industries; duped into factory, construction or agricultural work for subsistence wages, or enslaved for years at sea on fishing boats.⁴

The International Labor Organization (ILO) reports that nearly 12.3 million people are trapped in forced labor, debt bondage, or involuntary servitude throughout the world; perhaps as many as 2.4 million are victims of human trafficking.⁵ However, global estimates of the number of people trafficked per year vary widely because the crime takes place in fringe markets paralleling legitimate, above-board enterprises; in addition, front line officials often have

² Id.
³ David A. Feingold, *Think Again: Human Trafficking*, 50 FOREIGN POLICY WASHINGTON 26-32 (2005). Feingold, director of the Ophidian Research Institute, International Coordinator for HIV/AIDS and Trafficking Projects for UNESCO Bangkok, debunks myths about human trafficking by highlighting several common misconceptions of trafficking drive counterproductive policies and trafficking interventions. For example, the suggestion that “most victims are trafficked into the sex industry” is misleading, given the fact that statistics tend to be unreliable as they over-represent sex trafficking and often do not include the trafficking of men, since anti-trafficking laws in countries like Thailand only identify women and children as victims. Id. Feingold also invalidates the idea that “tightening borders will stop trafficking,” as this operates to increase the risks and costs associated with migration. Moreover, Feingold disproves the assertion that decriminalizing or “legalizing prostitution will increase trafficking.” In response to the U.S. government’s equation of “prostitution” with trafficking and vice versa in policies asserting that the legalization of prostitution increases the number of women and children trafficked into “commercial sex slavery,” Feingold explains that “by this logic, the state of Nevada should be awash in foreign sex slaves, leading one to wonder what steps the Justice Department is taking to free them.” Feingold further critiques international campaigns endorsing law-enforcement approaches to trafficking, as there is little evidence that policies emphasizing prosecution are effective at stopping or deterring traffickers since “convicting a local recruiter or transporter has no significant impact on the overall scale of trafficking. If the incentives are right, he or she is instantly replaced, and the flow of people is hardly interrupted.” This dynamic also illustrates why trafficking victims should not always be sent home, because this “may simply place them back in the same conditions that endangered them in the first place, particularly in situations of armed conflict or political unrest.” Repatriation schemes often operate to the detriment of trafficked persons, as many minorities, indigenous peoples, and undocumented migrants lack legal status or are “stateless,” a major risk factor in trafficking which “impedes” and often [precludes] victims’ return and reintegration,” as well as their ability to access legal work opportunities in the future. Obviously, simplistic explanations of trafficking which emphasize on poverty or sex abuse (while ignoring the agency of migrants themselves) disregard the fact that “trafficking is often migration gone terribly wrong . . . trafficking is influenced by the expanded world views of the victims,” as well as other factors contributing to poverty, social marginalization, and economic and political instability). Id.
⁴ ILO Press Release, supra note 1.
⁵ Id.
inconsistent understandings of what constitutes a legitimate case of trafficking.\textsuperscript{6} For example, the annual report issued by the U.S. State Department’s Office to Monitor and Combat Trafficking in Persons speculates that six hundred to eight hundred thousand victims have been “trafficked across international borders,” noting that many more are internally trafficked within their own country.\textsuperscript{7} Yet the report also makes a distinction between cases of “trafficking into commercial sexual exploitation” allegedly directed by criminal syndicates, conceptually divorcing it from more mundane forms of “labor exploitation.”\textsuperscript{8}

For decades, networks of grassroots organizations advocating for migrants’ and women’s rights have battled against the social, economic, and legal marginalization that fosters risky migration and labor exploitation in the informal sector. Yet despite the diverse conditions and forms of abuse attending forced migration and labor, some international campaigns to combat human trafficking tend to focus the political spotlight on young women and children exploited for commercial gain in the sex industry.\textsuperscript{9} The recent confluence of anti-prostitution feminists, faith-based organizations and socially conservative policymakers have mobilize sensationalistic campaigns to end human trafficking and forced prostitution that has had a direct impact on U.S.-backed initiatives to combat the phenomenon abroad.\textsuperscript{10} The resulting expansion of the “global gag” policies attached to U.S. funding, including the imposition of anti-prostitution and anti-sex trafficking provisions into grant agreements, has severely curtailed the sorts of interventions NGOs can employ in public health, HIV/AIDS prevention, and anti-trafficking initiatives.\textsuperscript{11} In addition, reactionary funding and programming policies advocating morally charged (and empirically questionable) positions on issues such as trafficking and prostitution effectively curb the kinds of partnerships and alliances that can be forged, thereby hobbling the development and implementation of effective interventions in targeted communities, such as


\textsuperscript{8} Id

\textsuperscript{9} Feingold, supra note 3.

\textsuperscript{10} Id. Feingold observes that the campaign for the U.S.’s 2000 Victims of Trafficking and Violence Protection Act involved “an odd but effective coalition of liberal Democrats, conservative Republicans, committed feminists, and evangelical Christians [that] pushed a law through Congress” that focused on prosecuting traffickers and protecting victims, “while pressuring other countries to take action abroad,” despite evidence that the few cases that are prosecuted has minimal deterrent effect, given the massive scale and nature of the trade in humans. Id.

\textsuperscript{11} Press Release, Brennan Center for Justice at New York University School of Law, Brennan Center Suit Challenges Sweeping Restriction on Relief Organizations Receiving U.S. HIV/AIDS Funding, (Sept. 23, 2005) (on file with author) [hereinafter Sweeping Restriction].
those of undocumented immigrants or commercial sex workers.  

The political agendas of major donor countries and international organizations exert a tremendous influence over both the rhetoric and resources of initiatives to combat global socio-legal injustice. For example, shifts in the diplomatic posture and policies of the United States have mandated increasingly conservative approaches to a wide range of issues. Recently, the U.S. adopted a policy requiring organizations to endorse a pledge “explicitly opposing prostitution and sex trafficking” as a condition of funding and participation in the government’s programs to prevent the spread of HIV/AIDS and human trafficking. Although originally limited in application to foreign grantees, U.S. policies presently forbid both foreign and U.S.-based organizations from “engaging in any speech or activity that could be perceived as insufficiently opposed to prostitution,” even if organizations use private funds. Moreover, the revised policies now require recipients to endorse language which forbids organizations adopting rights-based or harm-reduction approaches to advocate for the decriminalization or legalization of prostitution, condemning it as “inherently harmful and dehumanizing [and contributing] to the phenomenon of trafficking in persons.”

12. “Global AIDS Gag Holds Critical Funding Captive to Politics,” Press Release, ACLU, New York, November 9, 2005, [hereinafter Funding Captive to Politics] (discussing the alliance of signatory organizations to the amicus brief filed by the ACLU such as AIDS Action, American Foundation for AIDS Research, American Humanist Organization, Center for Health and Gender Equity, Center for Reproductive Rights, Center for Women Policy Studies, Community HIV/AIDS Mobilization Project, Feminist Majority, Gay Men’s Health Crisis, Global AIDS Alliance, Guttmacher Institute, Human Rights Center at the University of California, Berkeley, Human Rights Watch, Institute of Human Rights of Emory University, International Planned Parenthood Federation, Western Hemisphere Region, International Women’s Health Coalition, Physicians for Human Rights, Planned Parenthood Federation of America, Inc., Population Action International, Population Council, Religious Consultation on Population, Reproductive Health and Ethics, and The Sexuality Information and Education Council of the U.S. [hereinafter NGO Signatories]. The brief is available at http://www.aclu.org/WomensRights/WomensRights.cfm?ID=19379&c=33. See also Complaint, Alliance for Open Society International, Inc. and Open Society Institute v. United States Agency for International Development and Andres S. Natsios, Administrator, filed in U.S. District Court, Southern District of New York, at I [hereinafter OSI Complaint] (discussing the rationale of the ideological debates over “prostitution” versus “sex work” terminology. Throughout this paper, I will use the terms “sex work” and “sex worker” due to their common usage within the public health and international relief fields, which view the terms “prostitute” and “prostitution” as stigmatizing and counterproductive to gaining the trust of commercial sex workers to engage them in efforts to combat the spread of HIV/AIDS and the risk of trafficking. However, when referring to policies endorsing the abolition of the commercial sex industry, I will use “prostitution” terminology, as this is common terminology among many politicians, anti-prostitution feminist groups, and conservative faith-based organizations.


14. Id.

15. Id.
A chorus of outcries from many international organizations (IOs) and the global community of non-governmental organizations (NGOs) proclaimed the U.S. policy an “ideological litmus test” that contravenes internationally recognized best practices in public health by forcing grantees “to choose between accepting U.S. funding and adopting a policy that alienates and stigmatizes many high risk communities.” Two U.S.-based not-for-profit organizations with affiliates or programs abroad are challenging the constitutionality of the anti-prostitution pledge requirement as an intrusive, overbroad policy that treads on the First Amendment freedoms of non-profit organizations partnering with the government. On August 11, 2005, DKT International (DKT), a U.S.-based organization operating several family planning and HIV/AIDS prevention programs around the world, filed suit in federal court in the District of Columbia against the U.S. Agency for International Development (USAID). One month later, the Open Society Institute (OSI) and its member organization, the Alliance for Open Society International (AOSI) filed suit in the U.S. District Court for the Southern District of New York.

The complaints of DKT International and OSI allege that requiring organizations to denounce prostitution as a condition of U.S. support not only undermines successful interventions with at-risk communities: it also violates private organizations’ right to free expression and invites arbitrary application of the laws. Organizations fighting against the current administration’s anti-prostitution/trafficking pledge requirement argue that it is unconstitutionally vague, as it fails to define the clause “explicitly opposing prostitution,” allowing broad construction and arbitrary enforcement. Plaintiffs argue that the funding requirement violates the Due Process clause of the Fifth Amendment, compels speech in violation of the First Amendment, and that the pledge is “unconstitutionally vague” in violation of the Administrative Procedures Act, 5 U.S.C. §§ 551 et seq. OSI argues that the anti-prostitution pledge requirement is unconstitutional because it “requires private organizations to adopt the

17. Funding Captive to Politics, supra note 12.
18. Sweeping Restriction, supra note 11. See also OSI Complaint, supra note 12.
19. Cohen, supra note 16.
20. Sweeping Restriction, supra note 11.
22. Id.
23. See, e.g., OSI Complaint, supra note 12. See also Funding Captive to Politics, supra note 12.
government's point of view in order to receive funding." Moreover, the pledge requirement not only applies to activities funded by U.S. government agencies, but also to organizations’ use of private funds from other sources.

Plaintiffs and their amici contend that the funding restrictions essentially mandate civil service organizations to endorse governmental ideologies to the detriment of the very communities they intend to assist. Deeming “any group” which does not adopt an anti-prostitution stance as ineligible for U.S. funding effectively limits the competition to groups willing to operate within an anti-prostitution, anti-choice framework. Conditioning funding on an organizations’ willingness to adopt a position that condemns those involved in the sex industry as “inherently [harmed] and [dehumanized]” victims runs counter to the best practices in public health and many respected organizations in the IO and NGO community. Groups at risk of human trafficking, exploitation in the commercial sex industry, and contracting or spreading HIV frequently do not take advantage of programs providing social, health, and legal services unless services are provided in a non-judgmental, non-discriminatory context. As a result, the anti-prostitution pledge requirement works to screen out key organizations with years of experience in the field, established connections to targeted communities, and links to local networks of indigenous organizations, excluding them from U.S.-backed initiatives that work to combat HIV/AIDS and human trafficking. Critics of the extended global gag orders argue that socially conservative policies in foreign aid and programming undermine the development of a robust civil society, impede the democratic process, and operate to limit the

24. OSI Sues, supra note 21.
25. Id.
26. See, e.g., Funding Captive to Politics, supra note 12.
27. See AAPD 05-04, supra note 13.
28. See Cohen, supra note 16. See also See NGO Signatories, supra note 12.
29. See UNAIDS, Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India and Bangladesh, UNAIDS BEST PRACTICE COLLECTION, (2000), at 55-87 [hereinafter UNAIDS BEST PRACTICES] available at http://data.unaids.org/Publications/IRC-pub05/JC438-FemSexWork_en.pdf?view=true. Compare Kristin Bumiller, Victims in the Shadow of the Law: A Critique of the Model of Legal Protection, 12 Signs 2 (1986) (discussing an “ethic of survival,” where experiences of social discrimination and harassment by criminal justice officials make “surviving” a point of pride, rather than dejection). Id. This paradoxical effect makes migrants less likely to adopt a “victim” posture and perceive injustices as violations of their rights, making them unlikely to report crimes or pursue formal justice. Moreover, migrants’ own assessments of their working conditions and sense of agency or victimization does not correlate with criminal justice or NGO activists assessments. Thus, migrants may perceive movement into “better,” but still exploitative work as a boon rather than a violation of their rights. Labor rights’ perspectives suggest that interventions should take into account migrants’ own assessments of their working conditions and sense of agency or victimization, perhaps triggering a self-help mechanism (or a reporting mechanism) that could facilitate identifying cases of labor exploitation by migrants themselves.
participation of women and other marginalized groups in society.\textsuperscript{31} Several prominent public interest groups have rallied around the issue, submitting amicus briefs in support of DKT's position.\textsuperscript{32} These organizations assert that U.S. funding policies violate the First Amendment by forcing the speech of organizations to take an ideological stance in exchange for government funding.\textsuperscript{33} Moreover, they allege that the negative fallout of the U.S.'s expanded "global gag" order curbing HIV/AIDS interventions is tantamount to wholesale "public health malpractice."\textsuperscript{34}

Many advocacy groups and non-governmental organizations (NGOs) have reported that the administration's policy is negatively affecting the efforts of NGOs to combat HIV/AIDS on the ground.\textsuperscript{35} Not only have funding restrictions and terminations disrupted crucial health and social welfare services for impoverished peoples throughout the world, such policies undermine the utilization and development of best practices in the field and arguably constitute violation of international laws.\textsuperscript{36} Beyond the detrimental health and development consequences of the expanding U.S. global gag policies, the implementation of increasingly conservative funding restrictions has also taken a considerable toll on the class of organizations that qualify to receive funding from U.S. agencies, thereby reshaping the political composition and trajectory of many AIDS-prevention initiatives at home and abroad.\textsuperscript{37}

Yet while many critics have argued that U.S. funding restrictions operate to undermine established best practices in the arena of public health and HIV/AIDS prevention, the effects of the policy on initiatives to combat human trafficking are less well documented. This article begins by assessing recent U.S. initiatives to abolish human trafficking and prostitution on a global scale against the backdrop of previous crusades to end the sexual exploitation of young women in "White Slavery" in the United States a century ago. I show that the sensationalized figure of the suffering "prostitute" has come to dominate dialogue around the issue of human trafficking to such an extent that other forms of trafficking and exploitation, in many cases far more damaging to the bodies and rights of workers, have been sidelined. Next, I outline recent developments in U.S. laws and funding policies that require organizations to endorse anti-

\begin{itemize}
\item \textsuperscript{31} See, e.g., Funding Captive to Politics, supra note 12.
\item \textsuperscript{32} See NGO Signatories, supra note 12.
\item \textsuperscript{33} Funding Captive to Politics, supra note 12.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} See e.g., Mehlika Hoodbhoy et al., Exporting Despair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya, 29 FORDHAM INT'L L.J. 1 (2005) (suggesting that current U.S. funding policies may violate international human rights obligations such as the right to health as set out in the International Covenant on Economic, Social and Cultural Rights, as well as the importance of the rights of free expression and the prohibitions against gender discrimination as set out in the International Covenant on Civil and Political Rights).
\item \textsuperscript{37} Funding Captive to Politics, supra note 12.
\end{itemize}
choice, anti-prostitution agreements as a condition of U.S. funding. I then compare objections against the application of funding restrictions in HIV/AIDS prevention programs to campaigns against human trafficking, illustrating some of the early effects of the U.S.' prostitution-abolitionist funding policies on grassroots NGOs and initiatives to combat human trafficking in Thailand and the Greater Mekong Sub-region (GMS). Finally, I argue that strict abolitionist policies hinder efforts to curtail human trafficking, particularly trafficking for sexual exploitation, by further alienating and marginalizing sex-worker communities and their NGO advocates, as well as inhibiting the formation of effective alliances and successful interventions to tackle the trafficking and exploitation of workers in other informal sectors.

The following analysis is based in part on ten months of field research in Thailand which included site visits to Public Welfare safe houses, detention and rehabilitation centers, and migrant worker clinics. Quotes are drawn from over fifty confidential interviews with NGO and IO activists, lawyers, police, government social workers, and United Nations personnel involved in counter-trafficking and AIDS-prevention taskforces and programs. The voices of activists, front line officials, and undocumented migrants suggest that for HIV/AIDS and trafficking programs to be successful, they cannot be conditioned on morally charged funding restrictions. Without consulting a broad coalition of groups, encouraging rigorous development of best practices in the field, and taking seriously the demands of trafficked and exploited migrants themselves, even the best-intentioned policies will ultimately backfire.

II. INTERNATIONAL CAMPAIGNS TO COMBAT HUMAN TRAFFICKING: FROM ‘WHITE SLAVERY’ TO ‘MODERN DAY SLAVERY’

The issue of trafficking has been inexorably linked with prostitution for over a century. Indeed, sensationalistic debates about trafficking have crystallized during periods of socio-economic disruption, historically centering

38. In the spring and summer of 2005, the author personally conducted over fifty in-depth and qualitative interviews with police, prosecutors, NGO activists, government bureaucrats and social workers, program and research directors of international organizations involved in anti-trafficking initiatives in Bangkok and Northern Thailand. Each interview lasted approximately one hour and fifteen minutes involving open-ended interview questions regarding the respondent’s experiences in state-backed anti-trafficking campaigns receiving funding from the U.S. or non-U.S. funded campaigns for sex workers’ rights and migrant’s rights. Interviewees were asked to describe their assessments of best practices and flawed approaches and their evaluation of the legal process afforded trafficking victims. Interviewees referenced throughout the piece were given descriptive pseudonyms to protect the identities of my research subjects. Due to confidentiality constraints, the author assumes responsibility for the accuracy of reporting from all interviews referenced in this article.

39. Id.

on the question of the commercial exploitation of women in prostitution.\textsuperscript{41} The first international moral panic around trafficking and "White Slavery" arose after the social purity and anti-vice campaigns of the nineteenth century, where the caricature of the underclass prostitute "literally and figuratively was conduit of infection to respectable society. She was nonetheless an object of class guilt as well as fear, a powerful symbol of sexual and economic exploitation under industrial capitalism."\textsuperscript{42} Unfortunately, such a myopic focus on trafficking as brothel prostitution or sexual exploitation tends to sideline concerns about more widespread forms of labor exploitation.\textsuperscript{43}

Contemporary activists and politicians have invoked the symbolic power of the "sex slave"—and the concomitant evils of pedophilia—to galvanize an international movement to end trafficking and the sex trade.\textsuperscript{44} Similar to the Progressive reformers and prostitution abolitionists who fought against the White Slave trade a century ago, debates decrying "modern day slavery" are frequently sparked by moral outrage against the "special evil in the abuse and exploitation of the most innocent and vulnerable" in the sex trade.\textsuperscript{45}

Once again, the prostitute has become an iconic figure in debates about human trafficking, as the "suffering third world prostitute serves well to symbolize the excesses of the global march of capital, and its negative effects on women."\textsuperscript{46} However, policies enacted in the sway of moral indignation at the

\begin{footnotesize}
\begin{enumerate}
\item See generally, JUDITH R. WALKOWITZ, PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE, (Cambridge University Press 1980) (discussing the emergence of social purity campaigns and the rise of women's participation in politics, in part, by using "separate spheres" to legitimize their moral crusade against male vice, including prostitution).
\item Id. at 4.
\item Id. at 256 (noting that "the obsession with male vice . . . sidetracked early twentieth-century feminists into crusades against white slavery, while obscuring the economic basis of prostitution . . . [and] led to repressive social policies. Walkowitz observes that by 1914 "feminists were rediscovering once again that the state 'protection' of young women inevitably led to coercive and repressive measures against those same women"). Id.
\item See, e.g., President George W. Bush, Address to the United Nations General Assembly (Sept. 23, 2003) [hereinafter Bush UN Speech, cited in UNITED STATES DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT, 12 (2004) [hereinafter 2004 TIP REPORT], available at http://www.state.gov/g/tip/rls/tiprpt/. (connecting trafficking to a series of political and social problems. In the space of two paragraphs, Bush links forced labor, smuggling, pedophilia, tourism and commercial sex industries with child sex abuse, organized crime and trafficking. ". . . [H]undreds of thousands of teenage girls, and others as young as five . . . fall victim to the sex trade. This commerce in human life generates billions of dollars each year—much of which is used to finance organized crime. There's a special evil in the abuse and exploitation of the most innocent and vulnerable. The victims of the 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." To promote the fight against "this industry" (rather than trafficking itself), Bush promised $50 million "to support the good work of organizations that are rescuing women and children from exploitation, and giving them shelter and medical treatment and the hope of a new life"). Id.
\item Id.
\item Jo Doezema, Ouch! Western Feminists' 'Wounded Attachment' to the 'Third World
highly emotive intersection of sex work and trafficking [generate] a lot more heat than light" by conflating, and confusing, the concepts of trafficking and prostitution. The sensationalistic language of rescue in the politics of sexual protection in anti-trafficking crusades, coupled with orientalist conceptions of the (naïve, passive, and racialized) trafficked female migrant bears the strong scent of imperialism. Invoking the symbol of the “suffering third world prostitute” simultaneously invites and justifies western intervention, while operating to legitimate repressive campaigns to “protect” women by restricting their movement . . . justifying discrimination against migrants and sex workers, and limiting their freedom and autonomy.

The moral appeal of initiatives to address human trafficking makes it difficult for policymakers to interrogate the operation of programs attempting to remedy such tragic exploitation. Because trafficking is linked to controversial debates regarding prostitution, child exploitation, illegal immigration, the HIV/AIDS epidemic, terrorism and organized crime in popular rhetoric, many NGOs fear that governments can easily “hijack” anti-trafficking movements, using the issue of trafficking as a vehicle “to pursue their own domestic agendas concerning asylum and immigration.”

This worry is not unfounded, since the policies and directives of U.S. agencies charged with distributing funds and monitoring programs operate as mechanisms of political leverage which tend to support NGOs and programs whose agendas resonate with the current administration’s policies. In the fight to combat trafficking, for example, U.S. funding restrictions function to channel political legitimacy and government resources to prostitution abolitionist groups. These groups view measures to eradicate commercial sex establishments as per se anti-trafficking/HIV-prevention programs, as abolitionists reject any

Prostitute,” 67 FEMINIST REV. 16-38 (2001) (discussing the construction of the “suffering third world prostitute” and in western discourses about trafficking. Doezema uses Wendy Brown’s analysis of injured identity and the politics of sexual protection, concluding that the trafficked prostitute, “oppressed by tradition and religion, exploited by western patriarchal capitalism, carrying the baggage of the colonial legacy of presumed backwardness and sexual innocence” perfectly symbolizes the systemic sexual subordination of womanhood. “Her victimhood, established by over a century of feminist, abolitionist, and colonialist discourses, is indisputable”). Id.

47. See Feingold, supra note 3.
48. See, e.g., Doezema, supra note 46.
49. Interview with Sex Worker Activist Lisa, in District 2 (July 15, 2005) (on file with author).
50. See, e.g., Bridget Anderson & Julia O’Connell Davidson, SAVE THE CHILDREN SWEDEN, TRAFFICKING—A DEMAND LED PROBLEM? A MULTI-COUNTRY PILOT STUDY (2002), http://se-web-01.rb.se/Shop/Archive/Documents/2486%20-%20Trafficking.pdf (discussing the rhetoric of criminality and moral panic surrounding the issue of trafficking. The authors suggest that mentioning “organized crime” alongside “illegal immigration” is a . . . potent and populist formula. Fears and prejudices concerning “illegal immigration” are given fresh basis (the threat is not just that society will be ‘swamped’ by ‘aliens’, but also overtaken by ‘mafia’ and other hardened criminals), and clampdowns on irregular migration are justified and humanized (rounding up, detaining and deporting undocumented migrants takes on new meanings when presented as rescuing, rehabilitating and reinserting the victims of organized crime”). Id. at 6.
distinction between "forced" and "free choice" prostitution. Conversely, organizations that adopt a non-judgmental stance on prostitution, or endorse peer-based strategies to empower sex workers to fight discrimination and abusive working conditions through decriminalization or regulation of prostitution, are excluded from funding altogether.

Ideologically-driven initiatives which bar groups that have extensive expertise in the field, established connections and credibility within targeted communities, and knowledge of local conditions would appear destined to face several obstacles to effective implementation. As a result, not only may such policies fail to reach targeted populations in the most direct and effective manner; gag rules like this may also serve to alienate key allies in the very communities they purport to assist.

III. GLOBALIZING SOCIAL ISSUES: HUMAN TRAFFICKING, PROSTITUTION, AND HIV/AIDS

Much like the moral panic sparked by fears of "White Slavery" a century ago, the international community has turned its attention to the "dark side" of development and capitalist expansion under globalization. Tragic stories of migrants who die en route to the slavery-like working conditions of the fields, sweatshops, brothels and factories; shocking accounts of the abuse and murder of mail order brides; the seemingly unstoppable spread of HIV/AIDS; and even a cable television miniseries based on the commercial exploitation of children and young women in the international sex industry, all contribute to a sense of a deepening socio-political crisis. In the United States, many of these concerns have been articulated in the context of debates over the amorphous rubric of "human trafficking."

A. Fighting Trafficking, American-Style

The issue of human trafficking first received sustained attention at the national level during the close of President Bill Clinton's administration in 2000 with the passage of the Trafficking Victims Protection Act (TVPA).

51. Id. at 8. See also Feingold, supra note 3.
52. See, e.g., Funding Captive to Politics, supra note 12.
53. See, e.g., Human Trafficking (Lifetime television original miniseries Oct. 24, 2005) (reflecting commonly-held beliefs and policy statements in awareness-raising campaigns about human trafficking. The miniseries relates several harrowing tales of trafficking and "modern day slavery" including women and girls duped into forced prostitution through modeling schemes, "abductions by sex traffickers" of a young American girl touring Asia, and an American female law enforcement officer’s undercover experience as a mail order bride. The immensely popular miniseries averaged 5.5 million viewers watching each night of the two-night miniseries and earned two Golden Globe nominations. View the trailer, available at http://www.lifetimetv.com/movies/originals/humantrafficking.html).
tremendous bi-partisan support, the TVPA enjoyed nearly unanimous voting margins of 371-1 in the House and 95-0 in the Senate. President George W. Bush has also pledged his commitment to combating modern-day slavery and stopping the spread of HIV/AIDS. For example, in his 2003 State of the Union Address, President Bush proposed the President’s Emergency Plan for AIDS Relief (PEPFAR). Later in 2003, Congress passed, and the President signed, the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the “Global AIDS Act”), implementing PEPFAR and appropriating $3 billion in funding for programs to combat AIDS and human trafficking each fiscal year from 2004-2008.

The billions in funding came with some strings attached. The Global AIDS Act prohibited this distribution of funds to groups that “promote or advocate the legalization or practice of prostitution and sex trafficking,” and excluded organizations that did not have a policy “explicitly opposing prostitution and sex trafficking.” Subsequently, President Bush signed the Trafficking Victims Protection Reauthorization Act of 2003, while adding a similar anti-prostitution provision to the original 2000 law.

The TVPA and its successors have extended the influence of American-style, abolitionist counter-trafficking policies to the global arena through two main mechanisms. Of the two, the proverbial “carrot” is the opportunity to secure resources to develop technical and legal infrastructure; to this end, the U.S. has crafted funding policies which allocate key technical assistance and efforts. The TVPA defines “severe forms of trafficking in persons” as: “(a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery”). Id.

55. 146 CONG. REC. S10211-01, S10212 (2000).
56. 146 CONG. REC. S10211-01, 10228 (2000).
59. Id.
61. 2004 TIP REPORT, supra note 44. Endorsing the deterrent value of “tough on crime” policies, U.S. assessments of “successful” counter-trafficking measures marginalize non-government efforts to reduce trafficking “indirectly” by crafting programs to address the structural bases of trafficking, “such as education programs, support for economic development, or programs aimed at enhancing gender equality, although these are worthwhile endeavors.” TIP reports are frequently criticized for their political bias, questionable data collection and assessment methodologies. Several interviewees criticized the U.S.’s tendency to rank political allies in tiers 1 or 2, while imposing a tier 3 ranking to punish countries which will not cooperate with the U.S. on other political fronts, specifically identifying U.S. bias against Muslim countries. Id.
financial support to training for law enforcement, prosecutors, and NGOs who cooperate with them in anti-trafficking taskforces. However, the “stick” in this regime is a combination of international shaming and the threat of economic sanctions for failure to meet the U.S.’ standards for the elimination of trafficking.

The TVPA requires the United States Department of State to release annual Trafficking in Persons Reports (TIP Reports), which have substantially increased the stakes for countries and organizations around the world attempting to address the phenomenon of human trafficking. The TIP reports rank countries into three “Tiers” based on perceived compliance with TVPA standards and efforts to eradicate trafficking through prevention, protection, prosecution, and rehabilitation efforts. If a state fails to make efforts to combat trafficking by drafting legislation criminalizing trafficking, creating national action plans to combat it, forging alliances with appropriate NGOs, or training criminal justice officials to identify and prosecute traffickers, the TVPA authorizes the denial of all non-humanitarian aid and threatens diplomatic relations with both the U.S. and international development institutions including the IMF and WTO.

62. Id.
63. 2005 TIP REPORT, supra note 7, at 26-7 (discussing the revised minimum standards enacted by the Trafficking Victims Protection Act (TVPRA)). The TVPRA defines the minimum standards as follows: “1. The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking. 2. For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault. 3. For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense. 4. The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.” Id. The 2005 TIP REPORT describes the changes enacted by the TVPRA. The fourth minimum standard has been amended to add criterion to consider not only investigations and prosecutions, but also convictions and sentences, as well as the responsiveness of governments to the State Department’s requests for law enforcement data. Another amended criterion assesses the efficacy and sentencing of corrupt government officials. New provisions mandate the consideration of whether the percentage of victims of severe forms of trafficking of non-citizens is “insignificant;” the government’s monitoring of anti-trafficking efforts and the dissemination of assessments; and whether the government has achieved “appreciable progress in eliminating severe forms of trafficking” relative to the previous year’s TIP REPORT.

64. TVPA, supra note 54.
65. 2004 TIP REPORT, supra note 44 (endorsing the deterrent value of “tough on crime” policies, U.S. assessments of “successful” counter-trafficking measures marginalize non-government efforts to reduce trafficking “indirectly” by crafting programs to address the structural bases of trafficking, “such as education programs, support for economic development, or programs aimed at enhancing gender equality, although these are worthwhile endeavors.” TIP reports are often criticized for their political bias, questionable data collection and assessment methodologies. Several interviewees disparaged the perceived U.S.’ bias and tendency to rank “friends” and political allies in tiers 1 or 2, while imposing a tier 3 ranking to punish countries which will not cooperate with the U.S. on other political fronts, “particularly Muslim countries”). Id.

66. Id.
Accordingly, when President Bush addressed the General Assembly of the United Nations in the fall of 2003, he charged member nations with a duty to increase international cooperation against transnational crime syndicates and escalate efforts to combat the sex industry. Bush’s address unequivocally conflated trafficking with the commercial sex industry as he called for increased efforts to abolish the “evil trade,” an ideologically and pragmatically problematic approach for many advocacy groups and organizations already active in outreach, harm-reduction, or rights-based work in communities of sex workers at risk for both trafficking and HIV-transmission. Bush’s speech to the UN and the passage of U.S. legislation related to anti-trafficking and AIDS prevention programs clearly forecast a shift towards more socially conservative and restrictive policies in the programming and funding decisions of U.S. agencies.

Consequently, one way countries can convince U.S. officials of their commitment to the goals of the TVPA and a continued need for funding is to ratchet up the number of brothel raids, satisfying the need to address both trafficking and the spread of AIDS by cracking down on commercial sex establishments. These mechanisms—building the capacity of legal and civil institutions and leveraging economic superiority—help the U.S. shape a desired international moral and legal order by creating incentives to abolish prostitution and encourage abstinence as the only U.S.-approved approach to stem the tide of human trafficking.

The recent reauthorization of the TVPA reconfirmed the current administration’s emphasis on trafficking for sexual exploitation, rather than other forms of forced labor. On January 10, 2006, while signing H.R. 972, the Trafficking Victims Protection Reauthorization Act, President Bush described human trafficking as “a crime in which human beings, many of them teenagers and young children, are bought and sold and often sexually abused by violent criminals.” Linking the phenomenon of trafficking for sexual exploitation with surreptitious border crossings by “illegal aliens,” transnational organized crime syndicates, sexual predators and deviants, HIV/AIDS and pornography, Bush emphasized the need to forge coalitions with faith-based and community organizations to increase the number of arrests and prosecutions of traffickers, to close down the operations of commercial sexual exploiters, and reduce demand for prostitution. President Bush highlighted the recent U.S. collaboration with Southeast Asian countries “to crack down on sex tourism...an industry that preys on the young and the vulnerable,” as an example of the United States’

67. Bush UN Speech, supra note 44.
68. Id.
71. Id.
commitment to combating the "modern day slavery" of human trafficking.\textsuperscript{72} Moreover, Bush vowed to increase domestic legal pressure and surveillance of "those who pay for the chance to sexually abuse children and teenage girls" both at home and abroad, by increasing the extraterritorial reach of U.S. jurisdiction to investigate and prosecute American customers of trafficked sexual laborers, child prostitution or pornography.\textsuperscript{73}

B. The Shift to Abolitionism: Implementing the Anti-Prostitution Pledge and Taking the "Best" Out of "Best Practices"

The United States Agency for International Development (USAID) and the United States Department of Health and Human Services play a primary role in the allocation of Global AIDS and anti-trafficking funds to both foreign and U.S.-based non-governmental organizations (NGOs), local sub-grantees, foreign governments and multilateral organizations.\textsuperscript{74} Using funding provided by Congress, USAID works directly with foreign countries on a variety of issues, ranging from family planning and reproductive health services to trafficking and AIDS prevention.\textsuperscript{75} USAID funding supports development assistance projects, technical training grants, and the work of local NGOs and enforcement officials in collaborative initiatives to address communities' vulnerability to trafficking and/or HIV-transmission.\textsuperscript{76} As part of its anti-trafficking mandate, USAID "works toward prevention of trafficking primarily through lessening the vulnerability of women and children to trafficking, protecting and assisting the victims of traffickers, and supporting legislative reform and implementation to help countries meet minimum standards for the elimination of trafficking."\textsuperscript{77}

However, restricting the use of U.S. aid and development funding based on conservative policy rationales is not new.\textsuperscript{78} In 1984, the Reagan administration announced its "Mexico City Policy," prohibiting foreign NGOs from receiving U.S. funds for family planning and reproductive health services if they "[perform] or actively [promote] abortion as a method of family planning"—even if the grantee used its own funding from outside sources and operated in accordance with domestic laws.\textsuperscript{79} Although several organizations contested the

\begin{itemize}
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} See, \textit{e.g.}, Office to Monitor and Combat Trafficking in Persons, Overview of the Administration's Implementation of the Trafficking Victims Protection Act of 2000 (2002) [hereinafter Administration's Implementation of TVPA], http://www.state.gov/g/tip/rls/rpt/10531.htm#usaid (last visited Feb. 10, 2005).
\item \textsuperscript{76} Administration's Implementation of TVPA, \textit{supra} note 74.
\item \textsuperscript{77} Id.
\item \textsuperscript{79} US Policy Statement for the International Conference on Population, 10 POPULATION &
Reagan administration's restrictive regulations, the primary lawsuits challenging the Mexico City Policy were unsuccessful. The federal courts held that while the legality of the policy's implementation could be questioned, attacks on the "political and social wisdom" of foreign policies are nonjusticiable political questions. Moreover, courts rejected the arguments made by foreign NGOs that the Mexico City Policy violated the First Amendment on grounds of freedom of expression and speech, holding that foreign NGOs lack standing to levy such a claim.

The Mexico City Policy governed aid and development programming in the arenas of reproductive health and family planning services throughout the Reagan and first Bush administrations. The policy was terminated in 1993, when President Clinton revoked the "global gag order" early in his administration by issuing a Memorandum to USAID removing the Mexico City restrictions. However, on January 22, 2001, as one of his first official actions, President Bush issued an executive memorandum rescinding the Clinton administration's policies, and reinstating the Reagan-era Mexico City policy.

However, the resurrected "global gag policy" is no longer limited to foreign aid related to family planning. Within the past year, the Bush administration has announced increasingly exacting requirements for organizations seeking U.S. funding for aid and development issues in other arenas, including HIV/AIDS prevention and efforts to combat human trafficking. In fact, Congress the Bush administration currently require both foreign partners and U.S. based NGOs to endorse anti-prostitution agreements as a condition of receiving U.S.-funding.

On January 15th, 2004, USAID issued a policy directive requiring recipients to "agree that they oppose prostitution and sex trafficking" as a

---


81. See DKT II, 887 F.2d at 291, supra note 80 (holding that foreign NGOs lack standing to bring a First Amendment challenge to the Mexico City Policy).


85. Cohen, supra note 16.

86. See AAPD 05-04, supra note 13.
condition of Global AIDS funding, revising the directive a month later to limit the application of the anti-prostitution pledge to foreign NGOs. The amended directive quoted remarks on the Senate floor explaining the meaning of the limitation in Section 203(f) of the Global AIDS Act was to prohibit funding to be used to provide assistance to “any group or organization” which does not have an explicit anti-prostitution platform. To fulfill the requirements, Senator Bill Frist stipulated that “a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women . . . would satisfy the intent of the provision.”

Early in 2004, the General Counsel of the Department of Health and Human Services requested a legal opinion from the Department of Justice (DOJ) regarding the constitutionality of implementing the prostitution pledge requirements in the TVPRA and Global AIDS Act with respect to U.S.-based organizations. Citing First Amendment concerns, the DOJ initially provided an opinion limiting the application of the anti-prostitution/anti-sex trafficking pledge only to “foreign organizations acting overseas.” As a result, a revised


90. Id.


92. Id. See also Complaint, DKT International, Inc. v. United States Agency for International Development and Andres S. Natsios, Administrator, filed in U.S. District Court, District of Columbia, [hereinafter DKT Complaint] available at http://www.dktinternational.org/pdf/DKT_Coplaint.pdf (last visited January 18, 2006), citing two Department of Justice opinions issued regarding the application of the provisions of 22 U.S.C.A. § 7631(f) (the anti-prostitution pledge). According to the DKT Complaint (Paragraph 8, Page 3), the Department of Justice’s early 2004 opinion stated that the enforcement of the pledge requirement against U.S.-based organizations would be unconstitutional. On this view, First Amendment considerations limited the application of the anti-prostitution pledge to foreign organizations operating overseas. See also Complaint, Alliance for Open Society
USAID directive notes “the US Government has determined that it is appropriate to apply the [anti-prostitution pledge] requirement...only to foreign organizations, including non-exempted public international organizations.”\(^9\)

However, in September 2004, the Department of Justice abruptly withdrew its “tentative advice” to HHS. The DOJ’s revised opinion stated that since the organization restrictions were “closely tailored to the purpose of the grant program, there are reasonable arguments to support [the] constitutionality” of the anti-prostitution pledge requirement as applied to U.S.-based organizations.\(^9\) In consultation with its Civil Division, the Department of Justice argued that the pledge requirements constituted a permissible condition of funding authorized by statute and “intended by Congress to apply without the [constitutional] limitations” identified in the DOJ’s previous advisory memo.\(^9\)

In turn, USAID issued a new directive, AAPD 05-4, on June 9, 2005, stipulating that all recipients of Global AIDS funding, whether foreign- or U.S.-based organizations, must have a “policy explicitly opposing...prostitution and sex trafficking.”\(^9\) The stated purpose of the revised directive is to create new standard provisions which not only require all grantees to agree not to “promote or advocate the legalization or practice of prostitution or sex trafficking;” the new provisions also operate to “permit recipients to not endorse or utilize a multi-sectoral approach to combating [sic] HIV/AIDS or to not endorse, utilize or participate in a prevention method or treatment program to which the organization has a religious or moral objection.”\(^9\)

The June 2005 USAID directive requires certification that all grants (and sub-grants) are conditioned on enforceable agreements adopting “Standard Provisions,” including the “Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance).”\(^9\) This funding limitation requires recipients to endorse language acknowledging that the “prostitution and related activities...are inherently harmful and...International, Inc., and Open Society Institute v. United States Agency for International Development and Andres S. Natsios, Administrator, filed in U.S. District Court, Southern District of New York, Paragraph 23, page 5.

94. See DOJ Letter, supra note 91 (citing South Dakota v. Dole, 480 U.S. 203, 206-8 (1987) and American Communications Ass'n v. Douds, 339 U.S. 382, 390-91 (1950) to support the rational connection between governmental policies to eradicate AIDS and human trafficking and the prostitution-abolitionist mandate. The letter further asserts that the pledge provisions do not raise separation of powers issues and urged HHS to implement the anti-prostitution pledge.).
95. Id.
96. AAPD 05-04, supra note 13.
97. Id.
98. Id. at 5.
dehumanizing, and contribute to the phenomenon of trafficking in persons,\footnote{99} which in turn is linked to the spread of AIDS.\footnote{100} As a result of the broad wording of the policy, the policy excludes groups unwilling to endorse the pledge for fear that condemning prostitution will curtail effective interventions or undermine outreach programs by endorsing discrimination against sex workers and alienating the high-risk communities that anti-trafficking and AIDS-prevention programs purport to protect and assist.\footnote{101}

IV. ASSESSING THE IMPACT OF ABOLITIONISM: UNDERMINING EFFECTS AND RESISTANCE IN THE FIELD

The HIV/AIDS pandemic and the phenomenon of human trafficking are both transnational issues which necessitate international and regional collaboration. However, initiatives to address these problems, both domestically and abroad, are often driven by the political agendas of major donor countries. As a result, the policies and practices of major funding agencies, such as USAID, have important repercussions on the operation of HIV/AIDS and human trafficking interventions—both domestically and around the world.

How has the shift towards abolitionism in American funding policies affected the AIDS-prevention and counter-trafficking programs of grassroots outreach networks and NGOs in the field? While it is still quite early to assess the full impact of the anti-prostitution/sex trafficking funding restrictions, a variety of international organizations, UN agencies, and NGO activists have reported pernicious effects stemming from the curtailed HIV/AIDS and trafficking interventions authorized by U.S. policies.\footnote{102}

\footnote{99}{Id. at 5. Section II, infra describes the prohibition on the promotion or advocacy of the legalization or practice of prostitution or sex trafficking. See also U.S. Dep't of State, Anti-Trafficking in Persons, Funding Opportunity No. DOS-GTIP, Mar. 2005, at 11-12 (stating that "U.S. law . . . prohibits such funds from being used to implement any program that targets victims of severe forms of trafficking in persons involving sex trafficking by an organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution. It is the responsibility of the primary grantee to ensure these criteria are met by its sub-grantees.").}

\footnote{100}{See 2005 TIP REPORT, supra note 7 at 49 (discussing "the link between HIV/AIDS and Trafficking in Persons". The report alleges, without citation to any specific studies or sources, that "globally, women in prostitution and those who have been trafficked for prostitution have a high prevalence of HIV [and other] STDs." Similarly, the report suggests that HIV/AIDS may be spread by trafficking: "some experts have linked sex trafficking to the spread and mutation of the AIDS virus. They believe that sex trafficking is aiding the global dispersion of HIV subtypes" (again with out reference or citation)) available at http://www.state.gov/g/tip/rls/tiprpt/2005/46611.htm (last visited Feb. 11, 2005).}

\footnote{101}{Sweeping Restriction, supra note 11.}

A. Curtailing Connections and Restricting Interventions in the Fight Against AIDS

Successful AIDS prevention campaigns and efforts to decrease the prevalence of trafficking and child prostitution have engaged commercial sex workers as partners, using non-judgmental, harm reduction strategies to develop trusting relationships, “reduce their social isolation, increase their participation in public life, and confront stigma and discrimination.” Yet some peer-outreach, rights-based sex worker organizations lauded for their development of “best practices” by international organizations such as UNAIDS have already been stripped of their USAID funds for refusing to sign the pledge opposing prostitution. In a recent letter to President Bush, a coalition of hundreds of NGOs and advocacy groups asserted that the broad language of the prostitution-pledge funding restriction has had a “chilling effect” on programs in the field, as NGOs anxious to secure grants curtail effective prevention programs for fear their activities may be construed as “promoting” or “supporting prostitution.”

Many organizations working at the grassroots level in South and South East Asia have reported negative effects of the United States’ anti-prostitution policies. For example, Cambodian NGOs working with people in the commercial sex industry have discontinued non-traditional programs teaching English developed to help educate and empower sex workers to assert their rights, demand condom use with clients, or simply to learn skills that provide an exit from sex work to alternative employment, such as the growing tourism industry.

Grassroots sex worker organizations and migrants’ rights advocates in Thailand argue that policies condemning prostitution and promoting “rescue” further marginalize and alienate sex workers, rather than address the dangers and abuses sex workers themselves identify as increasing the risks of exploitation, such as continued police harassment, corruption, and discrimination.

ongoing interventions and restrict organizations’ use of best practices in their respective fields of expertise.”

103. UNAIDS BEST PRACTICES, supra note 29.
104. Id. (citing the example of the Sonagachi Project in Calcutta India, a peer-based commercial outreach and education program for the sex worker community, which has been recognized by the World Bank and UNAIDS for reaching over 30,000 commercial sex workers by developing “best practices” in the field of AIDS prevention. The letter expresses concern that highly successful programs such as the Sonagachi Project are threatened by U.S. laws and policies which fail to differentiate from initiatives that “focus on promoting the fundamental human rights and health of persons working in prostitution, but do not equal the promotion of prostitution.”)
105. HRW Letter, supra note 102.
106. Id.
107. See, e.g., Empower Foundation Chiang Mai, U.S. Sponsored Entrapment, 8 Research for Sex Work: Sex Work and Law Enforcement, 2000, at 25-26 (discussing project experiences involving police posing as customers to entrap over thirty-seven migrant sex workers in just three weeks). Sex workers reported that the crackdown was driven by U.S.-based and international anti-trafficking organization working in the local area; sex worker activists surmised that the organization was the International Justice Mission, a group which received
migrants’ rights and sex worker activists argue that the decriminalization of prostitution would assuage these problems, thereby contributing to the success of public health campaigns against HIV by engaging sex workers to promote condom use, as well as increasing access for labor and health officials to monitor working conditions in commercial sex establishments. Indeed, activists and officials observed that abolitionist policies have actually backfired in the fight against HIV/AIDS in Thailand. A UN project director active in anti-trafficking and AIDS-prevention programming noted that Thailand’s 100% condom use campaign was highly successful, in part because brothels were not considered illegal and public health workers could easily access sex workers. In fact, “the brothel owners welcomed in the public health folks, because, well, it makes good business sense to keep your workers healthy!”

However, after new laws began cracking down on commercial sex establishments, brothels transformed themselves into legitimate businesses by creating “karaoke bars” or small restaurants as a front. Now, allowing public health workers to provide condoms and HIV testing for the brothel workers inside risks violating the new law. Thus, policies that may seem to promote positive social change fall prey to “the hell of good intentions,” as unintended consequences undermine the goals of the policy and the means of achieving it.

Nevertheless, programs which advocate for the decriminalization of prostitution to stymie the spread of HIV/AIDS through education and empowerment of sex workers to demand condom use are explicitly disallowed under U.S. laws and policies. For example, one grassroots sex workers’ empowerment organization was pushed to terminate its funding agreement with USAID, despite its protest that advocating for the health and rights of commercial sex workers did not amount to the “promotion of prostitution.”

---


109. Id.

110. Id. See generally, Feingold, supra note 3 (explaining that “giving sex workers a measure of legitimacy short of legalization would actually discourage trafficking,” as extending labor and social security laws to sex workers “could hamper trafficking by opening establishments to inspection, allowing labor organization, and exposing underage prostitution.”) Id. During the AIDS epidemic, NGO activists and public health workers were welcomed in commercial sex venues, but subsequent changes in Thailand’s laws regulating places of “entertainment” have created incentives for sex establishment owners to reclassify themselves as restaurants, karaoke, or bars in order to avoid prosecution. As a result, public health workers cannot distribute condoms or address the health needs of sex workers without violating the law. In addition, the unwillingness and/or inability of Ministry of Labor officials to inspect these worksites increases the likelihood of labor exploitation, thereby promoting conditions for trafficking.

111. TRADING WOMEN supra note 124.

112. Posting of of Meena Saraswathi Seshu, Executive Director, SANGRAM, “Indian NGO says no to US funds, rejects imposition of conditions,” to www.healthdev.org/eforums, (Oct. 10, 2005) (responding to an article accusing the NGO of trafficking. SANGRAM, a peer-based HIV/AIDS prevention initiative aimed to assist and empower sex workers, terminated its agreement with USAID after refusing to comply with the anti-prostitution/sex trafficking
The director of the organization issued a statement declaring that it “would not be true to our mission of local empowerment, including of all women and girls, if we succumbed to the dictates of people in Washington who do not apparently understand that victories against HIV/AIDS have been won when those most at risk are respected and empowered.”

Similarly, international critics of the U.S. anti-prostitution pledge have refused to align their policies with the U.S., underscoring the negative impact wrought by abolitionist funding, development, and programming policies on the very communities they intend to protect. For example, in May 2005, the Brazilian government refused $40 million in HIV/AIDS grants to protest the required pledge opposing commercial sex work. Dr. Pedro Chequer, director of Brazil’s AIDS program, reportedly stated that “we can’t control [AIDS] with principles that are Manichean, theological, fundamentalist and Shiite,” deeming U.S. demands as “interference that harms the Brazilian policy regarding diversity, ethical principles and human rights.” Dr. Chequer stressed that a pragmatic, empirically proven approach is essential to managing the AIDS crisis, pledging that “we must remain faithful to the principles of the scientific method and not allow theological beliefs and dogma to interfere.”

Brazil’s progressive national AIDS program emphasizes the importance of “accepting [and] open” policies encouraging condom education and distribution among difficult to reach, high-risk groups such as commercial sex workers, intravenous drug users, and men who have sex with men. Moreover, Brazil views sex workers themselves as “efficient and competent” partners in efforts to reduce high-risk sexual behavior and monitor and address problematic aspects of

pledge the conditions imposed by the United States’ Leadership Against Global HIV/AIDS Act of 2003. SANGRAM’s highly effective program has been lauded for reducing HIV-transmission, child prostitution, and for improving work conditions in the brothels. The success of SANGRAM’s programming is internationally recognized by groups such as UNAIDS, UNESCO, and Human Rights Watch, which presented its annual Human Rights Defender award to SANGRAM’s general secretary in 2003. Reporter Rema Nagarajan published an article, “US accuses NGO of 'trafficking'” in the Hindustan Times, Washington, on September 29, 2005, regarding USAID’s refusal to fund SANGRAM. Seshu’s response argued that the conditions attached to U.S. funding policies were not only counterproductive to promoting AIDS awareness and prevention, but would force SANGRAM to violate the mandate and spirit of their organization’s mission.

113. Id.
114. See Larry Rohter, Prostitution Puts U.S. and Brazil at Odds on AIDS Policy, N.Y. Times, July 24, 2005, [hereinafter U.S. and Brazil at Odds] (quoting Chris Beyer of the Center for Public Health and Human Rights and the Johns Hopkins School of Public Health as arguing, “it’s not like you’re choosing between neutral policy programs...Brazil has good data to show that their approach works, and to ask them to change that, even if they get the additional money, to one for which there is no evidence, just because of moral squeamishness in the United States, is an extraordinary position to take.”). Matt Moffett and Michael M. Phillips, Brazil Refuses U.S. AIDS Funds Due to Antiprostitution Pledge, Wall Street Journal, May 2, 2005 at A [hereinafter Brazil Refuses U.S. AIDS Funds].
115. Id.
116. Id.
117. U.S. and Brazil at Odds, supra note 114.
118. Brazil Refuses U.S. AIDS Funds, supra note 115.
Due to the consequent drop in rate of HIV-transmission, the Brazilian anti-AIDS program has been hailed as the most successful approach to managing the pandemic in the developing world. Unfortunately, the U.S. restrictions fail to recognize the proven value of such interventions.

B. Implications of the Abolitionist Agenda in Ongoing Efforts to Combat Human Trafficking in Thailand

While a host of critics have attacked U.S. policies as violating established best practices in efforts to combat the global AIDS pandemic, few have investigated the effect of the policy on the development of anti-trafficking interventions. In fact, the OSI suit against USAID explicitly notes that Plaintiff believes that while it is unconstitutional for the U.S. government to “force [OSI] to adopt a policy position in order to qualify for Global AIDS Act funds... [OSI] does not challenge either the requirement that they have a ‘policy explicitly opposing. . .sex trafficking’ or USAID’s implementation of that requirement.”

Although the recent lawsuits against the pledge requirements address the negative impact of prostitution-abolitionist policies in the fight against HIV/AIDS, such policies threaten to undermine efforts to combat human trafficking as well. As anti-trafficking campaigns are implemented in migration hot-spots across the globe, many non-governmental organizations (NGOs) assist in state efforts, urged by the U.S., to identify, protect, and rehabilitate victims; investigate and prosecute alleged traffickers; and develop victim-sensitivity training programs for judicial, enforcement and border officials. Creating innovative, more collaborative models for trafficking interventions that are responsive to the rapidly changing social and economic context of forced migration and labor exploitation is crucial for the effective implementation of counter-trafficking policies.

Yet efforts to engage NGOs in developing interventions that respect the human and labor rights of trafficked migrants frequently compete with state objectives to wage a “war on trafficking” through stricter immigration regulations, tighter border controls, and increased surveillance of “illegal aliens.” However, the casualties of this war are rarely representatives of the

119. *U.S. and Brazil at Odds*, supra note 114.
120. Betsy Illingworth, *HIV/AIDS Prevention in Brazil*, PLANNED PARENTHOOD, Feb. 22, 2006, http://www.plannedparenthood.org/pp2/portal/files/portal/webzine/globaldispatch/gd-060222-brazil.xml (contrasting South Africa and Brazil, which both had HIV-prevalence rates around one percent of their adult populations in 1990. Today, more than twenty percent of South African adults live with HIV, whereas Brazil’s percentage of adults living with HIV has decreased by nearly half.)
121. See OSI Complaint, supra note 12, at 5 (quoting the anti-prostitution and anti-sex trafficking clauses contained in AAPD 05-04, supra note 13).
123. Anderson & O’Connell Davidson, *supra* note 50 (noting that the pliability of trafficking
sophisticated "criminal syndicates" alleged to profit from trafficking; instead, trafficking interventions often net low-level "people movers" and frequently result in violations of migrants' rights in the process.\textsuperscript{124}

For example, despite new programs to incorporate "victim-sensitivity" and human rights trainings for trafficking interventions, discriminatory enforcement, extortion by corrupt officials, gender-based restrictions on mobility, and increased marginalization of workers in informal sectors, particularly in the sex industry, continue to plague trafficking interventions in the Greater Mekong Sub-region (GMS) countries, including Thailand.\textsuperscript{125} As a result, increasing

discourse allows for an amount of "doublespeak" regarding their concern for trafficking victims rights as well as stricter immigration controls. As the authors note, "this obscures the fact that a) policies designed to control irregular forms of migration can actually encourage, permit or exacerbate violations of migrants' human rights, and b) policies that focus on the prevention of illegal movements...do nothing to address the factors that make it possible for employers and others to engage in exploitative and slavery-like practices at the point of destination". \textit{Id.} at 14.

\textsuperscript{124} Feingold, \textit{supra} note 3 (noting that the varied circumstances of migration suggest that while trafficking is big business, it is not always associated with transnational organized crime). Feingold explains that "in many regions of the world, such as Southeast Asia, trafficking involves mostly 'disorganized crime': individuals or small groups linked on an ad hoc basis. There is no standard profile of traffickers. They range from truck drivers and village 'aunties' to labor brokers and police officers. Traffickers are as varied as the circumstances of their victims." Feingold located two networks in the mid- to late-1990s, the "'Luk Moo' [Piglet] network, which was responsible for about 50% of the women and girls smuggled into Thailand from Burma, China, and Laos to work in brothels;" as well as another network, "Kahuankarn Loy Fah [Floating in the Sky]...that specialized in girls for restaurants and karaoke bars. However, these networks have since "faded in importance, owing to changes in the structure of the sex industry." \textit{Id.} See also TRADING WOMEN, (Documentary produced by Dean W. Slotar and David A. Feingold 2003) (discussing Feingold's decades of research into the relationship between efforts to end the drug trade and the subsequent spike of the trade in women, focusing on the unintended consequences of such policies as "hell of good intentions").

\textsuperscript{125} See, e.g., Ly Vichuta and Mehn Navy, Asian Regional Cooperation for the Prevention of People Trafficking (ARCPPT), Gender, Human Trafficking, and the Criminal Justice System in Cambodia, (2005) [hereinafter ARCPPT Report]. http://www.arcppt.org/docs/GenderCBA2005.pdf (noting that "widespread lack of understanding of differences between trafficking, smuggling, and prostitution can result in inappropriate targeting of law enforcement efforts. This, in turn, can lead to...the arrest of trafficking victims, as illegal migrants, [and/or] for their involvement in the sex trade; law enforcement interventions also often seek to restrict movement of people, particularly women."). However, stricter immigration policies throughout the world have been shown "not only to be unsuccessful in preventing movement but to facilitate trafficking and other forms of exploitation by pushing potential migrants into more and more risky and dangerous forms of migration." Moreover, the report suggests that "a conflation of trafficking with prostitution can lead to law enforcement officers indiscriminately targeting those involved in the trade especially those who are most vulnerable to exploitation, rather than those who perpetrate exploitation, such as pimps, brothel owners, corrupt law enforcement officials and the 'customers' who create a demand for exploitation of prostitution. Experience suggests, in fact, that the women and children involved in prostitution often fare considerably worse in such crackdowns than any of the other groups...[these interventions result in] the targeting and disproportionate punishment of small-scale brokers or people movers. These people are mostly women with little or no connection to those who profit hugely from exploitation of trafficked persons..." \textit{Id.} at 10-11. Representatives of the group report that their research and work with law enforcement officials in Thailand reflects many of the same problematic practices among enforcement and judicial officials described above.
collaboration between NGOs, government organizations (GOs), and criminal justice agencies often inadvertently pits concerns about national security and illegal immigration against the protection and rights of exploited migrants.126

This final section illustrates some experiences of NGO activists, public health and welfare providers, and criminal justice officials involved in initiatives to address human trafficking in Thailand and the Greater Mekong Sub-region. Based on fifty open-ended interviews with Thai government officials, social workers, lawyers, police investigators, advocates from NGOs and IOs, and UN program directors, reports from the field suggest that the increasing pressure to crack down on human trafficking within an abolitionist, criminal justice framework may undermine the efficacy of interventions and co-opt organizations' development of progressive anti-trafficking approaches.127 Indeed, many interviewees agreed that many sex worker organizations and migrants' rights groups had eschewed state-backed (and particularly U.S. funded) anti-trafficking initiatives due to increasingly hostile policies against prostitution and repeated violations of migrants' rights during efforts to "rescue" trafficking victims.128

1. Tackling Trafficking in Thailand: Protecting Victims and Prosecuting Traffickers through Collaborative, Multi-disciplinary Taskforces

Thailand has established a multi-disciplinary, interagency approach dubbed the "Chiang Mai Model" (CMM) to address human trafficking.129 Originally developed by the Coordination Center for Protection of Child Rights in Chiang Mai (CPCRC) to address the re-victimization of abused children during criminal investigations, the CMM draws on the resources of non-governmental organizations in the private sector to coordinate and support the work of criminal justice officials and government service agencies.130 NGOs and GOs are called upon to help protect victims and "assist in the successful prosecution of traffickers."131 As a director of a major donor organization explained, multi-disciplinary approaches such as the CMM help to "centralize services for victims

126. See generally Herbert L. Packer, Two Models of the Criminal Process, in THE LIMITS OF THE CRIMINAL SANCTION, (1968) (discussing two models of the criminal justice process and the gulf between the "Due Process Model" of criminal administration, focusing on the rights of the individual, and the "Crime Control Model," which favors a broad range of discretion and rapid action).
127. See Methods, supra note 38.
128. International Organization Director, District 1 (May 24, 2005) (on file with author). See also Interview with Migrants' Rights Activist Ma Sung, District 2 (May 26, 2005) (on file with author). See also Interview with Trafficking Investigator Dang, District 2 (April 20, 2005) (on file with author).
129. See the US Embassy in Thailand, Factsheet on Human Trafficking, [hereinafter Factsheet], at http://bangkok.usembassy.gov/services/docs/reports/humanfacts02a.htm (discussing anti-trafficking programs in Thailand).
130. Interview with Prosecutor Sungsang, in District 1 (May 24, 2005) (on file with author).
131. Factsheet, supra note 129.
and tap different networks of resources” for better-planned trafficking interventions.\textsuperscript{132} The success of this model in the Northern provinces has spurred other provinces to mimic the structure throughout Thailand. Moreover, the CMM has been lauded internationally as an excellent step towards increasing cooperation between the state and civil society in efforts to combat trafficking.\textsuperscript{133}

However, conceptual and institutional problems arise when taskforces created to stop the abuse and commercial sexual exploitation of children are modified to address the complex questions of migrants’ agency and the ambiguous line between consent and coercion where “trafficked” adults engage in sex work or exploitative labor for subsistence wages. The diverse members of these taskforces do not necessarily share the same ideas about the most effective methods to combat human trafficking, creating obstacles to forging stable, workable alliances and planning successful, targeted interventions. Interviewees related several examples of botched trafficking interventions and failure to follow-up on cases, “turf wars” between partner organizations, and a lack of trust and communication barriers across professional boundaries.\textsuperscript{134} Police officials and sex worker organizations were not informed of raids because of allegations of prior tip-offs; investigators complained that they were still unsure what kind of evidence the prosecutors wanted; prosecutors bemoaned their tainted, skimpy evidence and blamed NGOs for manipulating and interfering with victim-witnesses.\textsuperscript{135} Others in the NGO community loudly criticized CMM-style taskforces for fixating on sex trafficking to the detriment of victims of more widespread forms of labor exploitation.\textsuperscript{136}

2. Policies Explicitly Opposing “Prostitution” Fracture Alliances in the NGO Community

The restricted range and ambiguous scope of interventions sanctioned by U.S. funding agencies means that organizations relying on these monies are pressured to curtail new programs or self-censor strategies proven effective in combating trafficking, forced prostitution and/or the HIV/AIDS pandemic.\textsuperscript{137}

---

\textsuperscript{132} Interview with International Organization Director Jill, in District 1, (Feb. 28, 2005) (on file with author).

\textsuperscript{133} Factsheet, \textit{supra} note 129.

\textsuperscript{134} Interview with Trafficking Taskforce Officer Lew, in District 2 (May 14, 2005) (on file with author). \textit{See also} Interview with International Organization Program Officer Porntip, in District 1, (May 23, 2005) (on file with author). \textit{See also} Interview with Prosecutor Sungsang, \emph{supra} note 130.

\textsuperscript{135} Interview with Activist Moo, in District 2 (March 1, 2005) (on file with author); \textit{see also} Interview with Police Official Luk, in District 2 (March 16, 2005) (on file with author); Interview with Migrants’ Rights Activist Soni, in District 3 (March 17, 2005) (on file with author); Interview with Prosecutor Sungsang, \textit{supra} note 130 (noting that many cases have relied on the large number of condoms found in the garbage cans of the brothel as evidence of sex trafficking (rather than viewing condom use as evidence of safe-sex practices)).

\textsuperscript{136} \textit{See}, e.g., U.S. Sponsored Entrapment, \textit{supra} note ???.

\textsuperscript{137} Press Release, Health and Development Network, U.S. Uses Funding to Pursue ‘Moral Agenda,’ Health and Development Networks’ NGO Forum, June 30, 2005 (discussing the
Several Thai activists and UN officials complained that the anti-prostitution policy restricts programs from utilizing best practices to prevent HIV-transmission and reduce the risk of exploitation in the commercial sex sector.\textsuperscript{138} Instead, U.S. funding policies exert a chilling effect on trafficking initiatives in Thailand and the Greater Mekong Sub-region: some NGOs in Thailand have already curbed their programming in response to decisions rescinding the funding of other groups to stay in the good graces of governmental authorities, thereby securing a stake in state-backed anti-trafficking initiatives that receive U.S. funding.\textsuperscript{139} Stories of AIDS-prevention and rights-based sex worker outreach programs cut off from USAID funding circulate widely through e-mail listservs within the international NGO community, disciplining organizations who resist abolitionist approaches, as well as groups whose work is unrelated to prostitution but who seek to maintain an important source of funding.\textsuperscript{140}

For example, several NGO activists I interviewed in northern Thailand were critical of the divisive effects of the anti-prostitution pledge on the multi-sectoral coalitions forged to combat child abuse, drug addiction, drug trafficking, and commercial sex exploitation.\textsuperscript{141} One child rights advocate whose organization had signed a USAID agreement to continue operating its shelter complained that the requisite anti-prostitution pledge had produced a rift in the NGO community, disrupting multi-sectoral strategies to combating AIDS and human trafficking and emerging alliances between USAID-funded NGOs and sex worker organizations, sympathetic AIDS-prevention groups, and key migrants' rights organizations working with ethnic minorities to the detriment of all groups.\textsuperscript{142} U.S. funding policies mandating endorsement of anti-prostitution ideologies disqualify a substantial number of local organizations that already

\begin{enumerate}
\item[] impact of the Bush administration’s ‘anti-prostitution’ pledge on organizations that work with sex workers and drug users) [hereinafter Moral Agenda].
\item[] Interview with Regional Trafficking Program Officer Somsok, in Districts 1-4 (May 12, 2005) (on file with author). Interview with International Organization Researcher Bill in Districts 1-4 (May 22, 2005). See also Interview with Trafficking Taskforce Officer Lew, in District 2, supra note 134. See Interview with Sex Worker Activist Sapaporn, in District 2 (July 14, 2005) (on file with author). See generally, Moral Agenda, supra note 137. Compare UNAIDS BEST PRACTICES, supra note 29.
\item[] Interview with Activist Moo, District 2, supra note 135. A similar view was expressed by International Organization Officer John, District 1 (April 13, 2005) (on file with author).
\item[] See, for example, the Health & Development Network “Sex-Work” international eForum, which seeks to “facilitate discussion around sex-work and HIV/AIDS,” at http://www.healthdev.org/eforums/cms/individual.asp?sid=103&snname=Sex-Work; Health and Development Networks' NGO Forum in Northern Thailand, ngoforum@hdnet.org; see also the Sex Workers Outreach Project listserv at http://www.swop-usa.org.
\item[] Interview with Activist Dek, in District 3 (March 15, 2005) (on file with author); see also Interview with Activist Nok in District 3 (March 16, 2005); see also Interview with Activist Moo, supra note 139; Interview with Community Coordinator Jeeab, in District 3 (March 14, 2005) (on file with author); see also Interview with Faith-Based Activist and Shelter Operator Kai, in District 2 (April 23, 2005) (on file with author). A similar view was expressed in an Interview with International Organization Officer Nathan, in District 3 (April 13, 2005) (on file with author).
\item[] Interview with Child Rights Advocate Chuwit, District 2 (March 27, 2005) (on file with author).
\end{enumerate}
maintain partnerships with high-risk populations and migrant communities. At one NGO forum, a wide array of activists assessed the negative impact of USAID funding on health and development NGO networks in northern Thailand: one sex worker advocate reported that “Bush’s [anti-prostitution] policy is creating division among NGOs. We used to work with a lot of other organizations but now many of them are obliged to sign this pledge that they will not work with sex workers.”

Other governmental officials and NGO advocates receiving funds subject to USAID restrictions suggested that while they appreciated the growing attention to the trafficking issue, they resented increased control over their programming and their ability to partner with other organizations. A few organizations accepted USAID funding and attempted to circumvent the policy by “partnering with sex worker and migrants’ rights groups on other issues,” even though it technically violated U.S. funding restrictions. One activist reported that the increasing push towards a “simplistic abolitionist” approach made him leery of accepting U.S. funding, “but we decided to accept it as long as they don’t poke their nose too far in our business. We need to be able to adapt to the changing situation of the local trafficking problem.”

Another member of an NGO coalition against trafficking observed that “sex worker organizations and migrants’ rights groups aren’t involved as much as they have been in the past,” in part because they were excluded from key funding for initiatives backed by the Thai and U.S. governments. Confided one activist at a shelter for victims of trafficking,

We’re not supposed to work together anymore, but we do. We need their help for translation, to help find their families and villages, and for their contacts in indigenous communities. We’re working to improve [our organization’s recognition in the community], but [sex worker advocates] are still better at it, because they’re trusted.

An ethnic hilltribe activist whose organization refused to sign the pledge in solidarity with female migrant sex workers described one botched raid where she was called to the police station in the middle of the night to translate for several scared women who had been detained as victims in a trafficking raid. "They

---

143. Cohen, supra note 16. Compare, Moral Agenda, supra note 137.
144. Moral Agenda, supra note 137.
145. Interview with Trafficking Taskforce Officer Lew, in District 2, supra note 134. See also Interview with International Organization Activist Ruth, in District 1 (March 21, 2005) (on file with author).
146. Interview with Trafficking Taskforce Legal Advocate Dee, in District 2, (April 21, 2005).
147. Interview with Trafficking Taskforce Officer Lew, in District 2, supra note 134.
149. Interview with Faith-Based Counselor and Shelter Operator Lim, in District 2 (February 28, 2005) (on file with author).
150. Interview with Minority Rights Activist Malee in District 3 (February 27, 2005) (on file with author).
all thought they were arrested for immigration violations. None of the police, the [anti-trafficking taskforce], or the social workers could speak their language! . . . How are they supposed to 'rescue' or help 'rehabilitate' them?"  

3. The Perverse Outcomes of Anti-Prostitution Crackdowns: 
   Patchwork Interventions and Discriminatory Enforcement 

Anti-prostitution funding mandates, as well as the economic and political stakes of non-compliance with U.S. anti-trafficking standards, create incentives for anti-trafficking taskforces receiving U.S. funds to focus on prosecuting sex trafficking to the detriment of workers exploited in other sectors. It is often more cost- and time-intensive to investigate cottage industries or closed labor sites, while commercial sex establishments must be open to the public to generate a profit. Pressures to generate arrests and convictions, coupled with the likelihood that police will locate undocumented "illegal aliens" and/or potentially trafficked workers, spur law enforcement officials to crack down on brothels, rather than more hidden sites of labor exploitation.

Many activists disparaged the fixation on sex trafficking among state-sponsored and U.S.-endorsed anti-trafficking initiatives in Thailand. Indeed, local police and prosecutors discussed the crime of "trafficking" exclusively in terms of forced brothel prostitution of women and children, even after recent reports of migrants forced to labor in the factory just outside town. International organization officers who led training programs to raise awareness about trafficking, gender stereotypes and victims' rights reported that the majority of border officials, front-line officers, prosecutors, and judges had difficulty identifying scenarios of trafficking outside the context of exploitation in brothels.

Migrants' rights organizations and sex worker advocates were highly critical of laws and policies focused on rescuing women from the sex industry, arguing that the common wisdom that "men are smuggled; women are trafficked" into sexual exploitation is based on and reproduces a problematic

151. Id.  
152. Feingold, supra note 3.  
153. Interview with Regional Prosecutor Ay, in Districts 1-4 (July 29, 2005). See also Interview with Legal Advocate/Human Rights Activist Sapna, in Districts 1-3 (Aug. 1, 2005). See also Interview with Investigator Long, in District 2, in District 2 (May 8, 2005) (on file with author). See also Interview with Trafficking Taskforce Officer Lew, supra note 134.  
155. See, e.g., Interview with Migrant's Rights Activist Pii Bee, in District 4 (March 3, 2005).  
156. Interview with Prosecutor Sungsang, supra note 130. See also Interview with Police Official Luk, supra note 135.  
model of gender difference in trafficking discourse. While male migrants are often cast as economic agents colluding with smugglers and posing threats to national security, female migrants are perceived as passive victims in need of rescue and "rehabilitation." Not only do trafficking raids on sex establishments place voluntary undocumented workers and ethnic minorities in jeopardy of arrest, fine, and deportation, such interventions disregard the diverse forms of trafficking and exploitation of men and women in workplaces other than the sex sector.

Frustrated by this myopic understanding of trafficking, activists frequently pointed out that women and children in many different work settings, particularly factory and domestic work, experience sexual harassment and rape. These widespread forms of sexualized exploitation reflect the limited impact of prostitution abolitionist anti-trafficking policies which channel funding to raid-and-rescue interventions focusing on brothel prostitution instead of attending to the abuse—sexual or otherwise—of migrant women, men and children working in the informal sector. As one sex worker advocate reported, the conditions are often "[safer] and better in brothels than work in a house" as a domestic worker, because women working in commercial sex establishments generally had more freedom of movement, more control over their own labor, higher earnings, and were more confident of their safety from abuse (sexual or

158. Interview with Activist Pii Mai, in District 2 (April 20, 2005) (on file with author); Interview with Activist Ma, in District 2 (May 8, 2005) (on file with author); Interview with Sex Worker Activist Lisa, supra note 49. See generally, Doezema, supra note 46 (discussing the problematic use of “consent” in discourses in dominance- and anti-prostitution feminism’s construction of trafficking victims as passive victims in need of rescue and protection. This approach tends to focus on the sexual subordination of women in trafficking for forced prostitution, disregarding the exploitation trafficked male migrants).

159. Interview with Activist Pii Mai, Id.

160. Interview with Sex Worker Activist Sapapom, supra note 138. See generally, Moral Agenda, supra note 137; see also Feingold, supra note 3.

161. Interview with Migrant Sex Workers’ Rights Activist Sumlee, in District 1 (April 8, 2005) (on file with author). See also Feingold, supra note 3 (citing a study of Burmese domestic workers in Thailand by Mahidol University’s Institute for Population and Social Research, which reported “beatings, sexual assault, forced labor without pay, sleep deprivation, and rape to be common.” Id.). Boys and men are also trafficked onto deep-sea commercial fishing boats; approximately ten percent never return, and disruptive or ill workers are reportedly thrown overboard. Id.

162. Interview with International Organization Activist Gita, in District 1 (July 7, 2005) (on file with author) (explaining that although many women are exploited in sex work, many women, some trafficked, some voluntary migrants, are sexually abused by employers and supervisors in factories, restaurants, in domestic work, and arranged marriages). See Interview with Activist Pii Mai, in District 2, supra note 158; Interview with Activist Ma, in District 2,,supra note 158. See generally, Global Alliance Against Traffic in Women (GAATW), Guidebook for Migrating Women (1999), http://gaatw.net/books_pdf/ Migrating%20 women’s%20handbook.pdf (discussing misconceptions and misdirected interventions for women migrants, and encouraging safer migration. GAATW adopts a rights-based approach to trafficking, blending “women’s rights as human rights” frameworks with initiatives to promote labor rights for migrant women. The Guidebook warns of danger signs and potential points of exploitation throughout the migration process, including the threat of trafficking, coercion, fraud, and sexual violence, both in and out of sex work).
otherwise) when they are not isolated from others.\textsuperscript{163} Private homes and cottage-industry manufacturers are unlikely to be visited by outsiders or inspected by labor officials, thereby promoting ideal conditions for labor exploitation. Conversely, police, inspectors, and customers can more readily locate and assess the existence or severity of exploitation in commercial sex establishments.\textsuperscript{164}

In fact, Thai activists and trafficking investigators reported that both customers and some women working in brothels had assisted trafficked persons to escape situations of involuntary prostitution.\textsuperscript{165} Voluntary sex workers knew brothel owners’ schedules, trustworthy police or NGO activists, and had access to cell phones or sympathetic customers to help plan the escape of workers who had been trafficked or whose work conditions did not meet their expectations.\textsuperscript{166} Prosecutors and investigators confirmed that the bureaucratic delay and turf wars within the NGO/criminal justice anti-trafficking taskforce frequently delayed its response to reports of trafficking while divergent factions investigated, re-investigated, debated the political ramifications of interventions, and so on.\textsuperscript{167} According to one shelter worker, in a few cases, by the time the taskforce finally raided a brothel, “the women had already rescued themselves!”\textsuperscript{168}

Patchwork trafficking interventions to liberate and repatriate victims—as opposed to broader programs to advance the rights of migrants and improve work conditions—may actually promote trafficking, as rescued workers are quickly replaced, particularly in brothel prostitution.\textsuperscript{169} Indeed, the leaders of some U.S.-funded anti-trafficking taskforces in Thailand admitted that “many of the rescued victims run away from the shelter and go back to the brothel the next day,” casting doubt on the efficacy of raid-and-rescue strategies to combat

\textsuperscript{163} Interview with Sex Worker Activist Sapaporn, supra note 138. See also Jones, supra note 69. Jones addresses some women’s voluntary migration for sex work, quoting Phil Marshall, former manager of the United Nations’ Inter-agency Project on human trafficking in the GMS, who explained: “some women, particularly those with families to support, see brothels as their best option...And given their other choices, I think this is understandable.” Since many migrant women lack the legal documents necessary to travel and obtain above-board jobs, the commercial sex sector is one of the more lucrative options available for women and children migrants with few marketable job skills in the Thai economy. The appeal of sex work is enhanced when migrants hear stories and news reports of horrific abuse of Burmese domestic workers trapped in private homes without pay, where they are forced to submit to repeated rape, serious beatings, and sometimes disfigurement by pouring acid on the face or body or burning domestics alive, leaving them without food, water or medical attention for days. Id.

\textsuperscript{164} Interview with Prosecutor Jin, in District 1, (May 9, 2005) (on file with author). See also Interview with International Organization Program Manager Helmut, in District 1 (July 27, 2005) (on file with author).

\textsuperscript{165} Interview with Investigator Long, supra note 153. See also Interview with Trafficking Taskforce Officer Lew, in District 2, supra note 134.

\textsuperscript{166} Interview with International Organization Activist Gita, in District 1, supra note 162. See Interview with Investigator Long, in District 2, supra note 153.

\textsuperscript{167} Interview with Trafficking Taskforce Officer Lew, supra note 134.

\textsuperscript{168} Interview with Social Worker Oi, in District 2 (April 23, 2005) (on file with author).

\textsuperscript{169} See, e.g., Feingold, supra note 3.
By treating all sex workers as victims, rather than "potential anti-trafficking workers in their own right," brothel raids may inadvertently remove voluntary workers who have developed strategies to assist others who want to leave in planning a safe escape.\(^{171}\)

When trafficked migrants and stateless ethnic minorities are "rescued" and "repatriated" they often may be forced to return to economic deprivation, political strife, or abusive spouses or families. For example, deportees and repatriated trafficking victims from Thailand to Myanmar have been subjected brutal oppression by the Burmese military that has a "license to rape" Shan women, torch fields, and plunder villages—atrocities which forced many women, men, and children to flee their homeland in the first place.\(^{172}\) Indeed, several activists in northern Thailand reported that Burmese authorities had shot and killed women returned to Myanmar under the auspices of AIDS-prevention, as all women who had left the country illegally were presumed to have entered the sex trade and contracted HIV.\(^{173}\)

Indeed, trafficking interventions that "rescue" victims without providing adequate follow-up support and realistic job training paradoxically foster the transition from victim to perpetrator. Reporting on a "success story" of strengthened prosecution of traffickers in Vietnam, the Asia Foundation observes that victims of trafficking often become successful traffickers, "knowing the tricks of the trade and the routes for trafficking . . . [former victims often] target the women and children they know, including their own families, relatives, and friends."\(^{174}\) In this case, the twenty-year-old trafficker had been abandoned by

170. Interview with Social Worker Pii Yai, in District 2 (June 8, 2005) (on file with author). See also Interview with Trafficking Taskforce Officer Lew, supra note 134.

171. Interview with Sex Worker Activist Lisa, supra note 49 (explaining that "[women] are much better off in a brothel than [working alone as a domestic worker] in a house. In a brothel if you've been trafficked . . . you've got eight other women immediately who are telling you when to run away, and where to run, how to run away and how to keep safe in the meantime . . . women already have a whole lot of strategies they use with each other and for each other. And when those women get rescued, there's no one in that brothel who's got those strategies anymore. So they're only seen as victim, they're not seen as anti-trafficking workers in their own right.").

172. SHAN WOMEN'S ACTION NETWORK (SWAN), LICENSE TO RAPE, (2002) (documenting the rape of over 620 women and girls by the Burmese military regime). The report details the actions of the Burmese military, which is "allowing its troops systematically and on a widespread scale to commit rape with impunity in order to terrorize and subjugate the ethnic peoples of Shan State" as part of the regime's anti-insurgency activities. SWAN reports that rape is "officially condoned as a 'weapon of war,' as officers commit rape in front of their own troops, instigate gang rapes, and enslave women for sex. Due to a lack of crisis support, blame and rejection from their families and communities, many rape survivors decided to flee to Thailand. However, because Thailand does not recognize Shan refugees, SWAN reports that survivors "have no protection, no access to humanitarian aid or counseling services. They are thus vulnerable to exploitation and trafficking and are in constant danger of being deported into the hands of their abusers." See http://www.shanwomen.org (last visited December 21, 2005).

173. Interview with Sex Worker Activist Lisa, supra note 49.

her husband when she discovered she was barren; she was subsequently “lured” into a brothel, and had been “sending money to help her mother survive” before she brought acquaintances across the border to her brothel owner. The victim-turned-trafficker was sentenced to twenty-four years in prison and ordered to compensate her victims for mental and physical trauma, despite the fact that she is “too poor herself to pay and will only be able to begin to do so once she is released and has a job.”

The conviction of such a low-level people mover (as opposed to the brothel owner, the original trafficker, or customers) not only fails to address the complex interplay of supply and demand that drives women into risky migration and commercial sex work, such a limited law-enforcement approach is unlikely to disrupt the vast trade in humans. The inability of the court or the state to provide any substantive compensation to vindicate the human and labor rights of trafficking survivors does little to overcome the reticence of victims to either report their abuse or to testify against low-level people-movers (who are often their friends, neighbors, or family, rather than those who actually profit from their exploitation).

V. CONCLUSION

The United States’ scheme to advance socially conservative approaches to the AIDS pandemic and human trafficking threatens to undermine global cooperation to address these issues, potentially affecting millions of individuals benefiting from foreign aid projects throughout the world. Moralistic and ideologically driven approaches to these issues do not hold much promise to prevent the spread of HIV/AIDS, or to assist the massive tide of migrants compelled to work in slavery-like conditions. The transnational nature of these phenomena, and the culturally and economically embedded practices of commercial sexuality in many regions of the world, suggest that pragmatic approaches engaging and empowering targeted communities are the most expedient and empirically proven strategies for improving conditions now.

The negative fallout from policies excluding and alienating key organizations already established in public health, immigrant, and sex worker communities suggests that U.S. anti-prostitution, anti-choice, law-enforcement policies are in fact undermining efforts to combat HIV/AIDS and trafficking. Restrictive funding policies sideline the input of workers themselves, causing U.S.-backed counter-trafficking initiatives to forgo the opportunity to inject more progressive labor and human rights concerns into interventions, development programs, and trainings for law enforcement officials. The resulting failure to develop cooperative relationships with migrant communities

175. Id.
176. Id.
177. Interview with Police Officer Wichit, supra note 154. See also Interview with Migrant’s Rights Activist Pii Bee, supra note 154.
to address the massive scale of forced migration and labor exploitation limits the ability of taskforces to identify cases of trafficking and plan more strategic and effective interventions.

Furthermore, mandates requiring both U.S. and foreign organizations to explicitly oppose prostitution cast a shadow of criminality over commercial sex workers, implicitly legitimizing discrimination against them and diminishing the efficacy of anti-sex trafficking enforcement as well as AIDS prevention and outreach programs.\(^\text{178}\) Interventions focused primarily on criminal justice prerogatives—rescuing victims to serve as witnesses against traffickers—fail to provide trafficking survivors with substantive civil remedies, compensation for their labor, protection from retaliation, or immigration relief such as work permits or asylum, each of which would more directly confront the root causes of human trafficking and ameliorate exploitation in the informal sector, including the commercial sexual industry.\(^\text{179}\)

The successes, limitations, and failures of law-enforcement/legal protection models for trafficking interventions have important implications for the global war against "modern day slavery."\(^\text{180}\) U.S.-backed initiatives framing trafficking in terms of criminality overshadow campaigns to protect and empower migrant laborers, compromising efforts to tackle the socio-legal discrimination which amplifies their vulnerability to trafficking in the first place.\(^\text{181}\) Indeed, critics argue that trafficking interventions styled along the criminal justice/victim intervention model endorsed by the U.S. are ultimately counterproductive because:

This approach on anti-trafficking is a lot of law enforcement, which makes more difficult for people to migrate... [But] why people vulnerable to traffickers? Because they have to have the legal documents to travel [with legal status]... if you just talking about anti-trafficking and people are just looking [for the] traffickers, it's pushing the criminal law to identify the trafficker, to rescue the women, put them in the rehabilitation house, which [does] not solve the problem....They don't want to be in rehabilitation, they want to work!

\(^\text{178}\) See, e.g., Moral Agenda, supra note 137.
\(^\text{179}\) See U.N. Econ. and Soc. Comm. for Asia and the Pacific (UNESCAP), Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices, ST/ESCAP/2293 (2003) at 25 (outlining the view of the United Nations Economic and Social Commission for Asia and the Pacific; the report also observes that “an effective law enforcement response addresses the entire spectrum of offenses, violations and infractions,” which may include component offenses such as criminal offenses (murder, assault, battery, kidnapping, rape) and administrative or regulatory violations (violations of wage and labor standards; violations of regulations hours and conditions of work), as well as attendant infractions (including requirements for liquor or entertainment permits, impermissible use of the premises, unlawful assembly, excessive noise or nuisance). Id. Compare Feingold, supra note 3.
\(^\text{180}\) U.S. DEPARTMENT OF STATE, THE OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS (G/TIP), http://www.state.gov/g/tip/ (discussing U.S. anti-trafficking campaign as “Actions to end Modern-Day Slavery”) (last visited Feb. 24, 2006).
\(^\text{181}\) See Feingold, supra note 3
‘Trafficking’ does not address the debate on labor exploitation.\textsuperscript{182}

After several botched brothel raids, misdirection, politicking, and disagreement about the dis/advantages of collaborating with different law enforcement agencies, the majority of NGOs promoting sex workers’ and migrants’ labor rights agendas have distanced themselves from local anti-trafficking taskforces in Thailand.\textsuperscript{183} As a result, U.S.-funded anti-trafficking initiatives do not tap the access and credibility these NGOs have fostered with the very migrant communities they seek to help. By planning for trafficked persons instead of with them, anti-trafficking taskforces fail to benefit from the pragmatic strategies that workers in the informal sector have developed to identify and assist their trafficked or exploited peers.\textsuperscript{184}

Back in the United States, the courts have recently issued judgment on challenges to the anti-prostitution funding policies. The Assistant U.S. Attorney defending the policy argued that the anti-prostitution pledge reflected Congress’ and the President’s belief that “prostitution contributes to trafficking and exposure to HIV and [they] committed the United States itself to eradicating such practices.”\textsuperscript{185} The government attorney asserted that the policy does not intend to stifle approaches critical of the government, but rather attempts to “to implement the priorities of the act by making sure that its message is transmitted and that it finds the most appropriate partners to accomplish its mission of combating HIV/AIDS.”\textsuperscript{186} In response, the lawyer representing the organizations contesting the anti-prostitution pledge argued that the governmental imposition of the pledge on private partners has “spawned a First Amendment nightmare.”\textsuperscript{187}

The courts have agreed. On May 9, 2006 Judge Victor Marrero of the U.S. District Court for the Southern District of New York ruled that the pledge requirement violated the First Amendment rights of the Alliance for Open Society International and Pathfinder International.\textsuperscript{188} Ten days later, Judge Sullivan of the U.S. District Court for the District of Columbia ruled in favor of DKT International, stating that “the Supreme Court has repeatedly held that the government may not compel private individuals or organizations to speak in a content-specific, view-point specific manner as a condition of participating in a government program.”\textsuperscript{189} Both judges found that the eligibility restrictions were

\textsuperscript{182} Interview with Sex Worker Activist Lisa, \textit{supra} note 49.

\textsuperscript{183} Interview with Trafficking Taskforce Officer Lew, \textit{supra} note 134. \textit{See also} Interview with Migrant’s Rights Activist Pii Bee, \textit{supra} note 154.

\textsuperscript{184} Interview with Sex Worker Activist Lisa, \textit{supra} note 49.

\textsuperscript{185} Larry Neumeister, \textit{Groups Ask Judge to Toss Out Restrictions on AIDS Funding}, AP, Newsday, April 12, 2005.

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} \textit{Id.}

\textsuperscript{188} Press Release, Brennan Center for Justice at New York University School of Law, Federal Court Holds “Anti-Prostitution Pledge Requirement” Violates First Amendment, (May 9, 2006) (on file with author).

\textsuperscript{189} \textit{See} Press Release, Brennan Center for Justice at New York University School of Law,
not narrowly tailored, and enforcement of the pledge requirements infringes organizations' ability to exercise private speech funded by private means.

While both courts rejected the imposition of the anti-prostitution pledge in the context of HIV/AIDS, neither relief organization maintained that it "supports prostitution." Rather, they merely contend that abolitionist funding criteria undermine their ability to engage in proven HIV-prevention programs with at-risk populations. Yet Judge Marrero observed that the U.S. government's asserted policy goal of eradicating prostitution may in fact be advanced by initiatives characterized as "supporting" prostitution, including adult literacy programs, loan assistance schemes, or efforts to reform laws and organize sex workers to mobilize their rights to reduce exploitation and abuse.\[190\] The Court noted that "activities supportive of prostitutes themselves, and conceivably facilitating prostitution in the short term, may indeed in the long run serve Congress's goal of eradication of prostitution."\[191\]

The same rationale employed by the court in the context of HIV/AIDS prevention may be extended to the issue of funding for anti-trafficking campaigns. No activists or organizations I encountered supported trafficking, forced prostitution, or the commercial sexual exploitation of children. On the contrary, migrants' rights organizations and sex worker advocates sought to ease legal barriers to migration and to decriminalize prostitution in order to reduce discrimination and exploitative conditions leading to trafficking, forced prostitution, and abuse. As illustrated above, engaging targeted communities as partners and stakeholders, rather than victims in need of rescue, allows counter-trafficking initiatives to more effectively reach at-risk groups, monitor and increase reporting of abuse, and reduces the isolation and marginalization of migrants—whether they work in brothels, factories, or construction sites.

The recent federal court decisions rejecting the USAID pledge requirements are a promising turn in a political arena fraught with competing ideologies, moralities, and visions for change. The global implications of human trafficking and the HIV/AIDS pandemic call for diverse approaches and programs sensitive to the nuances of local conditions, industries, and social practices. Moreover, the Court speculated that the "viewpoint favoritism" of the anti-prostitution pledge threatens to foster "troublesome" government funding practices where "the government would have the unmitigated ability to wield its spending power to play favorites... by supporting and thereby strengthening only those NGOs... that convey messages supportive of the government's viewpoint, while placing at a disadvantage, and potentially weakening, those that

---


191. AOSI Decision, at 103 n.45.
decline to endorse the government's message.\textsuperscript{192}

The political ramifications of the pledge requirements are already visible in counter-trafficking campaigns and local initiatives in Thailand and the Greater Mekong Subregion, as funding restrictions fracture networks and disrupt cooperative, multi-sectoral programs. As long as the United States seeks to implement strict abolitionist policies in efforts to combat HIV/AIDS and human trafficking throughout the world, many promising interventions will be abandoned, as opportunities to forge alliances with targeted communities and their advocates fall by the wayside. In an era of globalization, rapid social change, and mass migration, it is crucial for policymakers and activists to identify common grounds for change to develop more holistic, cooperative responses to the transnational injustices of the new century—and we must start by listening to the voices and concerns of migrants themselves.

\textsuperscript{192} AOSI Decision at 109.