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Strange Traffic: Sex, Slavery, and the Freedom Principle

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ANDERS WALKER

This Article uses the recent prosecution of a sex trafficking case in rural Missouri to argue three points. First, the federal law of trafficking is currently being used in unanticipated ways, including the apprehension of individuals who pay for sex. Second, trafficking invites creative use precisely because it provides prosecutors with a more salient justification for punishment than either legal moralism or harm; a rhetorical plea to anti-slavery that enjoys a longstanding but under-theorized role in criminal law rhetoric. Third, anti-slavery's recurrence in criminal law rhetoric illustrates a larger doctrinal point, namely that mid-century reformers like H. L. A. Hart truncated John Stuart Mill to reduce the criminal sanction, ignoring Mill's subordination of harm to a larger, more intrusive "principle of freedom."

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Strange Traffic: Sex, Slavery, and the Freedom Principle

ANDERS WALKER*

*“The principle of freedom cannot require that [one] should be free not to be free.”*¹

—John Stuart Mill

I. INTRODUCTION

On February 27, 2009, paramedics in Lebanon, Missouri responded to a call from an isolated trailer on a wooded hill, arriving to find a middle-aged man named Ed Bagley administering CPR to a twenty-four year old woman.² According to Bagley, the woman—whom he referred to simply as Nicole—had collapsed on the floor of their trailer just prior to leaving for work.³ According to Nicole, who was later revived in a Springfield hospital, Bagley had alternately shocked and suffocated her in a fit of violent abuse, causing her to suffer cardiac arrest.⁴ The near-death experience, Nicole later told federal authorities, marked the culmination of a brutal relationship involving torture, terror, and confinement.⁵

Aghast, federal prosecutor Cynthia Cordes ordered agents to the trailer, where they discovered a strange, white-walled room filled with chains, handcuffs, piercing items, whips, and other sexual devices.⁶ Upon further

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¹ JOHN STUART MILL, ON LIBERTY 101 (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859).

² Todd C. Frankel, *Torture or Kinky Sex? Opinion Split*, ST. LOUIS POST-DISPATCH, Nov. 5, 2010, at A1.

³ Nicole’s last name was never revealed. Instead, the government referred to her simply as Female Victim or “FV” in its indictment. Superseding Indictment at 5, United States v. Bagley, No. 10-00244-01/02/04/06-CR-W-DW (W.D. Mo. Mar. 30, 2011).

⁴ Frankel, *supra* note 2.

⁵ *Id.*

⁶ *See id.* (describing the scene discovered by FBI investigators).

questioning, Nicole revealed that Bagley had lured her into the trailer in 2002 with promises of a “great life,” meanwhile subjecting her to a pattern of sadistic violence that spanned almost seven years and took the couple from Missouri to Los Angeles for a pornographic photo shoot later sold to *Taboo* magazine.⁷ Convinced that she had stumbled across a case of modern slavery, Cordes charged Bagley with eighteen federal offenses, including sex trafficking and violation of the Mann Act.⁸

This last allegation proved curious. Enacted in 1910, the Mann Act emerged amidst a moral panic over white slavery that historians now believe was exaggerated to facilitate a series of ulterior policy agendas, including the regulation of immigrants and prostitutes.⁹ Recently, scholars have begun to wonder whether similarly hidden motives might lie behind federal trafficking prosecutions.¹⁰ To take just a few examples, sociologist Gretchen Soderlund has demonstrated that federal interest in trafficking derives in part from its utility as a tool of foreign policy, both as a rhetorical cover for legitimating American intervention abroad and as a device for directing United States Agency for International Development funds to nations that comply with various American directives on sex education, contraceptives, and prostitution.¹¹ Meanwhile, domestic reformers have embraced the rhetoric of trafficking to mount a larger, veiled struggle against immigration, prostitution, and challenges to

⁷ *Id.*

⁸ Superseding Indictment, *supra* note 3, at 1–4.

⁹ See Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT’L ORG. 479, 513 (1990) (describing white slavery as “the entire system of licensed prostitution in existence throughout much of Europe and parts of the United States”); see also DAVID J. LANGUM, *CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT* 38–41 (1994) (discussing the history of the drafting of the Mann Act); Dianne Otto, *Lost in Translation: Re-Scripting the Sex Subjects of International Human Rights Law*, in INTERNATIONAL LAW AND ITS OTHERS 318, 324 (Anne Orford ed., 2006) (describing the trafficking of women for prostitution as the impetus of white slavery). See generally Mary Ann Irwin, *White Slavery as Metaphor: Anatomy of a Moral Panic*, 5 EX POST FACTO 1 (1996) (explaining how an English newspaper article on white slavery sparked controversy across the world).

¹⁰ See Alicia W. Peters, “Things That Involve Sex Are Just Different”: US Anti-Trafficking Law and Policy on the Books, in Their Minds, and in Action, 86 ANTHROPOLOGICAL Q. 235, 236 (2013) (acknowledging a trend “to conflate prostitution with trafficking”); Gretchen Soderlund, *Running from the Rescuers: New U.S. Crusades Against Sex Trafficking and the Rhetoric of Abolition*, 17 NWSA J. 64, 77 (2005) (“This case suggests that the tools anti-trafficking laws put at the administration’s disposal can be used to further other geopolitical ends and are inseparable from the larger arena of international politics.”).

¹¹ Soderlund further contends that American interest in global sex trafficking spiked after evangelical groups embraced the rescue and rehabilitation of foreign prostitutes as a means of “proselytizing” them, even as President Bush invoked “nineteenth- and early twentieth-century anti-prostitution rhetoric” to launch a “War Against Trafficking” that bolstered America’s “broader moral agenda” in the War on Terror. Soderlund, *supra* note 10, at 77.

“traditional social values rooted in heterosexual . . . marriage.”¹²

Popular media have contributed to these efforts by publicizing extreme cases, drawing dubious connections to antebellum slavery, and citing questionable data.¹³ For example, the *New York Times Magazine* ran a sensational story about domestic trafficking in 2004, alleging a “sex-trafficking epidemic” in the United States that involved upwards of “30,000 to 50,000 sex slaves” held in “squalid,” secret “stash houses,” including one that evoked the “land-based equivalent of a 19th-century slave ship.”¹⁴ Almost immediately, critics questioned the veracity of the piece, citing a 2005 State Department report that boasted much lower numbers than the *New York Times Magazine* alleged.¹⁵ Similarly, a 2008 study of teenage prostitutes conducted by sociologists Ric Curtis and Karen Terry revealed that most of the youth were independently and voluntarily prostituting to earn money, without fear of confinement or coercion.¹⁶ The study concluded that claims of trafficked teenage prostitutes survived precisely because reformers found it a useful frame for advancing ulterior agendas—including counter-prostitution and immigration control—much like the Mann Act in 1910.¹⁷

¹² Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1665 (2010); see *id.* (discussing the link between trafficking and anti-prostitution efforts); Nicholas D. Kristof, *What About American Girls Sold on the Streets?*, N.Y. TIMES, Apr. 23, 2011, at WK10 (demonstrating the prevalence of trafficking even in the United States). One such agenda is the protection of illegal immigrants. Academics have already begun to show how reclassifying undocumented immigrants as victims of trafficking enables them to stay in the United States and avoid deportation. See, e.g., Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143, 146 (2011) (using a hypothetical to show that a police officer’s decision to arrest a foreign woman for prostitution or, alternatively, to suspect the same woman to be a victim of human trafficking, will impact whether the woman is deported or “protected”).

¹³ See generally Nicholas D. Kristof, *The Face of Modern Slavery*, N.Y. TIMES, Nov. 17, 2011, at A31 (describing the author’s interview with a six-year-old Cambodian sex slave); Peter Landesman, *The Girls Next Door*, N.Y. TIMES, Jan. 25, 2004, § 6 (Magazine), at 30 (portraying the scene of a police raid in New Jersey that rescued four underage Mexican sex slaves); Benjamin Skinner, *Modern-Day Slavery on D.C.’s Embassy Row?*, TIME (June 14, 2010), <http://content.time.com/time/nation/article/0,8599,1996402,00.html> (examining the case of a Tanzanian diplomat who forced a woman into slavery).

¹⁴ Landesman, *supra* note 13, at 32.

¹⁵ See Jack Shafer, *Sex Slaves, Revisited*, SLATE (June 7, 2005), http://www.slate.com/articles/news_and_politics/press_box/2005/06/sex_slaves_revisited.html (citing a 2004 State Department report estimating that between 14,500 and 17,500 people were trafficked across U.S. borders for forced labor and sexual exploitation); Editors’ Note, N.Y. TIMES, Feb. 15, 2004, § 1, at 3 (responding to and addressing various critiques of Landesman’s article).

¹⁶ I RIC CURTIS ET AL., CTR. FOR COURT INNOVATION, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY* 57–58 (2008); see also Kristen Hinman, *Lost Boys*, VILLAGE VOICE (Nov. 2, 2011), <http://www.villagevoice.com/2011-11-02/news/lost-boys/> (reporting on the research approach and findings of sociologists Ric Curtis and Meredith Dank).

¹⁷ See Hinman, *supra* note 16 (debunking the overwhelming media portrayal of child prostitution in the United States as one where the child is controlled by a pimp). According to Gretchen Soderlund, evangelicals have played a particularly important role in the resurgence of trafficking, seizing “on the issue of sex slavery” to expressly “expand their base and political power.” Soderlund, *supra* note 10, at

Ed Bagley's initial prosecution for both the Mann Act violation and sex trafficking provides a rare opportunity to assess the evolving power of legal rhetoric over time, particularly the rhetoric of anti-slavery as a justification for intrusive, regulatory regimes.¹⁸ To demonstrate, even though Bagley's Mann Act charge hinged on the claim that he transported Nicole across state lines against her will, considerable evidence exists to suggest otherwise. For example, the *St. Louis Post-Dispatch* sent a reporter to Lebanon in 2010 only to find locals claiming that Nicole boasted publicly of their sexual exploits, all part of a consensual S&M lifestyle that she and Ed videotaped and posted on the Internet.¹⁹ One of Nicole's co-workers told the *Post-Dispatch* that Nicole considered her trip to California a "blast," a story corroborated by California-based photographer Ken Marcus who had invited Ed and Nicole to Los Angeles in 2007 for the supposedly criminal photo shoot.²⁰ To Marcus, who became aware of the couple by viewing one of their "live shows" online, the pair seemed happy, Ed seemed doting, and Nicole appeared excited to be on the West Coast.²¹ That Ed had coerced Nicole to go on the trip struck Marcus as implausible, particularly since Nicole expressed an interest in professional modeling—an interest she herself corroborated during an interview with *Taboo* magazine in August 2007.²²

Nicole's stated willingness to serve as a pornographic model in California raises questions about Ed Bagley's trafficking and Mann Act charges, questions further exacerbated by the outcome of the case. While four defendants who traveled to Lebanon and participated in S&M sessions with Nicole pleaded guilty to conspiracy to commit sex trafficking, and one such defendant who also drove Ed and Nicole to California additionally pleaded guilty to violating the Mann Act, Ed evaded all trafficking and Mann Act charges and only pleaded guilty to the use of an interstate facility, i.e., the Internet, to facilitate sex with a minor.²³ This last charge

68. Finally, trafficking has proven a remarkably effective cover for the expansion of prosecutorial might. Already, the United States Attorney's Office for the Western District of Missouri has drawn considerable federal funds by making itself one of the foremost hubs of human trafficking prosecutions in the United States, even though it lies far from any international border or port. See Press Release, Dep't of Justice, Departments of Justice, Homeland Security and Labor Announce Selection of Anti-Trafficking Coordination Teams (July 25, 2011), available at <http://www.justice.gov/opa/pr/2011/July/11-crt-963.html> (announcing a plan to bring a team of federal prosecutors and federal agents to Kansas City, Missouri to combat human trafficking).

¹⁸ Chuang, *supra* note 12, at 1659.

¹⁹ Frankel, *supra* note 2.

²⁰ *Id.*

²¹ Hunter Walker, *FBI Questions Hustler Editor, Photographer in Sex Slave Case*, WRAP (Sept. 12, 2010), <http://www.thewrap.com/media/column-post/alleged-sex-slave-appeared-hustler-photoshoots-20766>.

²² Ernest Greene, *Master Ed and Slave Nicole: Heartland Kink*, TABOO, Aug. 2007, at 53, 55.

²³ Plea Agreement at 1, *United States v. Bagley*, No. 10-00244-04-CR-W-DW (W.D. Mo. Jan. 15, 2013); Press Release, U.S. Attorney's Office, W. Dist. of Mo., Lebanon Man Pleads Guilty, Faces 20

hinged on the fact that Ed allegedly began a sexual relationship with Nicole when she was still sixteen, two years before Missouri's age of consent and four years before the other defendants met the couple.²⁴

Though a separate charge exists for adults who traffic minors,²⁵ the U.S. Attorney ultimately opted not to invoke it in Bagley's case.²⁶ Taking this bizarre charge arrangement—and the even more bizarre asymmetry in convictions between Bagley and his co-defendants—as a starting point, this Article will advance three main claims, addressed in three separate parts. Part II will review the facts in the indictment, underscoring the contradictions between the government's initial charges, the defendants' pleas, and known evidence in the case, suggesting that the law of trafficking was used creatively to net defendants who paid for sex. Part III will place Bagley's conviction within the larger context of legal rhetoric, showing how the rhetoric of anti-slavery has consistently been used to impose heightened punishment, as evidenced by the White Slave Traffic Act, or Mann Act, and trafficking—both of which were charged in the case. Part IV will suggest that invocations of anti-slavery rhetoric bear doctrinal implications, reconciling increased federal power with an under-theorized version of what John Stuart Mill termed the “principle of freedom,” which is a basis for state power potentially more expansive and complicated than H. L. A. Hart's emphasis on harm.²⁷

Years in Prison for Coercing a Minor to Become a Sex Slave (Jan. 15, 2013), *available at* <http://www.fbi.gov/kansascity/press-releases/2013/lebanon-man-pleads-guilty-faces-20-years-in-prison-for-coercing-a-minor-to-become-a-sex-slave>.

²⁴ MO. REV. STAT. § 567.030 (2012); Plea Agreement, *supra* note 23, at 2. Paying for sex traditionally constitutes patronizing prostitution, a misdemeanor offense, and no U.S. attorney had ever charged a patron of prostitution, or “John,” with conspiracy to traffic an adult. Press Release, *supra* note 23.

²⁵ 18 U.S.C. § 1591 (2012).

²⁶ Plea Agreement, *supra* note 23, at 1.

²⁷ MILL, *supra* note 1, at 101. Mill uses the terms “freedom principle” and “liberty principle” interchangeably. See John Gray & G.W. Smith, *Introduction to J.S. MILL ON LIBERTY: IN FOCUS* 1, 12–13 (John Gray & G.W. Smith eds., 1991) (explaining the scope of the “liberty of action” contemplated by Mill). Even John Stuart Mill qualified his famous harm principle in cases where individuals willingly entered relationships that curtailed their freedom, a point that subsequent theorists like H. L. A. Hart have missed. See H. L. A. HART, *LAW, LIBERTY, AND MORALITY* 42–47 (1963) (explaining the difficulty in applying Mill's principles to the punishment of immoral or indecent behavior); Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 176–77 (1999) (discussing new applications of the harm principle in the context of Chicago's temperance movement); John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1, 14 (2009) (relaying the differences between morality legislation based on harm and that based on a “moral majority”); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 132 (2007) (explaining how proponents of morality legislation bolster their arguments with legitimate physical harm arguments). But see Alice Ristroph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151, 1151–52 (2010) (arguing that the recent interest in the legislation of morality is “greatly exaggerated”). To those who maintain that the principles of harm and liberty merge, this Article disagrees, arguing that prevailing notions of the harm principle are overly utilitarian, hopelessly vague, and oft-eclipsed by rhetorical bids to rationalize the criminal sanction in the frame of anti-slavery.

II. "EXTREME TYPES OF PLAY"

If ever a federal indictment aimed to shock the conscience, it was Ed Bagley's. Issued by a grand jury on March 29, 2011, the document claimed that Ed and his wife Marilyn lured a sixteen-year-old girl named Nicole, or "FV" (female victim), into their trailer with promises of "a great life," including, but not limited, to making her a "model," making her a "dancer," and making her "dreams come true."²⁸ The Bagleys allegedly provided FV with a "bedroom, dresser, and television," along "with clothes and food," all in an effort "to entice her to stay in their trailer home."²⁹ From 2002 to 2004, when Nicole turned eighteen, the Bagleys "modeled 'slave clothes,'" and "used the internet and adult BDSM pornography to train and groom FV to become a sex slave."³⁰

Following Nicole's eighteenth birthday, Ed subjected her to a series of "sexual acts" that the government later framed as alternately "mutilation" and "torture."³¹ These included sessions during which Ed "hooded, roped down, and pierced through FV's nipples with hooks and stretched her breasts in the air;" "whipped FV's body" with "paddles, canes, and floggers;" "gagged FV and tied her body and neck up with rope;" and "locked, chained and hooded FV naked in a dog cage, often suspending the cage in the air or attaching FV's sex organs to electrical devices while she was trapped in the cage."³²

According to the indictment, Ed "advertised and publicized" these activities "over the internet and in live web cam sessions."³³ One of the websites that Ed posted to was alt.com.³⁴ According to Michael Stokes, one of Ed's co-defendants who later pleaded guilty to trafficking, Ed streamed so many videos on alt.com that he received a "free 'gold membership.'"³⁵ Ed also staged live "demo" sessions with Nicole, accepting cash and other items from men who paid to participate in the sessions.³⁶

Though the government framed Ed's conduct as trafficking, i.e., the use of force, fraud, or coercion to cause an individual to perform a commercial sex act, Ed argued that he and Nicole were involved in a

²⁸ Superseding Indictment, *supra* note 3, at 8.

²⁹ *Id.*

³⁰ *Id.*; see also United States v. Marcus, 487 F. Supp. 2d. 289, 292 (E.D.N.Y. 2007) (defining BDSM as "an alternative sexual lifestyle, known as bondage, dominance/discipline, submission/sadism, and masochism").

³¹ Superseding Indictment, *supra* note 3, at 10.

³² *Id.* at 10–12.

³³ *Id.* at 11–12.

³⁴ Plea Agreement at 2, United States v. Stokes, No. 10-00244-04-CR-W-DW (W.D. Mo. Jan. 5, 2012).

³⁵ *Id.*

³⁶ *Id.*

consensual, Dominant/submissive, or D/s relationship that hinged on bondage, domination, and sadomasochism, or BDSM.³⁷ Many of the actions alleged in the indictment, Ed argued, boasted identifiable corollaries in BDSM culture.³⁸ For example, the use of metal devices to pierce parts of the body is a common form of BDSM “play,” as is the use of electricity or “electro-torture,” “bondage,” “erotic restraint,” “suspension,” and the employment of various devices to whip or flog another person.³⁹ For serious BDSM practitioners, these activities assume a distinctly “theatrical,” even “artistic” form, often requiring advanced planning, preparation, and cooperation between the individual administering the treatment, or the “Dominant,” and the individual receiving the treatment, or the “submissive.”⁴⁰

Rather than convey the planned, theatrical component of BDSM practice, the government decontextualized Ed’s actions and portrayed them as random acts of sadistic violence. Meanwhile the government stressed the fact that Nicole was Ed’s “slave” as evidenced by the fact that Bagley had her “sign a ‘sex slavery contract’” shortly after her eighteenth birthday that bound her “legally” to him “with a term that ‘never’ ended.”⁴¹ Though the contract bore no legal validity, the government framed Ed and Nicole’s relationship in terms of modern slavery and trafficking.⁴²

This warrants some comment. Recently popularized by romance writer E.L. James in her 2012 best-seller *Fifty Shades of Grey*, the notion of a D/s, or “slave,” contract first emerged in a nineteenth century novel by German author Leopold von Sacher-Masoch.⁴³ Entitled *Venus in Furs*, the novel used the slave contract not to endorse chattel slavery but to underscore a larger point about the relationship between intimacy and law, arguing that true intimacy need not be rooted in notions of equality and that liberal preoccupations with equality actually obviate the possibility of achieving “the most intense human passion,” the highest form of love, and

³⁷ Frankel, *supra* note 2.

³⁸ Compare Superseding Indictment, *supra* note 3, at 9–12 (outlining the alleged conduct engaged in with Nicole), with PHILIP MILLER & MOLLY DEVON, *SCREW THE ROSES, SEND ME THE THORNS: THE ROMANCE AND SEXUAL SORcery OF SAdOMASOChISM* 2–4 (1995) (discussing conduct and practices commonly observed in BDSM relationships and culture).

³⁹ See generally MILLER & DEVON, *supra* note 38, at 4–9, 78–79, 81, 95 (providing an overview of BDSM tools and techniques used in “play”).

⁴⁰ Danielle Lindemann, *Will the Real Dominatrix Please Stand Up: Artistic Purity and Professionalism in the S&M Dungeon*, 25 *Soc. F.* 588, 593 (2010).

⁴¹ Superseding Indictment, *supra* note 3, at 9.

⁴² See Bill Draper, *Edward Bagley, “Master Ed,” Pleads Guilty in Sex Slave Case*, HUFFINGTON POST (Jan. 15, 2013), http://www.huffingtonpost.com/2013/01/15/edward-bagley-sex-slave-guilty_n_2481981.html (quoting the rhetoric used by the government in the Ed Bagley case).

⁴³ E.L. JAMES, *FIFTY SHADES OF GREY* 165–75 (paperback ed. 2012); LEOPOLD VON SACHER-MASOCH, *VENUS IN FURS* 73 (Joachim Neugroschel trans., Penguin Books 2000) (1870).

the giving of oneself completely to another.⁴⁴ In other words, the slave contract in von Sacher-Masoch's novel represented a legitimate, superior alternative to both the marriage contract and to Locke's social contract, nothing less than the foundation for "a new social polity."⁴⁵ Precisely because slave contracts mock both marriage and liberalism—they might be viewed as a form of political or perhaps even artistic protest—critiques of conventional values that coincide more closely with BDSM "play" than with legal definitions of trafficking explain why they are a common trope in D/s culture.⁴⁶ Yet the government once again downplayed the existence of such a culture in its indictment of Bagley, de-emphasizing the contextual history of slave contracts in order to frame Nicole as a victim of sex trafficking.

Arguably the most culturally freighted piece of evidence to be de-contextually used against Bagley was a tattoo that Nicole received shortly after her eighteenth birthday. According to Bagley's indictment, Ed "had FV tattooed to mark her as his property," including "a bar code on FV's neck."⁴⁷ Rather than a sign of trafficking, however, the barcode's origin dates to Canadian artist Jana Sterback who used it as a critique of mass

⁴⁴ VON SACHER-MASOCH, *supra* note 43, at 117–19; Nancy Bentley, *The Strange Career of Love and Slavery: Chesnut, Engels, Masoch*, 17 AM. LITERARY HIST. 460, 476–77 (2005).

⁴⁵ Bentley, *supra* note 44, at 476–77. Though von Sacher-Masoch's name would go on to inspire the term masochism, nothing suggests that either Ed Bagley or "slave nicole," as he referred to her on D/s blogs and in *Taboo* magazine, were aware of *Venus in Furs*. Yet, the text underscores the point that Bagley and Nicole's relationship may in fact have been consensual, their contract an effort to consecrate an intimate bond outside the confines of companionate marriage. *Id.* Indeed, if Bentley's read of von Sacher-Masoch is correct, then the slave contract may—for some—be even more "intimate" than the marriage contract. Further, Nicole signed the contract when she was eighteen. By that age, she was a consenting adult not just in the eyes of Missouri, MO. REV. STAT. § 566.034 (2012), but also from the viewpoint of the federal government, 18 U.S.C. § 2243 (2012). *See also* ASAPH GLOSSER ET AL., THE LEWIN GRP., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS (2004), available at <http://www.hhs.gov/opa/pdfs/statutory-rape-state-laws.pdf> (compiling state laws and reporting requirements regarding statutory rape). A tangential question—not addressed by the U.S. Attorney or, arguably, the Trafficking Victims Protection Act—is whether the creation of a slave contract per se violates the Thirteenth Amendment. As President Barack Obama stated in a presidential proclamation on December 29, 2011, "President Abraham Lincoln issued the Emancipation Proclamation" not simply to end black slavery, but to consecrate the "essential principles" of "equality and freedom," throughout the nation. Proclamation 8772, 3 C.F.R. 213 (2011). We live in a nation where, in the twenty-first century, "[t]he victims of modern slavery have many faces." Proclamation 8471, 3 C.F.R. 2 (2010). Hence, perhaps even those who enter willingly into master/slave relationships violate the Constitution by effectively seceding from the Union. Imagine, for example, if adherents to the S&M master/slave lifestyle chose not simply to build communities on the Internet, but to create actual, physical communities. Does the invisibility and/or non-geographicality of Internet communities obscure what would otherwise be roundly condemned under the Thirteenth Amendment?

⁴⁶ *See* MILLER & DEVON, *supra* note 38, at 3 (suggesting that BDSM goes against generally accepted social norms about love and sex).

⁴⁷ Superseding Indictment, *supra* note 3, at 9.

culture in a 1989 photograph of a faceless prisoner.⁴⁸ Entitled *Generic Man*, the photo sparked a trend in bar code tattoos in the United States and abroad—with celebrities like Pink and Aubrey O’Day acquiring them.⁴⁹ In D/s culture, the barcode tattoo gained salience in 1999 thanks to a novel by science fiction writer S.M. Stirling entitled *The Domination*.⁵⁰

An alternate history, *The Domination* tells the story of a rogue group of American colonists who remain loyal to the British following the American Revolution, reject the new republic, and move their plantations and slaves to Africa.⁵¹ Once there, they found a fictional colony called Drakia, which tolerates slavery through the twentieth century, ultimately becoming a major imperial power that defeats the United States in a global war.⁵² In the book, slaves are acquired through conquest and given barcode numbers as part of a larger process of being “groomed” into lives of service.⁵³ The book inspired the creation of the Master/slave Registry, an online service formed in 2000 that enables Masters to register their slaves by number.⁵⁴

Like *Venus in Furs*, *The Domination* posits an alternate social polity, a world in which society functions more effectively when based on social inequality, precisely because such inequality better suits human diversity. Much like BDSM “play,” *The Domination* posits that some are better suited by birth to be dominant, others submissive.⁵⁵ Further, some actively

⁴⁸ Tanos, *Slave Register Website History*, SLAVE REG., <http://www.slaveregister.com/about/history> (last visited Nov. 15, 2013).

⁴⁹ *Id.* Rather than evidence that Ed coerced Nicole into her relationship with him, the tattoo might explain why Nicole found the prospect of a relationship with Ed intriguing, possibly thinking it would be cultural caché. In fact, one of Sterback’s other pieces, the meat dress, also gained popular notoriety after Lady Gaga donned it at the 2010 MTV Video Music Awards. Christopher Knight, *Lady Gaga, Meat Jana Sterbak*, L.A. TIMES CULTURE MONSTER (Sept. 13, 2010, 8:45 AM), <http://latimesblogs.latimes.com/culturemonster/2010/09/lady-gaga-meat-dress-recycled.html>. Here, we see a blurring of lines between popular culture, counter-culture, and D/s subculture—again explaining why a young person might be attracted to its exotic/extreme nature more than its constitutional or criminal implications.

⁵⁰ See S.M. STIRLING, *THE DOMINATION* 39 (1999) (giving an example of the barcode tattoo).

⁵¹ *Id.* at 11–12.

⁵² *Id.* at 13–14.

⁵³ *Id.* at 22, 35.

⁵⁴ See Tanos, *supra* note 48 (evidencing *The Domination*’s impact on the Slave Register).

⁵⁵ This raises the question whether consensual slavery violates the Thirteenth Amendment. International law finds that slavery occurs whenever one party enjoys the exercise of “any or all of the powers attach[ed] to the right of ownership” over another. Slavery Convention, art. 1, para. 1, Sept. 25, 1926, 60 L.N.T.S. 253. “Equally,” notes Dr. Mohamad Mattar, “practices similar to slavery . . . such as debt bondage, serfdom, forced marriage, and sale of children are to be considered slavery-like conditions only if they involve ‘the status or condition of a person over whom any or all of the powers attaching the right of ownership are exercised.’” Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1247, 1258 (2011) (quoting Slavery Convention, *supra*, 60 L.N.T.S. at 263). Arguably more inclusive is the Thirteenth Amendment, which according to the Second Circuit’s decision in *United States v. Nelson* is “the denunciation of a condition, and not a declaration in favor of a particular people.” 277 F.3d 164, 176 (2d Cir. 2002). Additionally, as the

seek out submissive roles for reasons that might not be obvious to casual observers. For example, D/s circles registered a remarkable case of consensual slavery in 1996 when a twenty-two year old woman named Amanda posted a personal ad on alt.personals.bondage.com advertising herself for sale.⁵⁶ According to Amanda, she had auburn hair, was college-educated, and had been enjoying life “to its fullest” until she realized that her parents—who worked for “large acquisition corporations”—made their money by taking advantage of “less fortunate people,” foreclosing on family-owned businesses to sell their “assets” and “mak[ing] huge profits.”⁵⁷ Claiming a desire to “atone for the sins of [her] family,” Amanda offered herself for sale online to the highest bidder “as a sex slave” willing to “do and perform any perverse degrading and dehumanizing rituals” that her master desired, with the only requirement being that her owner “video tape one session a month to be sent to [her] parents” so they would know what her life had become.⁵⁸ Two months later, the winner of Amanda’s auction—identified simply as “Master Mark”—posted a message to the same blog, noting that “placing a monetary value to a slave exchange ensures that the submissive receives the best chance of being secured by a dominant who will appreciate, respect, and develop the slave’s gift of submission.”⁵⁹ Here, the transfer of money not only added value to the master/slave experience, but guaranteed some base-level treatment of the slave, even though the slave herself authorized the performance of “perverse degrading and dehumanizing rituals” upon her.⁶⁰

While Master Ed did not pay money for “slave nicole,” he did allegedly accept money from other men for activities involving Nicole. For example, four named defendants—Bradley Cook, Dennis Henry, James Noel, and Michael Stokes—all provided Ed with cash and other items so that they could “engage in sexual acts and torture sessions” with FV.⁶¹ Ed referred to such transactions as “whoring out” Nicole, a practice that enjoys some currency in D/s circles.⁶² While “whoring out” a

Ninth Circuit put it in *United States v. Mussry*, the Thirteenth Amendment applies “to a variety of circumstances and conditions . . . [and] to contemporary as well as historic forms of involuntary servitude.” 726 F.2d 1448, 1451 (9th Cir. 1984).

⁵⁶ Baboox, *Young Female Slave for Sale*, BONDAGE (Dec. 12, 1996, 2:00 AM), <http://www.alt.personals.bondage.com> (password protected website, record on file with author).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Master Mark, Comment to *Slaves Selling Themselves*, BONDAGE (Feb. 8, 1997, 2:00 AM), <http://www.alt.personals.bondage.com> (password protected website, record on file with author).

⁶⁰ *Young Female Slave for Sale*, *supra* note 56.

⁶¹ Superseding Indictment, *supra* note 3, at 7.

⁶² See, e.g., *Being Pimped/Whored Out*, SLAVEFARM.COM (July 7, 2007, 3:46 PM), <http://www.slavefarm.com/blog/fist-slut/being-pimpedwhored-out> (discussing the practice of being “whored out”).

submissive could theoretically qualify as prostitution, the U.S. Attorney in Bagley's case opted instead to charge all four individuals with conspiracy to traffic, an offense to which all four—but not Bagley—later confessed.⁶³

To be convicted of conspiracy to traffic, the federal government need only prove that the defendants agreed to affect interstate commerce by causing the victim to “engage in a commercial sex act” either knowing that “force, threats of force, fraud, [or] coercion” were necessary to do so, or being “in reckless disregard of the fact.”⁶⁴ According to the statute, a commercial sex act comprises “any sex act on account of which anything of value is given to or received by any person.”⁶⁵ Meanwhile, coercion requires “threats of serious harm,” “physical restraint,” or any type of scheme or plan “intended to cause a person to believe” that if she does not perform an act then she will be subjected to “serious harm” or “physical restraint.”⁶⁶

While Cook, Henry, Noel, and Stokes all pleaded guilty to the charge of conspiracy,⁶⁷ questions remain as to why, precisely, Bagley did not.⁶⁸ Further, questions remain as to why the government did not pursue Bagley on this point, pushing him to trial. For example, the exchange of cash in return for access to Nicole should theoretically have established a conspiratorial agreement between Bagley and the others. Meanwhile, both Cook and Stokes gave Bagley money to transport Nicole by car from Missouri to California for a pornographic photo shoot, thereby affecting interstate commerce.⁶⁹

On the topic of the photo shoot, one of the co-defendants charged with conspiracy, Henry, also pleaded guilty to violating the Mann Act for driving Bagley and Nicole at least part of the way from Missouri to California.⁷⁰ Here again though, questions remain as to why Bagley

⁶³ Plea Agreement, *supra* note 34, at 1; Plea Agreement at 2, United States v. Cook, No. 10-00244-02-CR-W-DW (W.D. Mo. Dec. 20, 2011); Plea Agreement at 1, United States v. Henry, No. 10-00244-03-CR-W-DW (W.D. Mo. Mar. 24, 2011); Plea Agreement at 1, United States v. Noel, No. 10-00244-05-CR-W-DW (W.D. Mo. Feb. 24, 2011).

⁶⁴ 18 U.S.C. § 1591(a) (2012); *see also id.* § 371 (describing the maximum punishment for conspiracy).

⁶⁵ *Id.* § 1591(e)(3).

⁶⁶ *Id.* § 1591(e)(2).

⁶⁷ *See* Press Release, U.S. Attorney's Office, W. Dist. of Mo., Lebanon Man Pleads Guilty to Sex Trafficking, Admits Torturing Woman Who Was Coerced as Sex Slave (Jan. 5, 2012), *available at* <http://www.justice.gov/usao/mow/news2012/stokes.ple.html> (describing the progression of guilty pleas from Cook, Henry, Noel, and Stokes on their charges of conspiracy to commit sex trafficking by force, fraud, or coercion).

⁶⁸ *See supra* note 23 and accompanying text.

⁶⁹ Another possible impact on interstate commerce might have been communications between Bagley, Cook, Noel, and Stokes via email, using an instrument of interstate commerce: the Internet.

⁷⁰ Press Release, U.S. Attorney's Office, W. Dist. Mo., Former Nevada Postmaster Pleads Guilty to Sex Trafficking Conspiracy, Admits Torturing Woman Coerced as Sex Slave (Mar. 24, 2011), *available at* <http://www.fbi.gov/kansascity/press-releases/2011/kc032411.htm>.

escaped conviction. After all, the Mann Act requires that the government prove a defendant transported a victim across state lines for the purpose of an illegal sex act, in this case trafficking.⁷¹ Presumably, Henry confessed to knowing that Nicole would be trafficked—meaning that she would be coerced into performing a commercial sex act.⁷² However, Bagley refused to plead and the government refrained from trying him.⁷³ Why?

One reason might be that Nicole was never actually coerced. Shortly after returning from California, Nicole declared in an interview with *Taboo* editor Ernest Greene that “Master Ed” was a “great, loving, outgoing guy,” and that she had a “fun-loving relationship” with him.⁷⁴ Noting that the couple had come to the magazine’s attention by way of photographer Ken Marcus, Greene proceeded to inquire into the details of Ed and Nicole’s relationship, including how they met.⁷⁵ According to Nicole, she “didn’t know anything about BDSM” before meeting Bagley, but thought he was “good-looking and seemed kind of on the wild side.”⁷⁶ Bagley, by contrast, remembered meeting Nicole through some friends, commenting on how she “bounced out of the car, wearing shorts and a skimpy little top,” immediately convincing him that “she was the slave girl for me.”⁷⁷ Shortly thereafter, Nicole moved in with the Bagleys and, as she told *Taboo*, fell “in love with” Ed and Marilyn and decided to “stay[] with them and lov[e] them for the rest of [her] life.”⁷⁸ Rather than portray herself as a victim, in other words, Nicole described her relationship with Ed and Marilyn as a voluntary arrangement, on par with a marital relationship—a haunting affirmation of Leopold von Sacher-Masoch’s theory that slavery could in fact coincide with love.

Ed provided further insight into the dynamics of their D/s “play” sessions during the *Taboo* interview. Rather than aimed at hurting Nicole, Ed explained to *Taboo* that their activities resembled an evolving series of theatrical performances, each one more radical than the last, but all

⁷¹ Mann Act, 18 U.S.C. § 2421 (2012).

⁷² Pursuant to the Trafficking Victims Protection Act of 2000, an adult is trafficked if she is made to participate in a commercial sex act by “force, fraud, and coercion.” 18 U.S.C. § 1591(a)(1) (2012). If she consensually agrees to a commercial sex act, say sex in exchange for cash, then she is technically not trafficked. While Nicole might be guilty of prostitution, it is actually in her best interest to allege that she was trafficked, for then she escapes criminal liability—a point worth noting given that the U.S. Attorney identified Cook, Henry, Noel, and Stokes as “customers” and “Johns.” Press Release, U.S. Attorney’s Office, W. Dist. of Mo., Three More Defendants Sentenced in Sadomasochistic Sex Trafficking Conspiracy (Sept. 12, 2013), available at <http://www.justice.gov/usao/mow/news2013/stokes.sen.html>.

⁷³ Draper, *supra* note 42.

⁷⁴ Greene, *supra* note 22, at 53.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

consensual.⁷⁹ For example, he explained that he “had to learn a lot” in order to “keep things fresh” with Nicole, including new “extreme types of play” like “catheter insertion, chastity sewing,” and “nailing [Nicole] to a board,” all activities later listed in the criminal indictment against him.⁸⁰ Nicole spoke articulately about these actions and others, including “hanging upside down,” “being hog-tied,” and wearing “hoods for the suspense of wondering which whip or what toy [she would] get next,” including “gags to bite down when [she felt] the need to cry or scream.”⁸¹ Though some degree of discomfort or pain seemed to be involved in almost every action they described, Nicole also confessed that she had a “safe word,” but did not like using it unless necessary.⁸²

One way to explain Nicole’s interview with *Taboo* is that she enjoyed their sessions, loved Ed, and was not trafficked to California. Another possible explanation is that Bagley somehow coerced her into saying the things she did. For example, Nicole might genuinely have been afraid that Bagley would hurt her if she did not pretend to condone their relationship, deciding instead to mask her fear in statements of enthusiasm. Of course, this begs the larger question: Why, over the course of the seven years that Nicole lived with Bagley, did she not try to escape, either by alerting neighbors, or physically absconding and contacting police? Such questions lend themselves either to Bagley’s innocence or to the possibility that just like many victims of domestic violence, Nicole developed what Dee Graham and Del Martin have called “traumatic bonding,” a condition where victims of domestic abuse develop an inability to leave or resist.⁸³ Yet, the state occluded any mention of such conditions, focusing instead on evidence suggesting that Bagley engaged in “sexual torture activities” for the sole purpose of harming Nicole.⁸⁴ Even if Bagley was a sadistic psychopath, for example, Nicole could not be counted a victim of

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See DEL MARTIN, BATTERED WIVES 80 (1976) (“[A] battered woman may spend more energy in keeping her secret and trying to salvage some self-respect than in trying to extricate herself from the trap.”); Dee L. Graham et al., *Survivors of Terror: Battered Women, Hostages and the Stockholm Syndrome*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 217, 220–21 (Kersti Yllö & Michele Bograd eds., 1988) (defining “[t]raumatic bonding” as “strong emotional ties that develop between two people in a relationship where one person intermittently abuses and/or threatens the other” (emphasis omitted)); see also Alfred DeMaris & Steven Swinford, *Female Victims of Spousal Violence: Factors Influencing Their Level of Fearfulness*, 45 FAM. REL. 98, 98 (1996) (reiterating the strong emotional attachment women may experience with their batterers). In such situations, individuals in Nicole’s position may develop a “learned helplessness” that leads them to view their attacker as invincible and themselves as incapable of taking any action against him. Robert Geffner & Mildred Daley Pagelow, *Victims of Spouse Abuse*, in TREATMENT OF FAMILY VIOLENCE: A SOURCEBOOK 113, 116 (Robert T. Ammerman & Michel Hersen eds., 1990).

⁸⁴ Superseding Indictment, *supra* note 3, at 6.

trafficking if she consented to their trips, “live webcam shows,” and “play” sessions, no matter how shocking they may have been to the uninitiated observer.⁸⁵

Such observers refused to believe that Ed had trafficked Nicole. For example, Lebanon local Lorrie Bredvick, a waitress at a local restaurant, explained to the *St. Louis Post-Dispatch* that Ed and Nicole frequented her restaurant often and would always sit at a table in the back corner.⁸⁶ According to Bredvick, Nicole was very outgoing and openly spoke about her hard-core photo shoots and sexual activities.⁸⁷ Bredvick said “[t]hey no more held that woman captive than a man on the moon,”⁸⁸ a story corroborated by others in the area, including Kelly Myers, a twenty-five year old dancer who worked with Nicole at the After Dark Gentlemen’s Club near Fort Leonard Wood.⁸⁹ According to Myers, stripping was Nicole’s “passion” and she took it very “[s]eriously.”⁹⁰ Myers also claimed that Nicole had not been taken to California against her will, but rather that she “said she had a blast,” raved about “[h]ow nice California is,” and encouraged Myers “to go out there.”⁹¹

Witnesses in California confirmed Myers’s version of events; among them was Ken Marcus, a longtime photographer for *Playboy* and *Penthouse* who worked with Nicole in Los Angeles.⁹² Upon questioning, Marcus claimed that he had invited Ed and Nicole to Los Angeles after viewing one of their “live webcam shows” on alt.com.⁹³ Marcus then conducted a series of shoots with Nicole and Anastasia Price, a professional S&M model, “over a period of several days,” selling some of the photographs to *Taboo* magazine—a Larry Flynt publication dedicated to BDSM pornography—and reserving others for view on his personal site.⁹⁴ Marcus also conducted an interview with Ed and Nicole during which she confessed that she had not been to Los Angeles before but “hope[d]” to return.⁹⁵ As Marcus explained it, Ed and Nicole “seemed to be quite a lovely couple,” and Ed appeared to be “going out of his way to make sure she was as happy as possible.”⁹⁶ Shocked to hear that Bagley had been arrested for trafficking, Marcus asserted that he witnessed no

⁸⁵ Walker, *supra* note 21.

⁸⁶ Frankel, *supra* note 2.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Walker, *supra* note 21.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

signs that Nicole was “forced, coerced, or mentally disabled.”⁹⁷ Instead, he claimed that she appeared “bright, intelligent and in control.”⁹⁸

While it is certainly possible that Marcus, Myers, and Bredvick all misread the nature of Ed and Nicole’s relationship, Nicole herself endorsed that relationship during her 2007 *Taboo* interview, conducted shortly after their return from Los Angeles.⁹⁹ That Nicole might have lied is possible, particularly if she suffered from a condition akin to traumatic bonding. However, even the successful demonstration of such a condition may not have been sufficient to convict Ed of trafficking, particularly if he remained oblivious to Nicole’s quiet non-consent. For example, Ed seemed to think that Nicole went willingly to California, minimizing the likelihood of proving the requisite *mens rea* that he either knowingly or recklessly coerced her, as required by the Trafficking Victims Protection Act (“TVPA”).¹⁰⁰ Moreover, Bagley posted on SlaveFarm.com that “slave nicole loved” the California experience and enjoyed “reading all the comments” online about the shoot.¹⁰¹ Though this too might have been a subterfuge, the combined effect of his online comments, Nicole’s tabloid interview, and eyewitness accounts in both Missouri and California all help to explain why the government ultimately discarded Bagley’s trafficking charge; a point underscored by his surprisingly mild plea deal. Though far more involved with Nicole than any of the other defendants who did plead guilty to conspiracy to traffic, Bagley escaped with a non-trafficking related charge: the federal version of statutory rape.¹⁰² The convictions of Cook, Henry, Noel, and Stokes, on the other hand, demonstrate how the law of trafficking is being used in creative ways, in this case to prosecute defendants who paid for what they believed was consensual sex. How this happened, as a rhetorical matter, is the subject of the next Part. It will argue that the government’s case against Ed Bagley points to an under-theorized rhetorical frame for amplifying the criminal sanction, neither

⁹⁷ *Id.*

⁹⁸ *Id.* Given that the government’s Mann Act charge hinged on illegal activity in California—including allegations that Bagley coerced Nicole into the trip—Marcus’s public statements cast Ed’s alleged use of coercion into doubt, at least in relation to the California trip. For example, shortly after photographs from Nicole’s shoot were published in *Taboo*, Bagley himself posted on SlaveFarm.com that the trip “made her want to try even harder [sic] to be a good slave girl.” Master Ed, Comment to *Hustler Taboo Magazine*, SLAVEFARM.COM (June 23, 2007, 6:07 PM), www.slavefarm.com/forum/general/general-discussions/hustler-taboo-magazine. Had Bagley known that he was facing a potential Mann Act charge, would he have blogged publicly about the trip? Or, conversely, was the act of blogging about the trip a deliberate effort to mask the fact that Nicole had indeed been trafficked? Ken Marcus would seemingly have answered the second question in the negative, as would Kelly Myers, the dancer in Fort Leonard Wood who told the *Post-Dispatch* that upon her return, Nicole claimed that her trip to California had been “a blast.” Frankel, *supra* note 2.

⁹⁹ Greene, *supra* note 22, at 53.

¹⁰⁰ 18 U.S.C. § 1591 (2012).

¹⁰¹ Master Ed, *supra* note 98.

¹⁰² Plea Agreement, *supra* note 23, at 1.

legal moralism nor harm, but liberty.

III. THE RHETORIC OF SLAVERY

Given the decontextualized nature of the charges against Bagley, trafficking appears to be an odd fit in his case. Yet, it is precisely this ill-fit that makes the case curious, raising the question of whether there are underlying cultural or rhetorical considerations at work—aspects of trafficking that make it an attractive prosecutorial device despite doctrinal incongruities. For example, federal interest in prosecuting Bagley might be related to the relatively straightforward question of resources.¹⁰³ Following the federal government's enactment of the TVPA in 2000, the Bureau of Justice Assistance sponsored forty-two Human Trafficking Task Forces in the United States, including one in the Western District of Missouri, which subsequently received federal grants of nearly one million dollars expressly to pursue trafficking cases.¹⁰⁴ Flush with federal funds but far from an international border or port, U.S. Attorneys in the Western District subsequently employed a variety of creative techniques to net trafficking convictions. Some of these techniques included merging the TVPA with the Racketeer Influenced and Corrupt Organizations Act ("RICO"), prosecuting traffickers who advertised trafficking victims online, prosecuting parents for trafficking their children, and, in the Bagley case, prosecuting "customers" or "Johns" who exchanged money for sex under a conspiracy theory.¹⁰⁵

This last charge warrants comment. Even if the Western District's decision to pursue Bagley bore some relation to resources, it still embodied a unique rhetorical move, an effort to apply the prevailing frame of trafficking to the more traditional trope of prostitution. For instance, the designation of defendants Cook, Noel, and Stokes as "Johns" in the indictment clearly evoked the frame of prostitution, suggesting they were

¹⁰³ If Nicole had clearly been forced to commit commercial sex acts, either by suffering physical detention or threats of deportation, as befalls many undocumented sex workers, then the trafficking charge would warrant little comment. Not so here. Conflicting witness testimony, counter-cultural practices unique to BDSM, and the smorgasbord of resulting convictions invites speculation as to the government's insistence on trafficking. This furthers the critique that the federal government has failed in the war to stop slave trafficking. KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* 248–50 (2009).

¹⁰⁴ Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow Against Modern Day Slavery*, 6 U. ST. THOMAS L.J. 9, 17 (2008); Abby Duncan, *A Tale of Two Districts: Lessons Learned from Missouri's Human Trafficking Task Forces 1–2* (Jan. 18, 2013) (unpublished paper, Saint Louis University School of Law) (on file with author).

¹⁰⁵ *Human Trafficking Rescue Project*, U.S. ATT'Y'S OFF., W. DISTRICT MO., <http://www.justice.gov/usao/mow/programs/humantrafficking.html> (last visited Sept. 20, 2013); see Duncan, *supra* note 104, at 24–26 (describing prosecution tactics in the Bagley case).

little more than men who paid Nicole for her sexual services.¹⁰⁶ Assuming Nicole consented to such activity, the most they could be charged with pursuant to Missouri state law would be patronizing prostitution, a misdemeanor.¹⁰⁷ Under a trafficking framework, however, Cook, Noel, and Stokes faced a much greater penalty, upwards of twenty years in federal prison.¹⁰⁸

That Stokes and the other “Johns” pleaded guilty to trafficking—but Ed Bagley did not—only underscores the creative prosecution of the case. It suggests, for example, that the array of charges against Bagley was not in fact as noteworthy as the creative application of conspiracy to net peripheral actors. This, in turn, bolsters arguments made by scholars of trafficking discourse like Gretchen Soderlund, Karen Terry, and Ric Curtis, all of whom contend that the rhetoric of trafficking tends to be invoked in cases where it does not actually apply.¹⁰⁹ One such expert particularly relevant to Bagley’s case is Janie Chuang.¹¹⁰ Beginning in the 1990s, argues Chuang, “an unusual alliance of feminists, neo-conservatives, and evangelical Christians” pushed for the abolition of prostitution through the rubric of trafficking.¹¹¹ Such “neo-abolitionists” refused to accept that women might willingly choose to become prostitutes, arguing instead that they suffered from “false consciousness” and were best understood as victims of a form of modern slavery that warranted abolition.¹¹² The rhetoric of abolition and slavery, in turn, enabled such “neo-abolitionists” to stir bipartisan support for aggressive implementation of anti-trafficking laws, precisely the kind of aggressive measures that have since come to characterize Missouri’s Western District.¹¹³

Though public interest in trafficking has spiked since the 1990s, the political salience of anti-slavery rhetoric dates back to the nineteenth century.¹¹⁴ As the remainder of this Part shall demonstrate, the rhetoric of anti-slavery has long energized anti-prostitution campaigns, beginning as

¹⁰⁶ See MO. REV. STAT. §567.030 (2012) (noting that a person who hires a prostitute commits a misdemeanor).

¹⁰⁷ *Id.*

¹⁰⁸ Bradley Stokes pleaded guilty to conspiracy to traffic and received a twenty-year sentence. Press Release, U.S. Attorney’s Office, W. Dist. of Mo., Kirkwood Man Pleads Guilty to Sex Trafficking (Dec. 20, 2011), available at <http://justice.gov/usao/mow/news2011/cook.ple.html>.

¹⁰⁹ See Soderlund, *supra* note 10, at 65 (explaining that anti-trafficking movements throughout history have drawn on the rhetoric of abolition to underscore the urgency of their cause); see also CURTIS ET AL., *supra* note 16, at 9–10 (explaining that most youth in their survey were not trafficked).

¹¹⁰ Nicole’s role in the case is markedly different depending on whether she is viewed through the lens of trafficking or prostitution. While Nicole might be guilty of prostitution, she could escape criminal liability if she alleges that she was trafficked.

¹¹¹ Chuang, *supra* note 12, at 1664.

¹¹² *Id.* at 1664–66.

¹¹³ *Id.* at 1659.

¹¹⁴ BALES & SOODALTER, *supra* note 103, at 6.

early as the 1880s.¹¹⁵ Recovering this history is important, if for no other reason than to underscore the manner in which anti-slavery rhetoric has traditionally operated as a counterpoint to the more staid rhetorical conventions of legal moralism and harm. For example, most criminal law scholars generally agree that moralism entered a decline in the latter half of the twentieth century, leading to what criminal law theorist Bernard Harcourt has termed a “cacophony of competing harm arguments without any way to resolve them.”¹¹⁶ The likely outcome of this cacophony, argues Harcourt, is that at some point “[a]nother structure will surely emerge,” perhaps even increasing our “appreciation that there is harm in most human activities.”¹¹⁷

Even a brief look at the history of legal rhetoric in the criminal law context suggests that another structure has emerged—or rather has been latent in criminal law rhetoric for over a century. As early as the 1880s, for example, reformers began to invoke the rhetoric of slavery to regulate prostitution, culminating in the passage of the White Slave Traffic Act, or Mann Act, in 1910.¹¹⁸ Born midst fear that growing numbers of women were being lured into prostitution, the Mann Act remains one of the single-most controversial pieces of legislation in American history.¹¹⁹ Historians generally agree that the stated reasons for the law—a fear that single women were being kidnapped and exploited as slaves—lacked substantial evidentiary basis.¹²⁰ Instead, the legislation became a rhetorical method for advancing a host of ulterior agendas, including immigration control and the abolition of prostitution.¹²¹ Precisely because it lent itself to such politicized uses, the Mann Act might be described as an early sanction invoking the rhetoric of slavery to criminalize “illicit” behavior—in short, an early version of the same sexual project that is being used to target Ed Bagley, who was also charged with violating the Act.¹²²

¹¹⁵ Nadelmann, *supra* note 9, at 513–14.

¹¹⁶ Harcourt, *supra* note 27, at 119.

¹¹⁷ *Id.* at 120.

¹¹⁸ LANGUM, *supra* note 9, at 4.

¹¹⁹ *See id.* at 4 (“[I]n enacting the Mann Act, Congress aimed at a very specific problem. Unfortunately, it used general language.”).

¹²⁰ *See id.* at 7 (“[T]he rhetoric behind the enforcement of moral norms has seldom been this narrowly tailored and almost always condemns conduct for its own sake.”).

¹²¹ *See* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 790 (2006) (“[L]awmakers linked Mann’s bill to the 1907 Immigration Act as enacting a single, common project”); Loftus, *supra* note 12, at 143–44 (arguing that human trafficking laws often conflict with immigration enforcement policies despite legislative intent to link the two); Nadelmann, *supra* note 9, at 513–14 (explaining the link between white slavery rhetoric and prostitution); Kristof, *supra* note 12 (emphasizing how trafficking victims are often wrongfully characterized and prosecuted as prostitutes).

¹²² Superseding Indictment, *supra* note 3, at 1–2. The Mann Act has been amended three times between 1948 and 1986. As currently written, the statute punishes individuals who transport others across state lines for illegal sex, or in Bagley’s case, trafficking. However, trafficking itself requires

While Harcourt is certainly correct that conservatives endorsed harm arguments in the 1990s, a brief look at the climate that produced the Mann Act indicates that the current cacophony in criminal law rhetoric is not new. Reformers like Anthony Comstock began to enlist harm arguments in the regulation of illicit sex as early as 1872, not long after Mill finished *On Liberty*.¹²³ According to historian Nicola Beisel, the “overwhelming majority” of Comstock’s reasons for attacking pornography in the 1870s “concern[ed] its effects on children,” including the harm that it caused them both morally and physically.¹²⁴ Among the physical effects that Comstock focused on was pornography’s tendency to encourage the “fatal habit of masturbation,” a physical and psychological “debility.”¹²⁵

Driving Comstock’s invocation of harm was a concern over collapsing morals, particularly regarding pornography and prostitution, the latter of which was not only tolerated in most cities but also legalized in some, including St. Louis in 1870.¹²⁶ As historian Paul Boyer notes, St. Louis’s decision to legalize prostitution set off “alarm bells” in “moral-reform circles all over the country.”¹²⁷ However, such bells did not simply stir morality-based arguments; they also roused the rhetoric of harm. For example, nineteenth century reformers argued that prostitution threatened not simply moral decline, but also safety, as “debauched husbands” brought syphilis home to their unsuspecting wives.¹²⁸ Consternation over prostitution’s role in spreading venereal disease to innocents spawned a “social hygiene movement” that then merged with a more moralist “Purity Movement” to suppress prostitution completely.¹²⁹ As historian David Langum notes, cities across America suddenly “began to discover they had vice problems” and formed vice commissions to investigate segregated red light districts, ultimately leading to their abolition.¹³⁰

Anti-vice crusades provide convincing evidence of how moral arguments and harm arguments merged in the nineteenth century,

coercion, and that element that cannot be satisfied if the victim acquiesced to the sexual conduct in question. Mann Act, 18 U.S.C. §§ 2421–2423 (2012); *see also* Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7102(3)(A) (2012) (defining coercion as “threats of serious harm to or physical restraint against any person”); LANGUM, *supra* note 9, at 153 (stating that if a woman followed a man across state lines, at neither the man’s request nor expense, and then resumed a sexual relationship, the Mann Act would not be violated).

¹²³ *See* NICOLA BEISEL, *IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA* 76 (1997) (discussing how Comstock linked his anti-vice movement to changes in the social order that affected and harmed the foundation of the Victorian family).

¹²⁴ *Id.* at 53.

¹²⁵ *Id.* at 54–55.

¹²⁶ PAUL BOYER, *URBAN MASSES AND MORAL ORDER IN AMERICA, 1820–1920*, at 143 (1978).

¹²⁷ *Id.*

¹²⁸ BEISEL, *supra* note 123, at 22.

¹²⁹ LANGUM, *supra* note 9, at 22–23.

¹³⁰ *Id.* at 25.

engendering a cacophony not entirely unlike that which Harcourt describes today. For example, historian Nicola Beisel notes that “[t]he anti-vice crusade[s]” of the nineteenth century “gained legitimacy from the claim that children were threatened by the vices reformers sought to suppress.”¹³¹ These included prostitution, pornography, and extra-marital sex—a problem facilitated by easily available contraceptives and abortions.¹³² Reformers like Anthony Comstock targeted such issues, pushing states to criminalize the transfer of obscenity in the mail, the distribution of contraceptives, and the performing of abortions—the latter of which “had been legal in virtually all of the states until the 1850s.”¹³³ Such issues, argues Beisel, including dangers of “pornography” and “the corruption of children by libidinous and pervasive popular culture,” prefigured “contemporary political concerns.”¹³⁴

Animating the rise of harm arguments in the nineteenth century was a sense on the part of some reformers that morality alone did not sufficiently justify why certain behaviors needed to be controlled. For example, many proponents of the charity organization movement “rejected” the “church-related approaches” prevalent earlier in the nineteenth century, partly for fear that churches might opt not to root out vice so much as to use it as a shaming device for boosting church attendance.¹³⁵ Of particular concern in this regard was the Catholic Church, an institution popular among urban immigrants yet reviled by Protestant reformers who suspected it of tolerating vice as an ineradicable “sin” and therefore an “inevitable” part of life.¹³⁶ Sectarianism, in other words, fueled the turn away from moral arguments and toward the harm principle.

Yet, harm arguments were themselves disputed at the close of the nineteenth century. For example, radical reformers like Victoria Woodhull and Tennessee Claflin both argued that behind Comstock’s anti-vice crusade lay a more sinister campaign to subordinate women, partly by subjecting them to the male-dominated institution of marriage.¹³⁷ Proponents of extra-marital sex, or “free love” as it was called at the time, joined Woodhull, Claflin, and other radicals like Ezra Heywood, who argued for the abolition of marriage on account that it “enslaved” women

¹³¹ BEISEL, *supra* note 123, at 4.

¹³² *See id.* (discussing how crusades against prostitution, pornography, abortion, and contraceptives were strengthened by the claim that these vices harmed children).

¹³³ *Id.* at 8–9, 25.

¹³⁴ *Id.* at 4.

¹³⁵ BEISEL, *supra* note 123, at 148–49.

¹³⁶ LANGUM, *supra* note 9, at 210; *see also* BOYER, *supra* note 126, at 133 (stating that Protestant churchmen saw the decline in urban Protestantism and increase in Roman Catholicism as contributing to the moral decline of the city).

¹³⁷ BEISEL, *supra* note 123, at 79–80.

and “demeaned” the very notion of love itself.¹³⁸

By invoking the trope of slavery, Heywood and others countered Comstock’s arguments about immorality—and harm—as it pertained to extra-marital sex, effectively subsuming both legal moralism and the harm principle within the larger rubric of promoting liberty.¹³⁹ This emphasis on liberty provided just the type of alternate rhetorical structure to the morality/harm debate that we see in trafficking today—only it emerged a century ago. As historian Paul Boyer puts it, “In the more lurid rhetorical flights of the antivice crusaders, to become a prostitute was to enter a life of ‘white slavery.’”¹⁴⁰ Meanwhile, “from the perspective of many of the women themselves . . . the decision represented a liberating escape from bondage,” or matrimony.¹⁴¹

At a time when African Americans were still considered inferior to whites, the invocation of white slavery proved a particularly powerful rhetorical trope aimed at mobilizing reform.¹⁴² For example, post-bellum American labor leaders regularly identified America’s industrial working class as white slaves, railing against industrial employers for treating their employees like chattel.¹⁴³ As popular labor leader Eugene Debs put it in 1897, “the African slave” was a “prince” compared to white “workmen,” who were not valued at “15 cents a cord by the slavholders [sic] of today.”¹⁴⁴

Just as labor leaders employed the rhetoric of white slavery to sanction reform at the turn of the twentieth century, so too did social reformers argue that similar dangers threatened white working-class women.¹⁴⁵ Beginning in the 1880s, for example, reformers in Chicago began to fear that “shop-girls, cigaretmakers [sic], and sewing girls” risked exploitation at the hands of unscrupulous employers who kept wages so low that women had no choice but to compromise their virtue to survive.¹⁴⁶ Such

¹³⁸ *Id.* at 76, 87.

¹³⁹ *Id.* at 87–88.

¹⁴⁰ BOYER, *supra* note 126, at 204.

¹⁴¹ *Id.*

¹⁴² See Helga Kristin Hallgrimsdottir & Cecilia Benoit, *From Wage Slaves to Wage Workers: Cultural Opportunity Structures and the Evolution of the Wage Demands of the Knights of Labor and the American Federation of Labor, 1880–1900*, 85 SOC. FORCES 1393, 1402 (2007) (discussing how the labor movement used the term white slavery to mobilize indentured laborers to fight against wage slavery).

¹⁴³ See *id.* (“In postbellum America, references to wage slavery drew on both the historical memory of slavery and indenture as well as on a racialized meaning in which color was brought in to overlay and heighten critiques of work conditions for white workers.”).

¹⁴⁴ *Debs Army Quits Work*, CHI. DAILY TRIB., June 22, 1897, at 7.

¹⁴⁵ See, e.g., *An Infamous Traffic*, CHI. DAILY TRIB., July 8, 1885, at 1 (juxtaposing London’s “white slave trade” against the experience of Chicago’s young, vulnerable working women); “*White Slaves*,” CHI. DAILY TRIB., Sept. 19, 1881, at 8 (offering a cautionary description of human trafficking operations that existed between London and the European continent).

¹⁴⁶ *An Infamous Traffic*, *supra* note 145.

fears escalated in the 1890s, fueled by sensational stories like H.H. Holmes's serial killing of women in Chicago during the 1893 World's Fair.¹⁴⁷ Lurid accounts of immigrant women trafficked into slavery followed, further intensifying calls for legal reform.¹⁴⁸ By the close of 1907, Chicago journalist George Kibbe Turner completed his torrid exposé of prostitution dens run by depraved men who preyed on hapless, Jewish, immigrant women.¹⁴⁹ Countless white slavery narratives followed, ultimately leading Illinois Congressman James Mann to sponsor the White Slave Traffic Act, or Mann Act, in 1910.¹⁵⁰

While scholars of the Mann Act have focused heavily on its race and gender implications, few have underscored the law's significance to the legal rhetoric of criminal law, particularly its use of slavery to counter and/or accentuate claims rooted in legal moralism and harm.¹⁵¹ For example, reformers began to reframe prostitution as white slavery at the turn of the century partly to override the question of whether single women who engaged in extra-marital sex might have done so willingly, for their own pleasure.¹⁵² Such "charity girls" suffered criticism for going "out with men for an evening of pleasure and drink and intercourse where no money [was] asked or offered."¹⁵³

As social conservatives struggled to reign in urban youth, the Mann Act became a popular prosecutorial tool—partly because it criminalized men who transported women "for immoral purposes," thereby obviating the question of whether those women might have actually wanted to travel.¹⁵⁴ Further, the law's invocation of liberty helped it transcend fundamental problems with legal moralism, including the question of what,

¹⁴⁷ See, e.g., ERIK LARSON, *THE DEVIL IN THE WHITE CITY: MURDER, MAGIC, AND MADNESS AT THE FAIR THAT CHANGED AMERICA* 6 (2003) (discussing the many women who went missing during the World's Fair and were then found murdered).

¹⁴⁸ See LANGUM, *supra* note 9, at 28–30 (describing the outpouring of public sympathy for young immigrant women involved in prostitution).

¹⁴⁹ *Id.* at 18.

¹⁵⁰ See *id.* at 18, 27, 40 (retelling popular white slavery narratives of the time and linking those to James Mann's decision to sponsor the White Slave Traffic Act).

¹⁵¹ To be clear, scholars have discussed the white slave traffic scare as a discursive episode "which acted as a condenser of anxieties about shifting race, sex, and gender relations." Cecily Devereux, "The Maiden Tribute" and the Rise of the White Slave in the Nineteenth Century: The Making of an Imperial Construct, 26 *VICTORIAN REV.* 1, 3 (2000). See generally BRIAN DONOVAN, *WHITE SLAVE CRUSADES: RACE, GENDER, AND ANTI-VICE ACTIVISM, 1887–1917*, at 5–6 (2006) (emphasizing the law's role in constructing racial categories); FREDERICK K. GRITNER, *WHITE SLAVERY: MYTH, IDEOLOGY, AND AMERICAN LAW* 3–4 (1990) (examining the interaction between myth and law concerning the issue of white slavery); LANGUM, *supra* note 9, at 3–4 (underscoring the political motivations behind the act).

¹⁵² See *Deals in White Slaves: Philadelphia Syndicate Has Branches in Europe*, *CHI. DAILY TRIB.*, Nov. 21, 1902, at 4 (telling the story of one hundred girls who were "[sold] into lives of shame" to more than twenty houses).

¹⁵³ LANGUM, *supra* note 9, at 121.

¹⁵⁴ Dubler, *supra* note 121, at 793.

precisely, constituted an immoral purpose. As legal historian Ariela Dubler has demonstrated, the Mann Act did not reflect shared morals so much as it provided prosecutors with a tool for delineating what precisely constituted “licit and illicit sexual expression.”¹⁵⁵ Initially defined as anything outside of marriage, prosecutors gradually began to look within marriage as well, particularly after prostitutes began to employ the “marriage cure” by betrothing their pimps.¹⁵⁶ Given natural disagreements over morality, the Mann Act benefited substantially from its association with anti-slavery rhetoric, which all parties endorsed. Consequently, “[b]etween the end of Prohibition and the mid-1940s,” notes historian David Langum, “the Mann Act vied for second place in federal convictions,” only “trailing behind interstate transportation of stolen vehicles.”¹⁵⁷

Then, abruptly, things changed. The Act began to lose support in the late 1940s and early 1950s, partly due to a shift in attitudes toward private sexual behavior on the part of American elites, and partly due to evolving attitudes about race that made appeals to ending “white slavery” politically gauche.¹⁵⁸ For example, the Supreme Court indicated as early as 1938 that the federal government might be constitutionally authorized to protect civil rights abuses against African Americans in southern states.¹⁵⁹ President Harry Truman redoubled these efforts following World War II, establishing a committee to investigate civil rights abuses in 1946.¹⁶⁰ Finally, in 1986, Congress deleted any mention of whiteness from the law.¹⁶¹

Though slavery’s color fell from view, support for regulating prostitution did not—as evidenced by a spike in concern over trafficking in the 1990s. For example, not long after Congress deleted “White Slave Traffic” from the Mann Act, President Clinton outlined a three part strategy to address the “prosecution of trafficking, prevention of trafficking, and protection of trafficked persons—to guide U.S. anti-

¹⁵⁵ *Id.* at 759, 766–67.

¹⁵⁶ *Id.* at 765.

¹⁵⁷ LANGUM, *supra* note 9, at 168.

¹⁵⁸ *Id.* at 219. Though popular during the Progressive Era, the Mann Act suffered a decline in support over the course of the twentieth century. Yet, the statute lived on. *Id.* In 1978, for example, Congress amended the law to better define “immoral purpose,” including an explicit reference to “sado-masochistic abuse.” Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 3, 92 Stat. 7, 9 (1978). In 1986, however, Congress jettisoned such terms, limiting the offense to anyone who transported an individual across state lines for the purpose of engaging in “any sexual activity for which any person can be charged with a criminal offense,” including trafficking. Child Sex Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5(a)(2), 100 Stat. 3510, 3511 (codified as amended at 18 U.S.C. § 2421 (2012)).

¹⁵⁹ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 342 (1938).

¹⁶⁰ DAVID MCCULLOUGH, TRUMAN 586–89 (1992).

¹⁶¹ Congress substituted “Transportation for Illegal Sexual Activity and Related Crimes” for “White Slave Traffic.” § 5(a)(1), 100 Stat. at 3511.

trafficking initiatives at home and abroad.”¹⁶² Clinton’s move followed in the steps of an international initiative against trafficking that dated to 1949 when a host of nations approved the first United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others—thereby entering a treaty that invoked the rhetoric of trafficking to target international and domestic prostitution.¹⁶³ Article 1 of the Convention required signatories to “punish any person” who “[p]rocures, entices, or leads away,” any woman for “purposes of prostitution.”¹⁶⁴ The law demonstrated how rationales that had once animated the Mann Act survived, this time in the guise of trafficking.¹⁶⁵

Though liberal efforts to deregulate vice in the 1960s and 1970s dampened trafficking reform, that interest returned in the 1980s when moral conservatives seized on the rhetoric of trafficking to revive interest in abolishing prostitution, a move that carried into the 1990s when President Clinton led negotiations over a new United Nations Trafficking Protocol in 1998.¹⁶⁶ That December, the United Nations General Assembly passed a resolution establishing an “intergovernmental ad hoc committee” to discuss proposals for quelling international “trafficking in women and children.”¹⁶⁷ Subsequently, the Committee met in Austria in 1999 to consider draft proposals from member states, including a draft protocol to the Convention against Transnational Organized Crime that included a provision on trafficking.¹⁶⁸ One year later, the Committee approved a final draft and sent it to the General Assembly for approval.¹⁶⁹ In a symbolic move, the Assembly agreed to meet in Palermo, Sicily—“the epicenter of the old Italian Mafia”—to sign the final document.¹⁷⁰

All 117 signatories of the Treaty agreed to make “trafficking in persons” a criminal offense.¹⁷¹ To avoid delay, Congress drafted the

¹⁶² Chuang, *supra* note 12, at 1661 (quoting Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls, 1 Pub. Papers 358 (Mar. 11, 1998)).

¹⁶³ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *approved* Dec. 2, 1949, 96 U.N.T.S. 273.

¹⁶⁴ *Id.* art. 1.

¹⁶⁵ *See id.* p.mbl. (using moral rhetoric to denounce traffic in persons as “incompatible with the dignity and worth of the human person”).

¹⁶⁶ *See* Chuang, *supra* note 12, at 1666–67; Martti Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 134, 140 (2006) (arguing for the importance of focusing anti-trafficking efforts on the largest source countries).

¹⁶⁷ G.A. Res. 53/111, ¶ 10, U.N. Doc. A/RES/53/111, at 3 (Jan. 20, 1999); Gen. Assembly Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, Draft Elements for an Agreement on the Prevention, Suppression and Punishment of International Trafficking in Women and Children, Supplementary to the Convention against Transnational Organized Crime: Submitted by Argentina, U.N. Doc. A/AC.254/8 (Jan. 15, 1999).

¹⁶⁸ Loftus, *supra* note 12, at 154.

¹⁶⁹ *Id.* at 155.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

Victims of Trafficking and Violence Protection Act, or TVPA, authorizing the federal government to prosecute those who traffic in people for labor or sex in violation of the treaty.¹⁷² Ironically, even as conservatives derided the introduction of foreign law to the United States, few protested America's participation in the U.N. protocol on trafficking.¹⁷³ In fact, political interest in trafficking rose dramatically in the United States, leading not only to federal involvement in enforcement but also to unprecedented amounts of public and private funds for anti-trafficking initiatives, despite questionable evidence that rates of trafficking had actually risen.¹⁷⁴

Part of the reason for this surge was the manner in which social conservatives found the rhetoric of trafficking and anti-slavery useful for regulating prostitution.¹⁷⁵ For example, President George W. Bush declared in 2002 that trafficking was a “modern day form of slavery” that warranted abolition precisely because it was linked to prostitution.¹⁷⁶ “[T]he United States Government,” declared Bush, “opposes prostitution and any related activities, including pimping, pandering, or maintaining brothels as contributing to the phenomenon of trafficking in persons.”¹⁷⁷ Subsequently, neo-abolitionists attempted to federalize the criminalization of prostitution by introducing a bill that would have made any one who “persuades, induces, or entices” someone “to engage in prostitution” guilty of trafficking.¹⁷⁸ Though the bill failed,¹⁷⁹ it marked an increasingly aggressive effort to enlist the federal government's anti-trafficking laws in the cause of closing the brothels.

Few venues showcase the rhetorical power of trafficking—and anti-slavery—better than the Western District of Missouri. Located far from any international border or port, the district still managed to become a leader in trafficking prosecutions during the first decade of the twenty-first century due to the “innovative techniques” of its prosecutors.¹⁸⁰ In 2009,

¹⁷² *Id.* at 157–58.

¹⁷³ *See id.* at 159 (“The House passed the bill by voice vote . . . and the Senate passed it with unanimous consent.”).

¹⁷⁴ *See* Hinman, *supra* note 16 (reporting that millions of dollars have been spent to address forced child prostitution while only ten percent of child prostitutes are involved with pimps).

¹⁷⁵ *See* Chuang, *supra* note 12, at 1680 (noting that “[t]he end of the Clinton Administration brought an opportunity for the neo-abolitionists to recalibrate U.S. anti-trafficking policy” and by extension, prostitution regulation).

¹⁷⁶ *Id.* (citing National Security Presidential Directive/NSPD-22, at 2–3 (Dec. 16, 2002), available at <http://www.combat-trafficking.army.mil/documents/policy/nspd-22.pdf>).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1692 (citing William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. § 2430).

¹⁷⁹ *Id.*

¹⁸⁰ Ron Sylvester, *Prosecutor Shares Tactics for Fighting Sex Trafficking in Kansas*, WICHITA EAGLE (Aug. 30, 2011), www.kansas.com/2011/08/30/1995200/prosecutor-shares-tactics-for.html.

for example, Cynthia Cordes became the first federal prosecutor to “successfully prosecute customers of the sex trade under anti-sex-trafficking laws” by setting up elaborate stings.¹⁸¹ One year later, the office became the first in the nation to charge men who paid for sex, namely Cook, Henry, Noel, and Stokes, as conspirators in trafficking.¹⁸² Their subsequent conviction¹⁸³ underscores the successful manner in which the rhetoric of trafficking—and slavery—enabled federal authorities to expand the criminal sanction.

Though long criticized for undermining morals and causing harm, prostitution has also been heavily associated with the rhetoric of slavery, as this Part has shown. Importantly, this rhetoric is best viewed as separate from either legal moralism or harm—a rhetorical slogan that has been invoked precisely because it transcends questions of morality and damage. As we have seen, anti-prostitution activists in the nineteenth century settled on the notion of white slavery in order to rise above a cacophony of arguments rooted in utilitarian and moralist theories surrounding sex work. The utility of this rhetoric continued quietly through the twentieth century, exploding in the 1990s when anti-prostitution activists, or neo-abolitionists, turned to the rhetoric of trafficking as a means of stirring bipartisan support for intensifying the regulation of prostitution.¹⁸⁴

The next Part will look more closely at the rhetoric of anti-slavery, entertaining the possibility that in addition to being a discursive device, it might also lead to a substantive principle upon which the penal sanction might rest—independent of moralism or harm. The articulation of such a principle raises a variety of questions, including the possibility that H. L. A. Hart interpreted J.S. Mill strategically, intentionally truncating his theory of liberty to lessen the criminal sanction. Support for such a position can be found, as we shall see, by comparing Hart’s principle to Mill’s own discussions of freedom and, even more importantly, slavery. But first, a few words on the relationship between legal moralism, harm, and Bagley’s case.

IV. THE PRINCIPLE OF FREEDOM

According to most criminal law scholars, debates over punishing certain types of conduct have tended to focus on claims rooted in either morality or harm.¹⁸⁵ While claims rooted in morality tend to be considered

¹⁸¹ *Id.*

¹⁸² Indictment at 3–13, *United States v. Bagley*, No. 10-00244-01-CR-W-DW (W.D. Mo. Sept. 8, 2010); Press Release, *supra* note 23.

¹⁸³ *See supra* note 63 and accompanying text.

¹⁸⁴ Chuang, *supra* note 12, at 1699.

¹⁸⁵ JOEL FEINBERG, HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW 136–37 (1988); *see also* SANFORD KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND

“old-fashioned,” claims rooted in harm have “turned out to have little practical bite,”¹⁸⁶ leading scholars like Bernard Harcourt to conclude that a new rhetorical “structure will surely emerge.”¹⁸⁷ While the last Part posited that such a structure involves the rhetoric of slavery and freedom, more than simple rhetoric might be at work. As this Part will demonstrate, J.S. Mill articulated an over-arching theory of liberty, or freedom, that bore mixed implications for the criminal sanction,¹⁸⁸ at times justifying a greater role for punishment than mid-century liberals like H. L. A. Hart acknowledged.¹⁸⁹

To illustrate, consider BDSM. According to most accounts, Americans are increasingly indifferent to the bedroom exploits of private couples, even couples like Ed and Nicole who engage in extreme forms of BDSM play.¹⁹⁰ This is perhaps more true now than ever before due to the overwhelming popularity of E.L. James’s 2012 novel *Fifty Shades of Grey*, a best-selling romance that describes a relationship akin to the one shared by Ed and Nicole.¹⁹¹ Boasting more than ten million copies sold in its first six weeks on American shelves,¹⁹² the book recounts the story of a twenty-two year old protagonist named Anastasia Steele who is asked by an older man, Christian Grey, to enter into a written contract substantially restricting her freedom, including her ability to speak about their relationship as well as her conduct within the relationship—which involves BDSM play.¹⁹³

To legal theorist Katie Roiphe, the popularity of *Fifty Shades of Grey* reflects a larger “cultural interest” in “sexual domination,” reflected not just in James’s novel, but also in films like *A Dangerous Method* about the early relationship between Sigmund Freud and Carl Jung, as well as studies in *Psychology Today* and findings reported in popular journalist Daniel

MATERIALS 143 (9th ed. 2012) (noting the wide acceptance of Mill’s harm principle); JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 146–47 (2012) (describing the debate on the role that harm and morality play “in the shaping of criminal law”).

¹⁸⁶ KADISH ET AL., *supra* note 185, at 143.

¹⁸⁷ Harcourt, *supra* note 27, at 120.

¹⁸⁸ *Id.*

¹⁸⁹ According to H. L. A. Hart, “legal moralism” comprises “the view that the enforcement of sexual morality is a proper part of the law’s business.” HART, *supra* note 27, at 6.

¹⁹⁰ See Julie Bosman, *10 Million Shades of Green for an Erotic Trilogy*, N.Y. TIMES, May 23, 2012, at C3 (using the success of E.L. James’s trilogy as evidence that people are indifferent to “BDSM”); Nicole Sperling, *COMIC-CON; E.L. James Feels the Love from ‘Grey’ Fans; One Credits the Author’s Work with Helping Her Get Pregnant. Another Says It’s Made His Love Life ‘Awesome,’* L.A. TIMES, July 14, 2012, at D1 (describing how *Fifty Shade of Grey* transformed the sex lives of two couples).

¹⁹¹ Sperling, *supra* note 190.

¹⁹² Bosman, *supra* note 190.

¹⁹³ JAMES, *supra* note 43.

Bergner's 2009 *New York Times* article "What Do Women Want?"¹⁹⁴ Roiphe argues that such sources suggest, in part, that precisely because American women are "less dependent or subjugated" than ever before, "theatrical fantasies of sexual surrender" have become objects of casual interest, akin to a "vacation" or "an escape from the dreariness" of daily life.¹⁹⁵

That average Americans might view BDSM practice as a "vacation," could explain why the U.S. Attorney for the Western District of Missouri ultimately decided not to pursue a trafficking charge against Ed Bagley, a real-life version of Christian Grey. Such a position would actually coincide with prevailing constitutional frames regarding private sexual activity. As recently as 2003, for example, the Supreme Court declared that the Constitution did not brook the regulation of consensual sexual behavior between adults simply for moral reasons, thereby delivering what legal theorist Bernard Harcourt has termed a "coup de grâce to legal moralism."¹⁹⁶ The case, *Lawrence v. Texas*,¹⁹⁷ invalidated a sodomy law that had been invoked against a same-sex couple in Houston, marking a dramatic deregulation of same-sex relationships, not to mention all manner of other relationships that local majorities might term illicit.¹⁹⁸ To those

¹⁹⁴ Katie Roiphe, *She Works Crazy Hours. She Takes Care of the Kids. She Earns More Money. She Manages Her Team. At the End of the Day, She Wants to be . . . Spanked?: Katie Roiphe on the Curious Case of the Modern Woman's Retro Bedroom Fantasy*, NEWSWEEK, April 30, 2012, at 24. Not all reaction to the book was positive. Libraries in places as disparate as Maryland, Florida, Georgia, and Wisconsin refused to carry the book, while evangelical critics voiced their opposition to moral themes in the work, calling it "an unrealistic portrayal of physical intimacy," and "a setup for destruction." SELENA SARNS, 50 SHADES OF BLACK AND WHITE: A BIBLICAL RESPONSE TO 50 SHADES OF GREY 22, 37 (2012); see also Adelle M. Banks, *Tied Up in Knots: '50 Shades' Making It Even Tougher for Evangelicals to Address the Touchy Topic of Sex*, ST. J.-REG. (Springfield, IL), Dec. 8, 2012, at 20 ("[F]antasizing about individuals other than one's open spouse (fictional characters included), serves no healthy or holy purpose."); Megan Gloss, *Too Hot to Handle?* DUBUQUE TELEGRAPH HERALD, June 3, 2012, at A46 (describing the battle between the book's popularity and fights to pull it from the shelves); Michael S. Rosenwald, *Controversy over "50 Shades of Grey,"* WASH. POST, June 5, 2012, at B02 (narrating the censorship controversy in Harford County); Pastor Jay Dennis, *Your Marriage: Black, White and Grey Shades*, FIRST BAPTIST CHURCH MALL (Aug. 19, 2012), <http://www.churchatthemall.com/sermon/your-marriage-black-white-and-grey-shades/> (addressing the dangerousness of the book and why women should not read it); Kasey Harris, *50 Shades of Grey—Should We Read It?*, CHANGING FACE CHRISTIANITY (Sept. 1, 2013), <http://www.changingthefaceofchristianity.com/popculturechristianity/50-shades-of-grey-should-we-read-it-part-1-of-2/> (explaining the concept of the "pop-culture book").

¹⁹⁵ Roiphe, *supra* note 194, at 26–27.

¹⁹⁶ Bernard E. Harcourt, *Foreword: "You are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers. [Raising Questions about Lawrence, Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503, 503 (2004).

¹⁹⁷ 539 U.S. 558 (2003).

¹⁹⁸ See Dubler, *supra* note 121, at 807 ("In protecting the rights of individuals to engage in same-sex sex, *Lawrence* definitely unmakes the isomorphism between nonmarriage-illicit sex and marriage-illicit sex."); see also Mary Anne Case, *Of "This" and "That" in Lawrence v. Texas*, 2003 SUP. CT.

morally-minded majorities, the Court sent a clear message, noting “the fact that the governing majority in a state has traditionally viewed a particular practice as immoral, is not a sufficient reason for upholding a law prohibiting the practice.”¹⁹⁹ This, the Court maintained, was particularly true in cases where the sexual behavior in question was practiced between consenting adults in the privacy of their own home.²⁰⁰

Though focused on same-sex relationships, *Lawrence* carried with it broader implications for those involved in other “illicit” behaviors, like BDSM.²⁰¹ For example, many state sodomy laws prohibited anal and oral sex between opposite-sex partners, both commonly incorporated into BDSM play.²⁰² *Lawrence*’s declaration that such activities enjoyed protection under the liberty interest of the Fourteenth Amendment transported a considerable amount of historically illicit behavior across what legal historian, Ariela Dubler, has termed the “illicit/licit divide,” making it impossible to regulate couples like Ed and Nicole on strictly moral grounds.²⁰³ While Dubler focuses on the relationship between the illicit/licit divide and marriage—highlighting the fact that the Supreme Court has yet to extend the right to marry to same-sex couples—her point underscores the larger fact that what is and is not illicit remains culturally contingent. While some believe that the decriminalization of gay sex paved the way for the legalization of gay marriage, others disagree, arguing instead that the Supreme Court decriminalized gay sex precisely to prevent the legalization of gay marriage.²⁰⁴ Justice Antonin Scalia articulated the latter view in his *Lawrence* dissent, framing the struggle over the illicit/licit divide in terms not of constitutional interpretation but cultural war.²⁰⁵ “It is clear from this [decision] that the Court has taken sides in the culture war,”

REV. 75, 86 n.46 (registering surprise that Scalia did not mention S/M as one of the “parades of horrors” that *Lawrence* might have deregulated).

¹⁹⁹ *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal quotation marks omitted).

²⁰⁰ *Id.* at 571.

²⁰¹ Professor Mary Anne Case argues that *Lawrence* did more than simply deregulate same-sex relationships. See Case, *supra* note 198, at 78 (clarifying that *Lawrence* did not target anal sex in particular). For an analysis of “illicit” versus “licit” categories, see Dubler, *supra* note 121.

²⁰² The Supreme Court upheld one such law in 1986, over a decade before *Lawrence*. See *Bowers*, 478 U.S. at 196 (finding a Georgia statute criminalizing sodomy regardless of sexual orientation to be constitutional). To the extent that BDSM practice might include oral or anal sex, such activities would fall under traditional sodomy statutes. Other BDSM practices, however, remain unregulated. See Mary Anne Case, Commentary, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1684 (1993) (suggesting that some BDSM conduct is not generally criminalized by sodomy statutes due to the legislature’s inability to imagine such conduct).

²⁰³ See Dubler, *supra* note 121, at 812 (claiming *Lawrence* moved sexual behavior across the illicit/licit divide without regard to the marital status of the couple).

²⁰⁴ E.g., Dubler, *supra* note 121, at 809–10.

²⁰⁵ *Lawrence*, 539 U.S. at 602–03 (Scalia, J., dissenting).

lamented Scalia, “departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”²⁰⁶ Though vague on how precisely the Court might remain a “neutral observer” in liberty interest cases, Scalia’s dissent highlights the oft-observed fact that the illicit/licit divide is itself a political battle line—a contested front in what Bernard Harcourt has termed “a war of sexual projects that is being fought on American soil.”²⁰⁷

Ed and Nicole’s place in those projects is worth contemplating, if for no other reason than to better discern how, precisely, the rhetoric of anti-slavery might have served either as a separate or over-arching legal principle sanctioning convictions in the case. For example, just as there are problems with the notion of rooting BDSM prosecutions in notions of morality, so too are there problems with framing cases like Ed and Nicole’s in terms of harm.²⁰⁸ After all, the very premise of BDSM culture is the notion that the application of pain can yield heightened levels of pleasure.²⁰⁹ Hence, the government’s effort to frame Ed and Nicole’s BDSM play as torture and abuse fails to capture the cultural context, and subjective appeal, of such behavior.²¹⁰ Further, the government’s decision to convict Bagley of sleeping with, but not trafficking, Nicole points to doubts it may itself have had regarding its evidence.²¹¹ While some might contend that Bagley’s years of grooming and his assiduous attention to age limits and consent agreements amounted to a subtle, gradual process of coercion—not to mention popular perceptions of BDSM as a type of “vacation”—it may have dissuaded the government from taking his case to trial.²¹² Ironically, this might explain why defendants who only played a marginal role in the case confessed more easily to trafficking than Ed: they were less cognizant of the full scope and complexity of the law of

²⁰⁶ *Id.* at 602.

²⁰⁷ Harcourt, *supra* note 196, at 506.

²⁰⁸ Here too, *Lawrence* might pose problems. While it is certainly possible that the U.S. Attorney felt that Bagley harmed Nicole, *Lawrence* acts like a defensive bulwark in this particular sexual project, discouraging efforts to invoke harm as a justification for regulating consensual BDSM practice. *Lawrence*, 539 U.S. at 602–04.

²⁰⁹ MILLER & DEVON, *supra* note 38, at 4, 9–11 (explaining that in BDSM culture, receiving pain in the context of domination, bondage, corporal punishment, and flagellation between consenting adults elicits pleasure and eroticism).

²¹⁰ Of course, the government may have felt that Nicole never consented to her relationship with Bagley, particularly given the young age at which she began to be groomed. Yet, the U.S. Attorney never charged Bagley with trafficking a minor, even though he did end up pleading guilty to using the Internet to facilitate sex with a minor. Put differently, the possibility that Bagley might have trafficked Nicole by taking advantage of her young age is a possibility that not even the government was willing to accept.

²¹¹ Pursuant to the TVPA, coercion need only be proven when the victim is over eighteen. 18 U.S.C. § 1591 (2012).

²¹² Bagley’s slave contract might have been an effort to record Nicole’s consent to their BDSM activities.

trafficking, not to mention the counter-cultural norms of BDSM.

Lawrence might also have played a role. Since *Lawrence*, mutually consensual sexual behavior between adults has enjoyed constitutional protection—even if it causes alleged harm. For example, the Court in *Lawrence* ignored claims that sodomy threatened the spread of sexually transmitted disease, holding instead that the Fourteenth Amendment broadly protected private consensual behavior.²¹³ Hence, harm proved relatively useless as a rhetorical tool—ditto for moralism.²¹⁴ To compensate for this, the Supreme Court focused heavily on consent in *Lawrence*, arguably using it as a substitute for arbitrary measurements of damage.²¹⁵

With consent comes freedom.²¹⁶ Given the challenges that BDSM practice poses to questions of harm, it remains possible that trafficking provided the government with an opportunity to seize on the currency of liberty as a frame for prosecuting a variety of players in a complex, morally obtuse drama. As we have seen, trafficking offers rhetorical possibilities that other criminal penalties do not, possibilities that may even render it a powerful weapon against the Supreme Court's firewall surrounding intimate conduct in *Lawrence*. Even as *Lawrence* hinges on the arguably popular notion that the Constitution protects a liberty interest in private sexual conduct,²¹⁷ trafficking bounds that conduct by invoking the specter of coercion. Closely tied to coercion, of course, is the rhetoric of slavery, anti-slavery, and freedom, all cultural frames that engender considerable popular support, marshal considerable regulatory potential, and seem to fit nicely with Bagley's case.²¹⁸

While Ed can claim that Nicole engaged willingly in her own enslavement, jurors might find it repugnant that he asked her to sign a formal slave contract, a violation of the spirit of liberty more profound than either legal moralism or harm. Indeed, the idea that one might sign away one's freedom seems to defy the very purpose of the Fourteenth Amendment, an amendment forged in the aftermath of a bloody civil war

²¹³ *Lawrence*, 539 U.S. at 567 (majority opinion).

²¹⁴ See Harcourt, *supra* note 27, at 192–93 (asserting that there was “a certain disequilibrium in the relative rhetorical force of the competing arguments”).

²¹⁵ *Lawrence*, 539 U.S. at 567.

²¹⁶ MILL, *supra* note 1, at 101.

²¹⁷ *Lawrence*, 539 U.S. at 569.

²¹⁸ See Mayer N. Zald, *Culture, Ideology, and Strategic Framing*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS* 261, 261 (Doug McAdam et al. eds., 1996) (recognizing the recent focus on “strategic framing of injustice and grievances, their causes, motivations, and associated templates for collective action”). See generally BALES & SOODALTER, *supra* note 103 (discussing modern slavery, including human trafficking); David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464 (1986) (discussing cultural frameworks touching on the topic of slavery).

dedicated to eradicating human bondage.²¹⁹ Further, the notion that one might surrender one's liberty also falls askance of the political theory espoused by John Stuart Mill.²²⁰

In the same essay that he articulated his famous harm principle, Mill also warned that one should not be able to "sell himself, or allow himself to be sold, as a slave," arguing that it violates the "principle of freedom."²²¹ This principle, argued Mill, overrides personal choice. Even if one finds it desirable to be a slave, the state should not allow individuals to sacrifice their freedom, because "[t]he principle of freedom cannot require that [one] should be free not to be free."²²² Granted, Nicole's slave contract bore no legal validity. However, the argument could be made that as a matter of principle, efforts to recreate chattel slavery through D/s practice approaches something like a common law marriage, an informal relationship in which individuals hold themselves out to be married—or in this case enslaved—thereby defying the *principle* of freedom.

To criminal law scholar Joel Feinberg, Mill's "principle of freedom" is simply another facet of the harm principle, an appeal "not to a sovereign *right* to 'dispose of one's own lot in life' but to a person's own *good*."²²³ Yet, this might be an incomplete inflation of harm's importance within Mill's larger theory of freedom or liberty. For example, legal scholar Vincent Blasi demonstrates that Mill granted "extraordinary protection" to the freedom of expression, even in cases where "severe harms" were at stake.²²⁴ This move stemmed from a larger conviction that questions of "utility" should remain subordinate to the development of individuals as "progressive being[s]," even if it meant opposing custom, conformity, and religion.²²⁵ One of Mill's problems with "Calvinistic theory," for example, was that it placed "obedience" above freedom.²²⁶ Rather than encourage obedience, Mill believed that law should foster "the cultivation of individuality."²²⁷ "[I]t is only the cultivation of individuality," argued Mill,

²¹⁹ WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 62 (1998).

²²⁰ *See* MILL, *supra* note 1, at 101 (denouncing the idea that a person has a right to sell themselves into slavery).

²²¹ *Id.*

²²² *Id.*

²²³ FEINBERG, *supra* note 185, at 75. The loss of one's freedom essentially constitutes an "evil" and falls easily "among many [other] types of harm." *Id.* at 75–76.

²²⁴ Vincent Blasi, *Shouting "Fire!" in a Theater and Vilifying Corn Dealers*, 39 *CAP. U. L. REV.* 535, 540 (2011).

²²⁵ *See id.* at 541 ("Those permanent interests related to progress depend, Mill firmly believes, on widespread free thought and on the presence throughout the society of persons with the strength of character to be bold in their inquires, unshackled by custom and convention.").

²²⁶ MILL, *supra* note 1, at 59.

²²⁷ *Id.* at 60–61.

“which produces, or can produce, well-developed human beings.”²²⁸

Mill’s doubts about religion and his interest in developing individuality are worth noting, precisely because they point to a rationale for legal intervention in private matters otherwise downplayed by criminal law scholars.²²⁹ In his famous “pared down” version of Mill’s theory, for example, H. L. A. Hart deliberately occluded any mention of the development of individuality, focusing instead on a “simple and succinct statement” about harm, noting that “[t]he only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others.”²³⁰ This move, argues Bernard Harcourt, “structured the debate over the legal enforcement of morality” for the remainder of the twentieth century, pitting legal moralism against harm.²³¹

That Hart deliberately truncated Mill is not something criminal law scholars have considered, though its implications are potentially profound. For example, Mill enumerated a variety of scenarios where power could be “rightfully” “exercised” over individuals “against [their] will” that arguably did not involve preventing harm.²³² For example, he sanctioned the use of unfettered power against “children,” “young persons,” and anyone who was too “backward” to be improved by “free and equal discussion.”²³³ Mill also declared it a “self-evident axiom” that the state should “compel” parents to educate their children “up to a certain standard.”²³⁴ If they failed, he maintained, they should be punished; subjected to “a moderate fine” determined by whether or not their children passed “public examinations.”²³⁵

Mill’s support for punishing parents who did not adequately educate their children stemmed not simply from his conviction that the law should prevent harm, but a larger conviction that the law should be used to engender a particular type of person: a creative, free-thinking individual, or what Mill termed a “genius.”²³⁶ While Mill recognized that not all persons could achieve genius status, he placed the cultivation of such figures at a premium, arguably even above the interests of majoritarian democracy.²³⁷ “Precisely because the tyranny of opinion is such as to make eccentricity a

²²⁸ *Id.* at 61.

²²⁹ For a more in-depth discussion of Mill’s theory of development, see Russell Hittinger, *The Hart-Devlin Debate Revisited*, 35 AM. J. JURIS. 47 (1990).

²³⁰ HART, *supra* note 27, at 4 (quoting MILL, *supra* note 1, at 9) (internal quotation marks omitted); see Harcourt, *supra* note 27, at 122–23, 129 (noting that Hart “pared down” Mill’s thesis).

²³¹ Harcourt, *supra* note 27, at 122–23.

²³² MILL, *supra* note 1, at 9–10.

²³³ *Id.*

²³⁴ *Id.* at 104.

²³⁵ *Id.* at 105.

²³⁶ *Id.* at 62.

²³⁷ *Id.* at 62–63.

reproach,” argued Mill, “it is desirable, in order to break through that tyranny” that government should foster individuality, “eccentricity,” and “genius.”²³⁸ The way to do this, argued Mill, was to guarantee a certain degree of personal freedom, for “[g]enius can only breathe freely in an *atmosphere* of freedom.”²³⁹

Yet, that freedom was itself bounded by the larger goal of developing individuality, not conformity. Even if the majority of people longed for “the despotism of custom,” or the “mediocrity” of religion, argued Mill, society’s proper posture, according to him, was the encouragement of unique, creative individuals with exemplary talents—even if it meant forcing parents to educate their children in a certain way.²⁴⁰ “I insist thus emphatically on the importance of genius,” noted Mill, continuing that “[t]he initiation of all wise or noble things comes and must come from individuals; generally at first from some one individual.”²⁴¹

Because he prized individual genius above community norms, Mill endorsed a variety of regulations that may or may not have had anything to do with harm. This explains why he called for mandatory education and for penalties against parents who did not sufficiently train their children.²⁴² It also explains why he refused to extend legal protection to entire populations of what he termed “backward” people and “barbarians” who could not be improved by “free and equal discussion.”²⁴³ Such measures, argued Mill, made the development of genius among a select few more likely, even if it left groups considered “backward” unprotected.²⁴⁴

Committed to fostering personal creativity, Mill endorsed state measures that intruded more heavily into private life than criminal law theorists like H. L. A. Hart have let on. Indeed, Mill himself never actually invoked the term “harm principle,” referring instead to the “principle of freedom” or “liberty” as his animating principle of regulation.²⁴⁵ Acknowledging this is important. While the invocation of harm lends itself to diminishing the criminal sanction, to dismantling legal moralism, and so on, the celebration of individuality, eccentricity, and “genius” invites a more ambiguous regulatory agenda, one that H. L. A. Hart chose not to expound.²⁴⁶ In fact, one might say that the principle of freedom introduces a new basis for justifying and expanding the criminal sanction.²⁴⁷

²³⁸ *Id.* at 64.

²³⁹ *Id.* at 62.

²⁴⁰ *Id.* at 62–63, 67, 104.

²⁴¹ *Id.* at 62–63.

²⁴² *Id.* at 104.

²⁴³ *Id.* at 10, 105.

²⁴⁴ *Id.* at 105.

²⁴⁵ *Id.* at 103.

²⁴⁶ *See id.* at 62 (noting that “[g]enius can only breathe freely in an *atmosphere* of freedom”).

²⁴⁷ *See* FEINBERG, *supra* note 185, at 72–73 (noting that laws protecting the rights of those who

To take just a few examples, the principle of freedom might be invoked as a rationale for those who try to recreate chattel slavery, not just individuals like Ed Bagley but those who participate in even more elaborate D/s practices, like paying money for slaves—such as Master Mark.²⁴⁸ The freedom principle might also be invoked to criminalize the distribution—but not necessarily the possession—of certain drugs on the theory that those who knowingly profit from addiction are responsible for spreading a form of slavery, or un-freedom.²⁴⁹ As Mill himself noted, the “interest” of “dealers in promoting intemperance” rather than just imbibers “is a real evil and justifies the State in imposing restrictions and requiring guarantees which, but for that justification, would be infringements of legitimate liberty.”²⁵⁰ Further, the freedom principle might be invoked to regulate purveyors of other types of vice, like prostitution, a point that Mill raised by acknowledging that while fornication “must be tolerated” the same did not necessarily apply to whether “a person [should] be free to be a pimp.”²⁵¹

Political philosophers have proven more open to exploring the implications of Mill’s concept of freedom than criminal law theorists. Compare, for example, H. L. A. Hart’s exclusive emphasis on harm to Gerald Dworkin’s argument that Mill envisioned the use of state power “to heighten a person’s ability to lead a rationally ordered life,” a point that coincides with the development of individuality, creativity, and genius.²⁵² In a manner that suggests the plausible existence of a distinct principle of freedom, Dworkin also endorsed the idea that Mill would have sanctioned government intervention in private life out of “a concern not just for the happiness or welfare, in some broad sense, of the individual but rather a concern for the autonomy and freedom of the person.”²⁵³ Though criminal law scholars like Joel Feinberg have tended to resist such “freedom maximization” arguments by attempting to roll them into calculations of harm,²⁵⁴ even Feinberg concedes that freedom and harm do not necessarily

would be slaves, and thereby limiting a slave’s ability to contract, protects and does not interfere with the slave’s liberty).

²⁴⁸ See *supra* text accompanying notes 56–60 (describing a situation in which the “master” of a sex slave was paid by others so that they might “engage in sexual acts and torture sessions” with the sex slave).

²⁴⁹ MILL, *supra* note 1, at 99.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 98. But see Jeremy Waldron, *Mill on Liberty and on the Contagious Diseases Acts*, in J.S. MILL’S POLITICAL THOUGHT: A BICENTENNIAL REASSESSMENT 11, 18 (Nadia Urbinati & Alex Zakaras eds., 2007) (commenting that Mill was not always clear about social interference).

²⁵² HART, *supra* note 27, at 30; Gerald Dworkin, *Paternalism*, in PHILOSOPHY OF LAW 174, 184 (Joel Feinberg & Hyman Gross eds., 1975). But see Richard J. Arneson, *Mill Versus Paternalism*, 90 ETHICS 470, 470 (1980) (analyzing the conclusions of various authors on the subject of paternalism).

²⁵³ Dworkin, *supra* note 252, at 174, 184.

²⁵⁴ FEINBERG, *supra* note 185, at 76.

coincide, noting that one might have “a powerful psychological” imperative to willingly impose harm upon oneself, either out of “atonement for some sin,” “the achievement of perfect self-discipline through a kind of self-abasement,” or “a religious need to achieve genuine humility through the lowliest status he can acquire.”²⁵⁵ “Voluntary enslavement for some of these reasons,” continues Feinberg, “seems no crazier than the solitary forms of holy asceticism, like choosing the life of an anchorite in the desert, wearing sackcloth and ashes, and mortifying the flesh.”²⁵⁶

V. CONCLUSION

The prosecution of Ed Bagley and four other defendants in rural Missouri for sex slavery points to new, even strange directions for the law of trafficking.²⁵⁷ To begin, Bagley’s D/s relationship, with FV/Nicole complicated the case precisely because it hinged on acts unique to BDSM subculture. However, the government deliberately decontextualized such acts in its indictment, arguably misrepresenting Ed’s treatment of Nicole as a matter of simple abuse. Further, the government decontextualized Ed and Nicole’s “slave contract,” using it to reinforce its claim of trafficking, along with Nicole’s barcode tattoo.

While the government could have argued that a subtle form of coercion underlay Ed’s activities, the Western District of Missouri pursued a different path, accepting a non-trafficking related plea from Ed.²⁵⁸ Meanwhile the government convicted the remaining defendants of conspiracy to traffic—an odd asymmetry given that they had much less contact with Nicole.²⁵⁹ Part I concludes that the government’s case against Ed ultimately proved less important than its pursuit of marginal defendants who paid for sex with Nicole, pointing to a new role for the law of trafficking—the regulation of men who pay for sex.

Part II expands on the relationship between trafficking and prostitution to make a larger point, namely that trafficking invites creative use precisely because it provides prosecutors with a more salient justification for punishment than either legal moralism or harm; a rhetorical plea to anti-slavery that enjoys a longstanding but under-theorized role in criminal law rhetoric. According to criminal law scholar Bernard Harcourt, criminal

²⁵⁵ *Id.* at 73.

²⁵⁶ *Id.*

²⁵⁷ It is important to note here that Bagley’s case is not the only case where trafficking has been used to prosecute D/s couples. However, it is the first case in which individuals who paid for sex with a submissive were convicted of trafficking. *See, e.g., United States v. Marcus*, 487 F. Supp. 2d. 289, 292 (2007) (noting that the charges in the case “arose out of conduct related to an alternative sexual lifestyle, known as bondage”).

²⁵⁸ *See supra* note 23 and accompanying text.

²⁵⁹ *See supra* note 67 and accompanying text.

law rhetoric is rooted in a fairly straightforward dichotomy between morality and harm.²⁶⁰ While most criminal law theorists agree with this postulate,²⁶¹ Bagley's case indicates that a third trope is also operative: freedom.

Part III demonstrates that freedom/anti-slavery rhetoric has long played a role in American criminal law, dating at least as far back as the Mann Act of 1910. Initially styled the White Slave Traffic Act, the law emerged during a time in American history when reformers sought desperately to control prostitution, immigration, and eroding rural values. When it came to such projects, neither appeals to morality nor harm proved as salient as invocations of slavery, pointing to a longstanding, if lost, pillar of legal rhetoric, a counter to legal moralism and harm rooted in Mill's notion of liberty. Recovering the rhetorical role of freedom in the criminal law context is the most significant contribution of this piece.

Part IV engages the doctrinal implications of freedom as a principle, asking whether anti-slavery's recurrence in criminal law discourse might be more than simply rhetorical; a possible free-standing principle upon which to rest criminal punishment—one deliberately submerged by H. L. A. Hart in the 1960s. While most criminal law scholars merge Mill's thoughts on freedom and liberty with his mention of harm, Mill himself espoused an interest in using state power to encourage creativity, individuality, and "genius," all regulatory agendas potentially more complicated than H. L. A. Hart's "pared" down emphasis on damage.²⁶² Perhaps no better example of this exists than Mill's own assertion that selling oneself into slavery violates the "principle of freedom."²⁶³ Even criminal law scholars like Joel Feinberg concede that regulating such choices might actually have little to do with the analytics of harm.²⁶⁴ Even if H. L. A. Hart is not wrong on Mill, he encouraged an overly narrow interpretation of his work.

²⁶⁰ See generally Harcourt, *supra* note 27 (explaining various contexts in which morality and harm intersect).

²⁶¹ See, e.g., FEINBERG, *supra* note 185, at 136–37 (discussing different views of morality in criminal law rhetoric); KADISH ET AL., *supra* note 185, at 143 (labeling John Stuart Mill's "harm principle" as the "prevailing principle" of arguments rooted in harm); KAPLAN, *supra* note 185, at 146–47 (establishing John Stuart Mill's "harm principle" as the origin of arguments rooted in harm in criminal law rhetoric).

²⁶² See also Hittinger, *supra* note 229, at 51 (discussing how Mill sets out his harm principle at the very beginning of *On Liberty*, how Hart and Devlin criticize each other for interpreting Mill "tendentiously," and how they are both correct because "Hart and Devlin take [Mill's] rule and move immediately to the problem of applications, which Mill himself reserves for the final chapter of his book.").

²⁶³ MILL, *supra* note 1, at 101.

²⁶⁴ FEINBERG, *supra* note 185, at 76.