

The Eyes that Blind Us: The Overlooked Phenomenon of Trafficking into the Agricultural Sector

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When most people in the United States think of human trafficking, they almost inevitably envision a situation of trafficking for sexual purposes because that is the form of trafficking that has come to occupy the popular imagination. If one has only a passing familiarity with human trafficking, it is due to evening news specials or perhaps a magazine feature of a girl or young woman who was trafficked into commercial sex work. A casual review of the legal scholarship related to trafficking suggests a fairly similar preoccupation with trafficking for sex work without much regard for accounts of trafficking as a phenomenon of exploited labor, often with a migration component.

Yet the relevant American legal regime governing trafficking, the Trafficking Victims Protection Act (TVPA),¹ is facially neutral as to what

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kind of labor trafficked persons perform. Severe forms of trafficking in persons are defined without narrowing the ultimate labor industry in which the trafficked person is exploited.² In shorthand form, the American legal system defines trafficking as labor, plus movement or control, plus coercion.

So why is it that trafficking is most commonly referred to as sex trafficking? Why are so few Americans concerned about the exploitation of trafficked migrant laborers who are not performing sex work? What makes sex trafficking garner levels of careful scrutiny and attention, while other forms of similarly egregious violations of immigrant workers' rights appear to escape the notice of the robust anti-trafficking regime that has developed in the United States since the advent of the TVPA? This article offers an explanation for these questions in several parts. First, I analyze American anti-trafficking legislation to demonstrate how, while the statute does mention sex work in specific, the legislative regime's definition of trafficking remains neutral with regard to the involved labor sector.³ Second, I document the level of American preoccupation with trafficking for sex work by using existing data from the Department of Justice to demonstrate just how strongly current anti-trafficking efforts focus their attention on trafficking for sex work, to the detriment of trafficking into other labor sectors.⁴ Third, I will offer a critique of this overemphasis, observing how the expectations of the individuals involved in enforcing anti-trafficking laws influence what kinds of cases they consider to be trafficking cases.⁵ Fourth, I will leverage this critique to observe why one form of labor trafficking—into agricultural work—typically escapes notice, and will note how ignoring trafficking into less obvious sectors permits human rights violations to continue, often with apparent government sanction.⁶ Finally, I will devote the balance of the article to offering a few modest interventions that might help reallocate some of the energy dedicated to trafficking for sex work on the equally meritorious, but perhaps less titillating, issue of trafficking into agricultural services.⁷

1. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended by various reauthorization acts in scattered sections of 8, 18, and 22 U.S.C.).

2. See discussion *infra* pp. 3-5.

3. See discussion *infra* pp. 2-5.

4. See discussion *infra* pp. 5-11.

5. See discussion *infra* pp. 11-15.

6. See discussion *infra* pp. 15-18.

7. See discussion *infra* pp. 18-21.

I. THE AMERICAN STATUTORY REGIME IS NEUTRAL AS TO THE LABOR SECTOR INTO WHICH TRAFFICKING OCCURS

The United States' current anti-trafficking efforts came to their initial statutory fruition in the Trafficking Victims Protection Act of 2000, which is more commonly known as the TVPA.⁸ The TVPA defines severe forms of trafficking in persons as

(A) sex trafficking⁹ 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.¹⁰

The TVPA was part of a larger bill, the Victims of Trafficking and Violence Protection Act of 2000, which also included a second major division: the Violence Against Women Act of 2000.¹¹ Thus, even from the beginning, the United States Congress understood trafficking as closely related to violence against women, as evidenced by the ways in which the bill is structured; it was not drafted to be considered along with an immigration bill or with a new set of labor standards securing rights for immigrant workers. Rather, the Victims of Trafficking and Violence Protection Act of 2000 clearly states that its goals are “[t]o combat trafficking in persons, especially into the sex trade, slavery, and involuntary servitude, to reauthorize certain Federal programs to prevent violence against women, and for other purposes.”¹² Even from its very inception, the TVPA problematized human trafficking as harm perpetrated primarily against women.

The statutory language of the TVPA is much more neutral and straightforward. The TVPA defines severe forms of trafficking in persons in a bifurcated fashion.¹³ Both the definitions of sex trafficking and traffick-

8. *Id.*

9. Section 103(8) of the TVPA defines sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” *Id.* at § 103(8), codified at 22 U.S.C. § 7102(9).

10. *Id.* at § 103(9), codified at 22 U.S.C. § 7102(8).

11. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

12. *Id.*

13. The TVPA addresses severe forms of trafficking in persons through criminalization, provision of assistance and protection for victims of trafficking, and the creation of a

ing into other sectors contain “recruitment, harboring, transportation, provision, or obtaining of a person” and “force, fraud, or coercion” as central elements.¹⁴ However, the sex trafficking definition refers to control of a person for purposes of commercial sex acts, whereas the more general labor trafficking definition refers to control of a person for labor or services. Given the long history of the fight over whether prostitution should be considered a form of work or not,¹⁵ the TVPA bows out of this debate entirely by codifying definitions of sex trafficking and general labor trafficking differently; a prosecutor need not engage in the argument of whether sex work is work to seek a prosecution for trafficking into the sex industry. The only variation from this framework is the reference to all sex work performed by minors qualifying as a severe form of trafficking in persons. Due to the inability of minors to formulate legally cognizable consent,¹⁶ all sex work performed by minors can qualify as a severe form of trafficking in persons, provided it is induced by another person.¹⁷

What is perhaps of greater interest is the lack of difference between the definitions of sex trafficking and all other severe forms of trafficking in persons as codified in the TVPA. Legally speaking, trafficking into any labor sector—sex work, agriculture, domestic labor, factory work, or any other—is interchangeable. It is a severe form of trafficking in persons, equally subject to all aspects of the TVPA. Except for its separate definition, sex trafficking is not privileged in the TVPA; persons trafficked into sex work receive the same benefits, rights, and opportunities as those trafficked into other labor sectors. Thus, American law, as found in the relevant statute, conceives of all forms of trafficking as interchangeable when contemplating prosecution, accessibility of services for victims, and the creation of domestic bodies charged with oversight of trafficking-related issues, such as the Interagency Task Force to Monitor and Combat Trafficking.¹⁸

State-Department-based international relations framework; through this international regime, the United States both offers assistance to foreign countries working to eradicate trafficking and publishes annual reports on countries’ efforts to end trafficking.

14. Trafficking Victims Protection Act of 2000, *supra* note 1, § 103(8).

15. Jo Doezema, *International Activism*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 204, 204-05 (Kamala Kempadoo & Jo Doezema eds., 1998) (noting how sex workers have fought for recognition from feminists as performing valid work) (discussed at greater length in the context of an evolving sex worker rights movement in Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women’s Health*, 34 HARV. J.L. & GENDER 225, 229-31 (2011)).

16. See Dorchen Leidholdt, *Prostitution: A Violation of Women’s Human Rights*, 1 CARDOZO WOMEN’S L.J. 133, 136 (1993) (observing that consent to perform sexual labor given by children or adolescents is meaningless).

17. Trafficking Victims Protection Act of 2000, *supra* note 1, § 103(9).

18. *Id.* § 105.

II. AMERICAN DISCOURSE ON TRAFFICKING, INCLUDING PROSECUTIONS, OVEREMPHASIZES TRAFFICKING INTO SEX WORK AND OVERLOOKS TRAFFICKING INTO OTHER LABOR SECTORS

Notwithstanding this statutory neutrality to the industry in which trafficking occurs, the current American obsession with sex trafficking is ubiquitous.¹⁹ Great quantities of research have been conducted into trafficking for sex work, while trafficking into other labor sectors goes largely unquantified.²⁰ Popular publications frequently run stories of women and girls trafficked for sexual purposes.²¹ Religious organizations offer the opportunity to provide assistance to sexually exploited girls as holiday charitable gifts.²² Law students frequently cite their desire to work on sex trafficking as their primary reason for attending law school in the first place.

Yet the current American preoccupation with sex trafficking is not merely a popular phenomenon or a mistake made by those with little serious exposure to the issue of human trafficking. Rather, prosecutorial discretion and investigatory resources are likewise substantially dedicated to work on trafficking for sexual purposes. Under the Trafficking Victims Protection Reauthorization Act of 2003, the Department of Justice must file an annual report documenting U.S. Government activities to combat trafficking in persons, including the numbers of persons who received benefits, who had been granted or denied immigration benefits for trafficked persons, and who were convicted for trafficking activities.²³ The 2009 report

19. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 318-19 (2007) (noting the U.S. government's focus on sex trafficking and overlooking of "trafficking into agriculture, domestic service, restaurants, hotels, manufacturing, and construction" and observing that the "emphasis on criminal enforcement and antiprostitution policies curtails the rights of trafficked persons voluntarily engaged as sex workers, and marginalizes trafficked persons in non-sex related industries").

20. Elzbieta M. Gozdzik & Elizabeth A. Collett, *Research on Human Trafficking in North America: A Review of Literature*, in DATA AND RESEARCH ON HUMAN TRAFFICKING: A GLOBAL SURVEY 99, 117, 18 (Frank Laczko & Elzbieta Gozdzik eds., 2005) (observing that in the North American context, "[a] great deal of research has focused on trafficking for sexual exploitation, to the detriment of investigating trafficking for bonded labour and domestic servitude").

21. See, e.g., Michelle Goldberg, *The Superbowl of Sex Trafficking*, NEWSWEEK (Jan. 30, 2011), <http://www.newsweek.com/2011/01/30/the-super-bowl-of-sex-trafficking.html>; Alan Mascarenhas, *America v. Sex Trafficking*, NEWSWEEK (June 18, 2010), <http://www.newsweek.com/blogs/the-human-condition/2010/06/18/the-week-when-america-woke-up-to-sex-trafficking.print.html>.

22. See, e.g., *Hope for Sexually Exploited Girls*, WORLD VISION, http://donate.worldvision.org/OA_HTML/xxwv2ibeCCtPltmDspRte.jsp?section=10370&itm=1445952 (last visited Mar. 29, 2011).

23. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, codified at 22 U.S.C. § 7103(d)(7) (2003).

provides a chart listing the numbers of defendants charged, prosecuted, and convicted in human trafficking cases since Fiscal Year 2001;²⁴ from this chart, it is possible to calculate the percentage of cases, charges, and convictions for trafficking for sex work and ascertain the ratio between labor trafficking and sex trafficking:

All trafficking prosecutions	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Cases filed									
Labor	6	3	3	3	9	10	12	12	21
Sex	4 (40%)	7 (70%)	8 (73%)	23 (88%)	26 (74%)	22 (69%)	20 (63%)	27 (69%)	22 (51%)
Total	10	10	11	26	35	32	32	39	43
Defendants Charged									
Labor	12	14	6	7	21	26	29	33	53
Sex	26(53%)	27 (66%)	21 (78%)	40 (85%)	75 (78%)	85 (77%)	60 (67%)	48 (59%)	61 (54%)
Total	38	41	27	47	96	111	89	81	114
Convictions									
Labor	8	5	5	3	10	38	17	27	20
Sex	15 (65%)	23 (82%)	16 (76%)	30 (91%)	25 (71%)	61 (62%)	86 (83%)	50 (65%)	27 (57%)
Total	23	28	21	33	35	99	103	77	47 ²⁵

Averaging the percentages from each year, what is clear is that, on average from 2001 through 2009, 66% of cases filed, 69% of defendants charged, and 72% of convictions for human trafficking prosecutions are for sex trafficking.²⁶ Yet filing cases, pressing charges, and dedicating resources during trial for human trafficking offenses, like any other criminal offense, remains within the discretion of the prosecutor. Thus, these Department of Justice numbers are more reflective of the devotion of public attention and the investment of government resources in the fight against trafficking for sex work, rather than actual percentages of the incidence of sex trafficking as compared to trafficking into other labor sectors.

These ratios belie the reality of the prevalence of incidents of trafficking in various labor sectors in the United States. One non-governmental organization study, which counted published news reports of trafficking

24. ATT'Y GEN. ANNUAL REP. TO CONGRESS AND ASSESSMENT OF U.S. GOV'T ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS, FISCAL YEAR 2009, at 48 (July 2010) [hereinafter 2009 Trafficking in Persons Report], available at <http://www.justice.gov/ag/annualreports/tr2009/agreporthumantrafficking2009.pdf>.

25. See *id.* This chart reproduces the gross counts presented in the Attorney General's report; the calculations of the percentage of sex trafficking cases are the author's own.

26. Author's average of the annual percentage of cases that are sex trafficking cases.

cases in order to quantify the ratio of trafficking into a variety of labor sectors in the United States, stated that 46.4% of trafficking cases were into sex work, 27.2% into domestic service, and 10.4% into agriculture; the remainder were into sweatshop-factory work, service-food-care work, sexual exploitation of children, entertainment, and mail order brides.²⁷ The percentage of sex trafficking cases revealed by this methodology is far lower than that prosecuted, according to the numbers found in the Attorney General's report. Yet to the extent that this article argues that a bias in favor of seeing trafficking into sex work, and a commensurate blindness to seeing trafficking into other labor sectors, imbues all public discussions of trafficking, this methodology likely replicates this bias as it reflects reporting by journalists, whose coverage of cases of trafficking between different industries is shaped by this same bias.²⁸ It is thus quite likely that the 46.4% figure suggests in no small part what journalists find compelling, or what they believe the public might find interesting, rather than the actual percentage of trafficking cases in the sex industry as compared to all trafficking cases.

A potentially more promising approach to generate an accurate ratio of sex trafficking to all trafficking cases relies on government data regarding services sought by trafficked persons. Under the TVPA, the Secretary of Health and Human Services, after consultation with the Attorney General and the Secretary of Homeland Security, may certify an adult²⁹ as a victim of a severe form of trafficking who

(I) is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons or is unable to cooperate with such a request due to physical or psychological trauma;³⁰ and

(II)(aa) has made a bona fide application for a visa under section 1101(a)(15)(T) [of Title 8], as added by subsection (e) [of this section], that has not been denied; or

27. *Hidden Slaves: Forced Labor in the United States*, FREE THE SLAVES, WASHINGTON, D.C. & HUMAN RIGHTS CENTER, UNIVERSITY OF CALIFORNIA, BERKELEY, 14 (Sept. 2004), available at http://www.law.berkeley.edu/HRCweb/pdfs/hiddenslaves_report.pdf.

28. *See id.* at 6.

29. Minors do not receive certification as trafficked persons; rather, they are given eligibility letters stating that they are victims of trafficking and eligible for services.

30. This clause, permitting individuals to receive certification without cooperating with law enforcement in instances of physical or psychological trauma, was added to the TVPA through the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. Res. 7311-9, 110th Cong. (2008) (enacted). Prior to that edit, the TVPA was broadly criticized for compelling all trafficked persons to cooperate in prosecution. *See* April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 250-52 (2007).

(bb) is a person whose continued presence in the United States the Attorney General and the Secretary of Homeland Security is ensuring in order to effectuate prosecution of traffickers in persons.³¹

Once this certification is obtained, the certified victim is eligible to receive a wide variety of federal benefits and services, including “cash assistance, medical care, Supplemental Nutrition Assistance Program (formerly ‘food stamps’), and housing.”³² Indeed, because this certification is largely a benefit that accrues to victims of trafficking, without requiring substantial amounts of contribution in return for the social services received, data on certifications may well be one of the best ways to track the labor sectors from which trafficked persons have emerged. These numbers are likely to represent the number of victims who have sought assistance from some kind of social services agency in accessing public benefits available to trafficked persons, without requiring the special attention of a prosecutor or journalist who is invested in the case. Yet even these numbers are likely to undercount the number of victims identified during any given year, because a substantial number of individuals might not be ready to bring their case forward, and others might choose to return to their country of origin without pursuing any benefits in the United States.³³ Thus, the number of certifications granted in a year represents, in a general sense, the number of individuals who seek assistance related to a trafficking situation, not the persons a journalist deems interesting enough to warrant a news article or a prosecutor deems compelling enough to demand the dedication of scarce resources in a prosecutor’s office.

In fiscal year (FY) 2009, 82% of certifications were provided to individuals who were victims of labor trafficking, 13% to victims of sex trafficking, and 5% to victims of both labor and sex trafficking.³⁴ Therefore, only 18% of persons certified as victims of a severe form of trafficking were trafficked into the sex industry. The other 82% of trafficked persons were trafficked only for non-sexual labor or services. Similarly, 56% of eligibility letters were provided to minors who were victims of labor trafficking, 38% for minor victims of sex trafficking, and 6% for victims of both sex and labor trafficking.³⁵ Thus, in FY 2009, 51% of the trafficking

31. 22 U.S.C. § 7105(b)(1)(E)(i)(I)-(II).

32. 2009 Trafficking in Persons Report, *supra* note 24, at 19. According to the statute, these benefits are available to the same extent as those made available to persons admitted to the United States as a refugee. *See* 22 U.S.C. § 7105(b)(1)(A).

33. 2009 Trafficking in Persons Report, *supra* note 24, at 20.

34. *Id.* at 19.

35. *Id.*

cases filed were of a variety that affected only 18% of the victims of a severe form of trafficking in persons.

This ratio cannot be completely faulted as demonstrative of a flaw in the prosecution system for those who have committed acts of trafficking. Understanding the ratio of sex trafficking to labor trafficking prosecutions requires further analysis of the total number of cases of human trafficking that the government identified during each relevant year.

Fiscal Year	Minors	Adults	Total
2001	4	194	198
2002	18	81	99
2003	6	145	151
2004	16	147	163
2005	34	197	231
2006	20	214	234
2007	33	270	303
2008	31	286	317
2009	50	330	380
TOTAL	212	1864	2076 ³⁶

In reality, in FY 2009, 380 persons were certified overall,³⁷ resulting in only 114 persons charged and only 47 persons convicted.³⁸ Substantially more persons are certified, both for labor trafficking and sex trafficking, than are ever prosecuted in either category. But we might anticipate that all certified cases would have an equal likelihood of resulting in filing a case, pressing charges, or pursuing conviction, barring some intent to choose to focus prosecutorial attention on sex trafficking cases and away from other kinds of labor trafficking cases.

This is not the case. In reality, the Department of Justice data indicates that approximately 22 minors were given eligibility letters and 59 adults were certified for sex trafficking in FY 2009.³⁹ Thus, a total of 81 sex trafficked persons were identified through the certification and eligibility letter processes. Given that 61 defendants were charged for sex trafficking offenses, there is roughly a 75% correspondence between a certified or eligible sex trafficked person and charges brought against an alleged sex trafficker—in essence, charges are brought against three alleged sex traffickers

36. *Id.* at 19-20.

37. *Id.* at 20.

38. 2009 Trafficking in Persons Report, *supra* note 24, at 48.

39. These figures add together the percentages of those exclusively sex trafficked and those who were victims of both labor and sex trafficking.

for every four sex trafficking victims certified or given eligibility letters. In contrast, approximately 28 minors received eligibility letters and 270 adults were certified for exclusively labor trafficking, for a total of 298 persons receiving benefits due to labor trafficking. Given that 53 defendants were charged with labor trafficking, the correspondence between a certified or eligible labor trafficked person and charges brought against an alleged labor trafficker is 18%—charges are brought against less than one labor trafficker for every five victims of labor trafficking who are verified through certification or eligibility letters. This overrepresentation of sex trafficking in public efforts to address human trafficking can therefore be documented with government statistics; the question is therefore, how can we properly understand why sex trafficking cases are prosecuted in a fashion so disproportionate to their prevalence in the total population of trafficking cases identified in the United States?

III. EXPLAINING THE DISPROPORTIONATE LEGAL RESPONSE TO SEX TRAFFICKING CASES AS COMPARED TO LABOR TRAFFICKING CASES

Disproportionate prosecution of sex trafficking cases is not the problem in itself. Rather, it is symptomatic of the excessive focus on sex trafficking that permits the public and those charged with addressing human trafficking to overlook instances of trafficking into other labor sectors. Attempting to understand why certain forms of human trafficking evade public scrutiny might help restore the focus more broadly on trafficking in its various guises.

Perhaps the simplest explanation for the focused use of anti-trafficking statutes to prosecute cases of sex trafficking is that the exploitation of laborers in other labor sectors has historically been addressed through the use of involuntary servitude and peonage statutes. Where the contemporary trafficking statute is used, it is only in the most egregious of cases of labor trafficking, as seen in the case of *United States v. Sahbnani*, a 2008 case revolving around a pair of exploited domestic workers whom the defendants kept in their home under force and refused to pay or otherwise compensate for their labor.⁴⁰ The defendants were convicted of conspiracy to commit forced labor, forced labor, conspiracy to harbor aliens, harboring aliens, conspiracy to commit peonage, peonage, conspiracy to commit document servitude, and document servitude.⁴¹ They were ordered to pay hundreds of thousands of dollars in net back pay and liquidated damages under

40. 566 F. Supp. 2d 139, 147 (E.D.N.Y. 2008). Particular thanks to Ruthann Robson for drawing attention to this case.

41. See Superseding Indictment, *United States v. Sahbnani*, 2007 WL 3193987 (E.D.N.Y. 2007) (No. 07 CR 492(S-1) (TCP)).

the Fair Labor Standards Act. However, even the *New York Times* observed that it was unusual for employers of domestic workers to be charged under the TVPA.⁴²

Building on this understanding that trafficking prosecutions most commonly center on sex trafficking, it may be very difficult to construct a watertight case to prosecute a suspect for human trafficking, and so prosecutors may well be particularly careful in choosing which cases to prosecute. As a result, if a case cannot clearly meet the criminal standard of proof, it is possible that the law enforcement and prosecution team will simply assist a trafficked person in obtaining certification by providing the necessary law enforcement endorsement,⁴³ but will not proceed with prosecution. If legal proceedings are commenced in such a situation, the trafficked person would need to bring the suit directly under the private right of action provision of the TVPRA of 2003, through which trafficked individuals may bring civil action against the perpetrator in federal court to seek damages and reasonable attorney's fees.⁴⁴

Indeed, prosecutors simply may be disinterested in pursuing trafficking cases when the victim has performed work in a labor sector other than sex work. These cases are less likely to make the headlines and may not attract the kind of press that often accompanies a successful trafficking prosecution. What is clear is that once a certification has been provided, it will only be in rare cases that prosecution is not pursued because the victim has refused to cooperate with the prosecution effort. Because of how certifications have been provided for individuals who have demonstrated their willingness "to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons,"⁴⁵ victim cooperation is very likely to be available to prosecutors. It is only since 2008, when the newest reauthorization of the TVPA added a clause permitting certification for victims who are "unable to cooperate with [law enforcement] due to physical or psychological trauma" that victim refusal to assist with prosecution will be a potentially valid explanation for the difference in the rates of prosecution of sex trafficking cases versus labor trafficking cases.⁴⁶ Thus, the disparity in the ratio prior to 2008 cannot be explained by traumatized

42. Paul Vitello, *Couple Held Two Servants Captive for Years, U.S. Says*, N.Y. TIMES, May 16, 2007, available at <http://www.nytimes.com/2007/05/16/nyregion/16slave.html?ref=slavelabor>.

43. 22 U.S.C. § 7105(b)(1)(E)(iv).

44. Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 23, at 117 Stat. 2878 (codified at 18 U.S.C. § 1595).

45. 22 U.S.C. § 7105(b)(1)(E)(i)(I).

46. 22 U.S.C. § 7105(b)(1)(E)(i)(I) (codified as amended by William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. Res. 7311-9, 110th Cong. (2008) (enacted)).

sex trafficked women declining to participate in the prosecutions of their traffickers since before that time, certified victims could not invoke their own trauma as a reason not to assist law enforcement with their prosecutorial functions.

Confirmation bias offers a more plausible explanation for the current American preoccupation with sex trafficking, which overlooks the majority of trafficking cases that occur in other labor sectors. The theory of confirmation bias has roots in psychology, and generally stands for the proposition that most people tend to “inappropriate[ly] bolster[] hypotheses or beliefs whose truth is in question.”⁴⁷ In a more specific iteration, due to confirmation bias,

[p]eople tend to seek information that they consider supportive of favored hypotheses or existing beliefs and to interpret information in ways that are partial to those hypotheses or beliefs. Conversely, they tend not to seek and perhaps even to avoid information that would be considered counterindicative with respect to those hypotheses or beliefs and supportive of alternative possibilities.⁴⁸

Confirmation bias would predict that police officers and prosecutors would tend to focus their attention on trafficking cases that are consistent with what they believe to be the paradigm of trafficking cases: trafficking is a matter of sex work.

Given the current cultural fixation on trafficking for sex work, it is not implausible that those tasked with legal enforcement of anti-trafficking laws would tend to focus their attention on cases that confirm their existing belief that human trafficking is about the trafficking of women for sex work. Law enforcement agents acting under the force of their own confirmation bias might investigate sex trafficking cases with greater care, generating an evidentiary record that permits prosecution of sex trafficking suspects. Prosecutors operating with confirmation bias would prosecute what they expect to see and might well choose to overlook cases that are inconsistent with their existing expectations of what constitutes a trafficking case. Even if prosecutors avoid acting on confirmation bias, they might predict that judges and juries have their own preconceived notions of what constitutes a trafficking case, and choose to prosecute cases that reinforce the fact finders’ existing beliefs about human trafficking. Thus, under confirmation bias held by law enforcement, prosecutors, or fact finders at trial,

47. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, REV. OF GEN. PSYCHOL. 2:2 175, 175 (1998).

48. *Id.* at 177 (citing A. Koriat et al., *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 107, 107-18 (1980)).

trafficking into other labor sectors looks more like run-of-the-mill, uninteresting, and exploited immigrant labor. Yet to the extent that the government insists on rescuing girls chained to beds in brothels, it will continue to overlook the vast majority of trafficked persons in this country, with devastating results for the ignored trafficked worker.⁴⁹ While this might be a legal problem, under the dichotomy that trafficking equals sex trafficking and other labor exploitation is simply a class and immigration issue,⁵⁰ trafficking prosecutions can continue to focus on sex trafficking cases and overlook the more hidden forms of human trafficking that exist alongside the more publicized form.

Confirmation bias may also have a gendered aspect. In light of the gendered assumptions that women are victims and men more often autonomous actors, decision makers regarding trafficking investigations and prosecutions may see a trafficked woman as a victim and a trafficked man as a low-income immigrant worker.⁵¹ Gender expectations regarding power and agency may be one particular application of a broader social narrative taking specific application in the trafficking context.

IV. TRAFFICKING INTO AGRICULTURE: A CASE STUDY IN HIDDEN FORMS OF TRAFFICKING

This article's working hypothesis is that individuals trafficked into agriculture remain hidden for a variety of important reasons that distract us from properly understanding how trafficking happens outside of the sex sector. First, sex work draws more attention because it is simply more titillating. It sells newspapers and television advertising, and generates traffic on websites. It attracts public interest because it is fundamentally more interesting to think about sex work than it is to think about the exploitation of the people who pick our vegetables or raise our beef cattle. Trafficking of sex workers conforms to our cultural understanding of sex work as a degrading means of earning a living. In contrast, members of the American public, while perhaps possessing some knowledge of the exploitation of

49. Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 351 (2007).

50. Professor Ruthann Robson has noted that the disparate treatment of trafficking for sex work and trafficking for other forms of labor is reflective of a broader "disparity between attention to sexual matters and attention to nonsexual labor and class issues[, which] is a familiar one for feminists." Ruthann Robson, *A Servant of One's Own: The Continuing Class Struggle in Feminist Legal Theories and Practices: Mrs. Woolf and Servants: An Intimate History of Domestic Life in Bloomsbury* by Alison Light, 23 BERKELEY J. L. GENDER & JUST. 392, 414 (2008).

51. See Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2011 UTAH L. REV. 1143, 1146 (2011).

agricultural laborers throughout history, do not think about farming as an inherently dehumanizing kind of labor. To embrace the possibility that farm workers are exploited is to throw into question fundamental understandings of the simple, rural life and its salubrious effects on those engaged in agricultural work. It additionally creates substantial psychic discomfort to acknowledge the exploitation of workers that is inherent in our food supply chain.

Second, while the nature of sex work is inherently transactional, insofar as trafficked sex workers must interact with members of the public to perform their sexual labor, agricultural workers, whether trafficked or not, remain largely out of public sight. At best, trafficked agricultural workers can be seen by individuals driving past farm fields in rural America, or perhaps if the labor contractor of a farm crew takes his workers to the local Wal-Mart to purchase food and sundry items. The labor of agricultural workers is by its nature isolated. In the instance of laborers on ranching operations in the Intermountain West of the United States, vast stretches of land can lie between a trafficked ranch worker and the nearest road. This isolation makes agricultural work dramatically different from the constant public contact that typifies sex work, whether trafficked or voluntary.

Third, trafficked farm workers are indistinguishable in many instances from voluntary farm workers for a variety of reasons. Farm workers, whether voluntary or trafficked, are most typically migrants with limited English capacity. Even when exploited agricultural laborers encounter authorities or members of the public, communication barriers frequently prevent the immigrant worker from asking for assistance or explaining the problems in his or her working situation. For those members of the public whose only encounter with trafficked agricultural workers occurs by looking out a car window while driving through a rural part of this country, it is impossible to determine if a particular individual has been trafficked or is voluntarily present. Furthermore, even when performed in a completely legal fashion, agricultural work looks dangerous and difficult. For outsiders, the reality is that labor conditions for most agricultural workers appear brutal, grueling, and in many instances, exploitative. Given that all farm workers appear to work in suboptimal conditions, it can be difficult for persons who might offer assistance to agricultural laborers to know which workers need aid and which are working under conditions that are legal and that the workers find tolerable.

Fourth, while trafficking is relatively common among H-2A visa holders,⁵² the nature of the visa itself may actually reduce exploited immigrants'

52. See, e.g., Julia Preston, *Indictment Accuses Firm of Exploiting Thai Workers*, N.Y. TIMES, Sept. 3, 2010, at A10 (reporting the indictment of six labor contractors for compelling forced labor from approximately 400 Thai farm workers, over 200 of whom were

willingness to seek assistance. H visas are available for individuals to work temporarily in the United States.⁵³ To obtain an H visa, an employer must file a petition on the behalf of the intending temporary worker.⁵⁴ Thus, the H visa holder maintains a permanent relationship to the employer who sponsored his or her visa. The H visa for temporary workers is not portable; to be valid, it requires the temporary worker to maintain his or her employment with the sponsor of the visa. While the American Competitiveness in the Twenty-First Century Act of 2000 provided for increased portability of the H1-B status,⁵⁵ this status is available only to persons eligible to work in specialty occupations and is often held by temporary foreign workers in the information technology and engineering fields. Agricultural workers, most often working on H-2A visas, do not have access to this portability right. If such a worker leaves a particular place of employment to seek other work, the visa is invalidated. For individuals who have come to the United States as temporary workers, typically with the goal of earning money, to leave a situation of paid, legal employment for undocumented work opportunities is a scary prospect. At times, employers have exploited this fear and maintained temporary immigrant workers under threat to report their undocumented status to the authorities. Many H-2A ranch workers report having their identity documents taken from them and being forbidden from leaving the ranch where they work.⁵⁶ As a result, even when present in the United States in documented fashion on an H-2A visa, many agricultural workers so fear the loss of their immigration status that they accept inhumane working conditions and a steady level of exploitation simply to keep their jobs.

While these are just a handful of reasons that trafficking into agricultural labor escapes notice, this blindness comes at a true cost, both to those who work in exploited conditions in agriculture and to the society as a whole. The most obvious of these costs is paid by workers in the agricultur-

present on temporary work visas), available at http://www.nytimes.com/2010/09/04/us/04trafficking.html?_r=1.

53. 8 U.S.C. § 1101(a)(15)(H).

54. The application process for an H-2A visa is detailed in Bryce Ashby, *Indentured Guests—How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers' Transportation, Visa, and Recruitment Costs is the Solution*, 38 U. MEM. L. REV. 893, 901-02 (2008).

55. This portability provision permits holders of H-1B visas “to accept new employment upon the filing by the prospective employer of a new petition on behalf of” the nonimmigrant. 8 U.S.C. § 1184(n). Prior to this act, the petition had to be accepted by the federal government before a person could leave a prior position and accept new employment.

56. MIGRANT FARM WORKER DIVISION OF COLORADO LEGAL SERVICES, *OVERWORKED AND UNDERPAID: H-2A HERDERS IN COLORADO 15* (2010), available at <http://www.coloradoimmigrant.org/downloads/clsreport.pdf>.

al sector who remain in trafficking situations. Less obvious is the cost paid in the future by those who will be trafficked into such situations, when proper enforcement would likely increase compliance with basic farm workers' rights laws. Without enforcement of the Trafficking Victims Protection Act and individual states' statutes prohibiting trafficking, exploitative farm bosses can act with impunity. Additionally, because many agricultural workers who satisfy the trafficking definition are in the United States on legitimate visas, the failure to identify trafficking cases makes a mockery of the immigration system that provides for orderly legal employment for agricultural laborers. Finally, because anti-trafficking statutes are relatively new, they present an outstanding opportunity to develop meaningful case law that protects workers' rights, both as matters of civil and criminal law. Thus, the situation is ripe to intervene and try to dedicate public resources and attention to those trafficked into less obvious labor sectors, including, but not limited to, agriculture.

V. PRACTICAL INTERVENTIONS CAN SHIFT ATTENTION AND RESOURCES TOWARD TRAFFICKING INTO THE AGRICULTURAL SECTOR

These issues that render trafficked farm workers invisible are endemic; overcoming the obstacles to making exploited farm workers visible will take time and suggests no easy solution. However, a number of modest legal and policy interventions offer the possibility of significantly reducing the number of trafficking cases and increasing the likelihood of enforcement actions against exploitative employers.

First, permitting H-2A visa holders to transport their valid visas from employer to employer would make temporary agricultural workers' employment situations more like those of individuals on the open employment market, who can leave a job when the conditions are too onerous and seek alternative employment. As an initial matter, extending the recent portability rule for H-1B visa holders to H-2A visa holders, thereby permitting persons in H-2A status to change jobs as soon as a new employer files an H-2A application, might offer some modicum of protection. However, because rural workers would often have a relatively difficult time identifying other employment opportunities from a ranch or farm, a more thorough portability provision would be preferable. Changing the H-2A visa to permit employment by various employers would render agricultural workers less dependent on a single employer and, as a result, less susceptible to exploitation. This could be done by the creation of a new scheme for H-2A agricultural workers that permits an even higher degree of portability than possessed by H-1B workers. If such changes were to happen, the moment a temporary worker feels vulnerable to exploitation by his or her employer,

he or she could leave and look for alternative employment while maintaining his or her legal status as an H-2A visa holder.⁵⁷

Second, providing ready legal assistance to trafficked persons is a key means of reducing trafficking in the United States and rectifying the harms that accrue to persons who have been trafficked. The TVPA partially provided for this legal assistance by permitting Legal Services Corporation (LSC) grantees to “represent victims of trafficking and their family members without regard to their immigration status.”⁵⁸ LSC-funded organizations in Utah, California, Micronesia, Texas, Florida, and Colorado provided assistance to ninety-two trafficked persons in FY 2009.⁵⁹ However, existing LSC regulations that severely restrict LSC-funded organizations from providing representation to most categories of undocumented immigrant workers further complicate the provision of legal aid to trafficked persons.⁶⁰ While the regulations governing the operation of LSC-funded organizations permit temporary H-2A workers to receive legal assistance regarding wages, housing, transportation, and other employment rights provided in their contract,⁶¹ many, perhaps most, agricultural workers are not present on the H-2A visas that would render them eligible for LSC-funded services.

In reality, some number of organizations that provide legal assistance to farm workers are not affiliated with the LSC and choose to receive no LSC funds so that they can serve these populations without regard for the restrictions that follow LSC dollars.⁶² To the extent that LSC regulations mean that undocumented farm workers have less contact with LSC-funded legal service providers, LSC-funded organizations may never encounter the very persons that the TVPA’s relaxation of the regulations permit them to help. Without contacting trafficked agricultural laborers, LSC-funded organizations cannot fulfill the mandate prescribed for them in the TVPA.

57. This shift would obviously change part of the nature of the H-2A, which at this time is a legal relationship between an employer and a non-immigrant employee, sanctioned by the government; such a change would move toward a free agency model for non-immigrant foreign employees.

58. Program Letter 05-2 from Helaine Barnett, President, Legal Services Corporation, re: Eligibility of Immigrant Victims of Severe Forms of Trafficking and Family Members for Legal Services (Oct. 6, 2005), available at <http://www.lsc.gov/program/pl/pl2005-2.pdf>.

59. *Supra* note 24, at 44.

60. 45 C.F.R. § 1626.3 (2010).

61. 45 C.F.R. § 1626.11 (2010).

62. For example, California Rural Legal Assistance is a LSC-funded farm worker organization that is limited to providing services to individuals who are legally present in the United States. See <http://www.crla.org/node/11>. However, the California Rural Legal Assistance Foundation, an offshoot organization founded when LSC funding restrictions were implemented, offers legal assistance to persons without regard for their immigration status. See <http://www.crlaf.org/eligibility-requirements>.

However, mandating small adjustments to LSC regulations in the next reauthorization of the TVPA may make a difference in helping farm worker assistance organizations identify trafficked persons in local farm worker communities. Permitting LSC-funded legal aid organizations greater leeway to perform outreach and know-your-rights education to undocumented farm workers may help legal services organizations identify otherwise hidden trafficked agricultural laborers. Likewise, providing limited financial assistance to non-LSC funded farm worker organizations that are likely to encounter trafficked agricultural workers may provide greater access to legal services for individuals who otherwise would not have contact with legal assistance.

Third, a shift in focus on potential intervention points can make a real difference in helping to identify exploited agricultural laborers who may be living in trafficking situations. Rural churches in the countryside surrounding farms and ranches are possible sources of outside contact for trafficked agricultural workers, as are gas or electric company workers and local law enforcement. Wal-Mart may also offer a site of potential intervention, as periodic trips to rural Wal-Marts are a mainstay of the life of agricultural workers in the United States. Training clergy, utility employees, law enforcement, and Wal-Mart staff to identify possible signs of exploitation and providing them with ready access to contact numbers of legal aid organizations may increase the level of assistance available to potentially trafficked persons. Likewise, outreach into communities of backpackers, hikers, mountain bikers, and recreation horseback riders who frequent the Bureau of Land Management—land on which cattle, sheep, and goats graze—may provide additional human contact for the herders who live in true isolation.

VI. CONCLUSION

As a fundamental violation of human rights, human trafficking warrants public attention and the dedication of public resources. However, it is not entirely clear why trafficking for sex work has garnered such extreme measures of public engagement, while trafficking into other labor sectors is often overlooked. This article has offered data to reinforce this assertion and a series of possible explanations for why well-intentioned persons are preoccupied with trafficking into sex work, yet remain willing to ignore trafficking into other labor sectors. This blindness, whether willful or ignorant, of trafficking into other labor sectors comes at a cost to the persons harmed by these other forms of human trafficking.

In particular, trafficking into the agricultural sector remains an often forgotten form of human trafficking and one with real consequences. There are particular reasons why rural trafficked persons remain unseen: farm labor is hidden from the majority of the population; exploited farm laborers are often indistinguishable from voluntary farm workers, even when work-

ing under the best of agricultural labor conditions; and the immigration regime that governs farm work creates a situation that is ripe for exploitation through workers' fear of loss of their visa or deportation. As a result, too many agricultural laborers' rights are violated, whether by human trafficking or other forms of exploitation. Only through targeted interventions designed to address the particular vulnerabilities of agricultural workers, such as an increased dedicated of Legal Services Corporation funds to addressing the needs of exploited agricultural workers regardless of their migration status, or reform of the agricultural H-visa regime, can legal institutions start to equilibrate their focus on all trafficked persons, and not merely on persons trafficked into the sex industry.