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Skin Deep Activism: American Exceptionalism and the Fight Against Human Trafficking

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Introduction

“[i]t is beyond comprehension why we should look...to...a legal, political, and social culture quite different from our own.”¹ These were Supreme Court Justice Antonin Scalia’s words in his famous dissent in the case of Roper v. Simmons.² Justice Scalia is known as a strident sovereigntist. As a proponent of sovereign equality on the Supreme Court, Justice Scalia does not believe that the United States [hereinafter U.S.] should be influenced in its jurisprudence by the laws and policy of foreign states.³ This view also encompasses the pushback against the global governance model of the international community. This model sees the rise of international law as a binding source on an increasingly interdependent globalized community of nation states.⁴ The idea that the US is a sovereign state impenetrable to international schools of thought, is based on the historical perception within the US and outside of its borders, that the US is exceptional and should conduct its affairs through a lens of uniqueness and, in some respects, superiority.⁵

American exceptionalism has been an influential factor in U.S foreign policy as well as in national law-making since the U.S. emerged as one of the international superpowers following the First World War.⁶ Even prior to this modern period, the US

¹ *Roper v. Simmons*, 543 U.S. 551, 626-27 (2005).

² Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1594 (2006) [hereinafter Resnik].

³ *Id.*

⁴ Steven Wheatley, *A Democratic Rule of International Law*, 22 EUR. J. INT'L. L. 525, 526 (2011).

⁵ Resnik, *supra* note 2, at p. 1582-83.

⁶ See Steven G. Calabresi, *"A Shining City on A Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 BU L. REV. 1335, 1366-67 (2006) (outlining the way in which the U.S., following the 1st and 2nd World Wars,

avoided many of the pitfalls of other European countries by perpetuating the idea of its unique nature. The U.S. established the constitutional mantra of “liberty and justice for all” as a battle cry to separate itself from the tyranny of mother Britain.⁷

The notion of American exceptionalism allowed the young U.S. to grow as a nation with a common purpose and, consequentially has shaped the development of U.S. policy both inward with local and federal legislation, as well as outward with the its approach to international law.⁸ The U.S Constitution is the best example of the inward effects of exceptionalism. As the supreme law of the land it highlights the treatment of the individual citizen and puts greater emphasis on nationality as a gateway to liberty.⁹

The other side of this coin is the outward expression of exceptionalism through U.S. foreign policy. This approach has manifested itself in numerous administrations, showing particular salience following the first and second World Wars.¹⁰ The U.S. policy during these times was never that it was joining these conflicts as an interested party but rather that it had an obligation to fight. From Wilson to Roosevelt the U.S. saw itself as a beacon of light swooping in to aid the democratic interests of Western Europe.¹¹

This nationalistic approach was juxtaposed against growing transnational issues. Advancements in travel and a more globalized economy have created a challenge to the

returned to its revolutionary era image of a “shining city on the hill”) [hereinafter Calabresi].

⁷ Jon Hanson, Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV CR-CLL. REV. 413, 415 (2006).

⁸ Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1483 (2003) [hereinafter Koh].

⁹ Louis Henkin, *Foreign Affairs and the United States Constitution* 185-188 (Oxford University Press, 2nd ed. 1996).

¹⁰ Michael Ignatieff, *American Exceptionalism and Human Rights* 1-3 (Princeton University Press, 2005) [hereinafter Ignatieff].

¹¹ Calabresi, *supra* note 6.

once closely held ideal of an insulated America.¹² One of the most prominent of these transnational issues is that of human trafficking, particularly sex trafficking.¹³

American exceptionalism has created a culture of legal thought in the U.S. that has hindered the development of effective anti-trafficking policies by ignoring the transnational nature of the issue and dismissing the culpability of actors and actions within U.S. borders. In order to illustrate the way in which American exceptionalism has evolved over the years to encompass human trafficking legislation and policy, first I will give a history of the doctrine itself including its origins in the United Kingdom. Following this historical analysis I will present the ways in which this doctrine has been implemented over the years within U.S. borders, including how its implementation has manifested itself within the leading national legislation on human trafficking, the Trafficking Victims Protection Act. Finally, I will show the negative result of the doctrine of exceptionalism on trafficking legislation and how it has caused skin-deep activism by the U.S. in its attempt to prevent and prosecute trafficking within its borders, as well as its ability to properly view the issue and its root causes through a lens of objectivity.

The History of American Exceptionalism

The doctrine of exceptionalism is a familiar one in the legislative history of the U.S. It has been influential in the development of American foreign policy, jurisprudence and legislation drafting from its infancy. The doctrine has been discussed and analyzed in its purpose by everyone from legal scholars and Secretaries of State, to several American

¹² Resnik, *supra* note 2, at p. 1670.

¹³ Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 29-31 (2001) [hereinafter Hyland].

Presidents.¹⁴ The leading theories on the concept of exceptionalism have created a context for statutory law as well as judicial interpretation throughout the years.¹⁵ Historically, exceptionalism has not been understood as having one concrete definition with clear and concise effects and breadth. It evolved seemingly to suit the political need at the time. The concept has been defined to be over-inclusive of various policy issues and within the narrow scope of specific rights.¹⁶ The purposes of the following analysis however, are not to deconstruct the numerous incarnations of the term “exceptionalism”, but rather to illustrate its evolution over time to provide a backdrop for the U.S.’s current stance on human sex trafficking legislation.

The concept of American exceptionalism has been a political ideology since the American Revolution and America’s subsequent independence from Great Britain.¹⁷ This is perhaps what makes exceptionalism so purely American in many respects. Further investigation evidences the fact that the idealizing of America started even prior to these events.¹⁸ This is shown by the European necessity for American colonization as a place for religious freedom and a more Utopian way of living.¹⁹ It is an ideology that contributed to a greater revolution based on the premise that the social theories of the founding fathers and revolutionaries were morally superior to any existing political or

¹⁴ See generally Resnik, *supra* note 2. (Professor Resnik’s article mentions various presidents and other political officials basing their policy goals off of the idea of American exceptionalism).

¹⁵ See Ignatieff, *supra* note 10 at 4-11. (In his introduction to the topic of exceptionalism Professor Ignatieff offers three versions of the doctrine that influence statutory law and judicial interpretation respectfully); Koh, *supra* note 8 at 1482-83 (2003).

¹⁶ Id.

¹⁷ Calabresi, *supra* note 6 at 1358.

¹⁸ Id. at 1345-52.

¹⁹ Id. at 1345-46.

social “dogma”.²⁰ The primary manifestation of this ideological purpose is the drafting of the U.S. Constitution and its Bill of Rights.²¹ This is especially important to the purposes of this essay as the rights bestowed by the Constitution and American legislative principles that have grown out of it shape not only the current statutory policies on human trafficking but also are the driving force behind the call to reform current legislation.²²

It has been the struggle of the US to reconcile this closely held ideal with two different viewpoints: exceptionalism as a way for the US to lead the rest of the world by example, and exceptionalism as an excuse to act unilaterally and not comply with the international human rights conventions.²³ In recent years the term has become somewhat of a misnomer referring to a partisan political ideological myth, however, the way in which the U.S. has postured itself internationally and the analytical framework for the decision-making process on legislation and foreign affairs is anything but myth.²⁴

The U.S. historically has been a driving force behind shaping international human rights standards because of its “exceptional status”. That is to say that despite the economic rise and development of countries like China, the U.S. still holds the strongest power of persuasion when it comes to the legitimacy of international law.²⁵ For this

²⁰ Randy E. Barnett, *The Separation of People and State*, 32 HARV. JL. & PUB. POL’Y. 451 (2009).

²¹ Id.

²² Hyland, *supra* note 13 at 30-31.

²³ Resnik, *supra* note 2 at 1582-83.

²⁴ Id.

²⁵ See Ignatieff, *supra* note 10. (noting the “exceptional leadership” of the U.S. in the promotion of international human rights).

reason, US ratification is a pre-requisite to the success of human rights treaty bodies.²⁶ For example, the U.S. has failed to ratify the Convention on the Rights of the Child, Convention on the Elimination of All forms of Discrimination against women, and the International Convention on the Rights of All Migrant Workers and Members of their Families.²⁷ Treaties such as those just mentioned have the goal of creating international obligations that member states must adhere to in accordance with basic human rights and the dignity of the individual. Because the U.S. has not yet ratified, it is not bound by such obligations.²⁸

The failure of the League of Nations is also an example of the power the U.S. has simply through a lack of consent. The negative affect of that lack of consent on the Western world was so influential that the legitimacy of the League of Nations was never truly established.²⁹ The League of Nations was established following World War I and its general purpose was collective security and maintaining the peace and stability of the international community as it existed at that time.³⁰ Additionally, within the League of Nations' Covenant and related treaties were provisions to protect minorities in Europe and combat human trafficking.³¹ Despite the fact that President Woodrow Wilson helped shape the League and championed its ratification internationally, Congress voted against

²⁶ Id. at 6.

²⁷ Convention on the Rights of the Child, Nov, 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women, Mar. 1, 1980, 1249 U.N.T.S. 13; International Convention on the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3.

²⁸ Lori Fisler Damrosch, Louis Henkin, Sean D. Murphy & Hans Smit, *International Law Cases and Materials*, 113 (West, 5th ed. 1993).

²⁹ Michael D. Ramsey, *Reinventing the Security Council: The U.N. As A Lockean System*, 79 NOTRE DAME L. REV. 1529, 1544 (2004).

³⁰ Id.

³¹ Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L. L. 1, 6 (2004).

joining the League in 1919.³² This was the first major lack of commitment to the League that eventually led to its functional collapse in 1939 when it failed to prevent a second World War. In 1946 the League was completely replaced by the United Nations.³³

The U.S.'s lack of support is not the only negative affect of non-ratification. The U.S. also excepts itself from responsibility and liability for international obligations such as banning the execution of minors under the age of 18.³⁴ Far too often the U.S. has signed on to a treaty obligation and then used exceptionalism as a political tool to escape responsibilities it does not feel obligated to fulfill.³⁵ This has become the catalyst for national legislation on human rights. But does the fact that this national legislation does not have to comply with the International standard make it a shell of what its ideal purpose should be? Is it a disarmed weapon against human sex trafficking? Exploring specific examples of U.S. application of exceptionalism to its international obligations is the only way to properly analyze its progress.

How has American Exceptionalism been Implemented in the U.S. Historically

The post-World War II era saw the rising international commitment to the dignity of human beings.³⁶ It is no surprise that the U.S. has claimed to be a leader in this movement. One need only look to the Bill of Rights to see the implicit importance of

³² Koh, *supra* note 8 at 1481.

³³ Ibrahim J. Gassama, *World Order in the Post-Cold War Era: The Relevance and Role of the United Nations After Fifty Years*, 20 BROOK J. INT'L. L. 255, 330 (1994).

³⁴ Koh, *supra* note 8 at 1485-86.

³⁵ Ignatieff, *supra* note 10 at 6.

³⁶ Resnik, *supra* note 2 at 1594.

basic human dignity as an American value.³⁷ Even in the area of human rights however, the U.S. has chosen to remain distinct in its implementation of human rights legislation. The U.S. has entered a pattern of reservations preserving the superiority of the Constitution over international law.

Michael Ignatieff, in his book *American Exceptionalism and Human Rights*, describes this pattern as “American Exemptionalism.” This exemptionalism caused the U.S. to half-heartedly be a part of the multilateral treaty process with other sovereign states.³⁸ The U.S. often lends its support to the drafting process and signing of various treaties as long as it is able to constantly assert its constitutional superiority through the process of entering reservations.³⁹

Other modern day examples of the manifestation of American exceptionalism in this sphere are the U.S. reservations lodged on the adoption of the International Covenant on Civil and Political Rights [hereinafter ICCPR] and the International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter ICERD].⁴⁰ The US signed on to these international human rights treaties but made sure to enter reservations that would give it the freedom to be able to determine how those treaties should be implemented domestically.⁴¹

³⁷ Id.

³⁸ Ignatieff, *supra* note 10 at 5.

³⁹ Id.

⁴⁰ David Sloss, *Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 *FORDHAM INT'L L.J.* 445, 449-51 (2012).

⁴¹ Id.

Specifically, the U.S.'s reservations to the ICCPR include preserving the U.S.'s long-standing liberty of "freedom of speech."⁴² The U.S., through its ICCPR reservations also preserves its right to continue to administer the death penalty, a closely held ideal that is growing to be distinctly American in the developed world as Europe has all but eradicated it.⁴³ Lastly, the U.S. reserved the right under the ICCPR to treat juveniles as adults and therefore not be subjected to certain provisions of the treaty.⁴⁴ All of these reservations use the language of the Constitution as a justification. The government makes the explicit assertion that the U.S. Constitution reigns supreme in the implementation of any international covenant.⁴⁵ This supremacy was further implemented by the Supreme Court decision of

Additionally, the reservations to ICERD include similar explicit language citing to the U.S. Constitution.⁴⁶ Most salient is the reservation stating that any obligations under the Covenant do not apply beyond the limits of the U.S. Constitution.⁴⁷ Another reservation entered by the U.S. replaces the language of the ICERD treaty with an explicit cite to freedom of speech and expression from the U.S. Constitution.⁴⁸ Section (1) of the U.S.'s reservation states:

That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation

⁴² International Covenant on Civil and Political Rights, Dec. 16, 1966, 1057 U.N.T.S. 407

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See Id.* (U.S. notes that it will not adhere to provisions contradicting the Constitution).

⁴⁶ International Covenant for the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

⁴⁷ *Id.*

⁴⁸ *Id.*

or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

These are also broad reservations that allow for a wide discretionary breadth to be given to the particular administration in place at the time.⁴⁹

The goal of the US's reservations upon ratification was to ensure that the US could maintain its superiority by using already existing constitutional and statutory law to implement its treaty obligations.⁵⁰ Both President George H.W. Bush and Bill Clinton were strong proponents of the reservations, further exemplifying that American exceptionalism transcends partisan politics and is truly an "all-American Ideal".⁵¹

The U.S. exempting itself from treaty and customary international obligations is not always a negative practice for human rights. Despite its wariness of being bound in the same way as other states, the U.S. still prioritizes international cooperation to further policy goals related to human rights.⁵² The best example of this pushback on the negative connotation of exceptionalism is the global health movement, particularly the effort to eradicate HIV/AIDs.⁵³

It is not just the U.S. that holds itself out as an international model for democracy and peace.⁵⁴ This image is not one that could be unilaterally achieved. The image of the U.S. as a beacon of international peace and democracy requires other nations to

⁴⁹ *Id.*

⁵⁰ Ignatieff, *supra* note 10 at 4.

⁵¹ *Id.*

⁵² *Id.* at 5

⁵³ *Id.*

⁵⁴ Resnik, *supra* note 2 at 1594.

contribute to the U.S.'s own stereotype of itself.⁵⁵ The question then becomes: in what way has the international community enabled Exceptionalism through its consent and acquiescence? In her recent essay published in the Yale Law Journal, Judith Resnik lays out two profoundly important movements that exemplify the U.S. as the outlier where human rights are concerned. These two movements are the movement for the abolition of slavery and the fight for equality of women under the law.⁵⁶

Professor Resnik provides a detailed look at the way in which an American ideology initially rejected transnational organization's efforts to eliminate the slave trade. Additionally, the U.S. became an outlier when the international climate turned its focus to intolerance for disparity between men and women legally.⁵⁷ The transnational means for these movements included Churches and other religious societies, which threatened the notion that these movements were based on a moral high ground for which the U.S. has claimed itself to hold the top perch internationally.

The slave trade was an international business which started on the continent of Africa and spanned the Caribbean islands across the Atlantic, to the coast of Europe and back to colonial America.⁵⁸ The south built its competitive international industry of farming on the backs of slave labor.⁵⁹ Changing opinions from within U.S. borders as

⁵⁵ This stereotype relates back to the afore-mentioned 2 viewpoints portraying the U.S. as an international role model and moral force to influence all other nations. The U.S. as a beacon of liberty, democracy, and equality; Id.

⁵⁶ Id.

⁵⁷ See Id. at 1586.

⁵⁸ Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 BU INT'L L.J. 207, 213-14 (2007).

⁵⁹ The actual profitability of slavery is hotly contested, however, the system itself was viewed by slave-owners and proponents of industry in the Antebellum South as critical to the South's economy. Harold D. Woodman, *The Profitability of Slavery: A Historical Perennial*, 29 J. S. Hist. 303 (1963).

well as international pressures led to the abolition movement.⁶⁰ By 1808 the U.S. had outlawed the international slave trade completely. Despite prohibiting the slave trade itself, the U.S. had fallen behind the rest of Western Europe, particularly Great Britain, who has already outlawed the slave trade in 1807.⁶¹ Additionally, the shift towards banning citizens from owning slaves altogether originated in Great Britain who outlawed the practice of owning slaves in 1833, thirty years before President Lincoln issued his famous executive order, The Emancipation Proclamation.⁶² The U.S.'s continuing practice of slavery began to be referred to in Europe as a "peculiar" American institution.⁶³

The abolition movement in the U.S. served to ignite another transnational movement, the movement for women's suffrage and equality.⁶⁴ This movement however, saw the U.S. as the origin of the transnational sentiment rather than the last in line. This movement was spear-headed largely by early forms of non-governmental organizations, as women were not permitted to participate in politics.⁶⁵ In 1848 women suffragists in the U.S. held the Seneca Falls Declaration of the Sentiments of Women.⁶⁶ With the help of transnational organizations like religious groups and churches, similar sentiments spread to Great Britain and the rest of Europe.

⁶⁰ Resnik, *supra* note 2 at 1585-86.

⁶¹ Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the Dred Scott Case*, 82 CHI-KENT L. REV. 393, 398 (2007) [hereinafter Cleveland].

⁶² Derrick Bell, *Racism As the Ultimate Deception*, 86 NC L. REV. 621 (2008).

⁶³ Cleveland, *supra* note 61 at 449.

⁶⁴ Resnik, *supra* note 2 at 1588-89.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1588-90.

A final example of U.S. exceptionalism that is still being applied in U.S. foreign policy decision-making is Congress' and the Department of Homeland Security's stance on law of war principles. This is a fitting example of the piecemeal approach the U.S. often takes when considering issues of international implication. Often times it follows the women's suffrage framework for being a leader as in World War II foreign policy. More recently however, with the rise of the War on Terror, the U.S. has rejected the international law of war principles in favor of an individualistic approach.

With its enactment of the Authorization for Use of Military Force [hereinafter AUMF] just three days after the terrorist attacks of September 11, the U.S. government set the tone for the war on terrorism as a uniquely American endeavor.⁶⁷ Because of the deeply rooted emotions tied to terrorism and the U.S.'s historical approach of being the world leader, it was an important facet of the AUMF to reject international law principles in favor of a heavier handed stance that culminated in a number of challenges to its legality. The AUMF created the issue of the lawfulness of military detentions resulting from the war on terror. The law is a symbol of the at all costs approach to capturing and punishing the perpetrators of the September 11th terrorist attacks. The detainees at Guantanamo Bay brought suits against the U.S. in an attempt to assert Habeas rights. This action led to reaction from not only Congress but also the U.S. Judiciary that included responding to the challenges and expanding upon the application of the AUMF through a lens of exceptionalism.⁶⁸ A major case clarifying the U.S.' application of the AUMF is *Al-Bihani v. Obama*, decided in the U.S. Court of Appeals in the District of

⁶⁷ AUTHORIZATION FOR USE OF MILITARY FORCE, PL 107-40, September 18, 2001, 115 Stat 224.

⁶⁸ *Al-Bihani v. Obama*, 590 F.3d 866, 871-72 (D.C. Cir. 2010).

Columbia circuit. There the court clearly rejected the detainees' assertion that a source for the AUMF and the U.S. policy on military detention generally should be international law of war principles. The court firmly noted that

*There is no indication...that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. Courts[in deciding Habeas cases].*⁶⁹

Examining the abolition of the slave trade, the women's suffrage movement and the U.S.' rejection of international laws of war principles it is clear to see the dichotomy of American exceptionalism. The U.S. is either the outlier, not wanting to put human rights goals before political and economic priorities, or it is the origin of revolution in various areas of social justice as evidenced by the women's movement and the influence of HIV/AIDs awareness.⁷⁰

The Evolution of the TVPA

The concept of uniqueness created the best intentions for fighting the danger of human trafficking in the national sphere, but has neglected the need for international cooperation in such a transnational matter and ultimately, has served to hurt the overall purpose of the Trafficking Victims Protection Act [hereinafter TVPA] and the normative values concerning moral and criminal corruption it is attempting to eradicate. The closely

⁶⁹ Id.

⁷⁰ The U.S., through the U.N., is a major proponent of HIV/AIDs awareness and prevention programs abroad. Additionally the U.S. provides for significant HIV/AIDs research and relief funding. Ignatieff, *supra* note 10 at 5.

held idea of American Exceptionalism has made the TVPA a band-aid on a wound that needs surgical attention. It borrows far too much from historical ideas of slavery and does not give the proper attention to a growing new medium for criminal sexual exploitation.

The TVPA became the only Federal anti-trafficking statute in the U.S. on October 28th, 2000.⁷¹ It was reauthorized in 2003 and has been amended to contain new language on several different occasions since then.⁷² Prior to the drafting of the TVPA, the U.S. attempted to address the issue in various ways. This led to a lengthy drafting process that eventually culminated in the 2000 signing of the TVPA.⁷³

International anti-trafficking efforts have come in many forms over the years, mainly international conventions and domestic legislation. The history of such efforts dates all the way back to 1921 and the first international anti-trafficking convention, The Convention for the Suppression of Traffic in Women and Children.⁷⁴ This Convention came out of the League of Nations and was amended under the newly formed UN.⁷⁵ It dealt mostly with trafficking of women and children over borders during the 1st and 2nd World Wars.⁷⁶ It represents the connection of trafficking in persons to a growing globalized international sphere of interdependence between states. The modern history of both U.S. and international anti-trafficking efforts began at what is known as the three

⁷¹ II. the Trafficking Victims Protection Act, 118 HARV. L. REV. 2180, 2188 (2005) [hereinafter Trafficking Victims].

⁷² Id.

⁷³ Id.

⁷⁴ Protocol signed at Lake Success to amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Women of Full Age, concluded at Geneva on 11 October 1933, Nov. 12, 1947, 53 U.N.T.S. 13 .

⁷⁵ Id.

⁷⁶ See generally Id.

Palermo Protocols.⁷⁷ One of the three protocols is the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [hereinafter the Protocol].⁷⁸ The Protocol defined for the first time trafficking in persons as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁷⁹

The Protocol established trafficking in persons as an international crime against human rights.⁸⁰ Despite the U.S.'s tendency to reject international influence in its national legislation, the Protocol's definition set up an important framework for anti-trafficking legislation that can be seen explicitly in U.S. domestic policy. That framework is the "3 p" approach to trafficking of prevention, protection and prosecution.⁸¹

The U.S.'s first attempt at defining human trafficking as a distinct crime apart from just modern day slavery came after the United Nations, from a consensus in the international community,⁸² put forth the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children.⁸³ The approach to anti-

⁷⁷ Kelly Hyland Heinrich, *Ten Years After the Palermo Protocol: Where Are Protections for Human Trafficking Victims?*, 18 NO. 1 HUM. RTS. BRIEF 2 (2010).

⁷⁸ *Id.*

⁷⁹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons. Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, U.N. Doc. A/53/383 (2000) (advance copy) [hereinafter *Protocol*] (standing as the first comprehensive antitrafficking in persons protocol), available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/index.htm, certified copy forthcoming at U.N. Doc. A/RES/55/25.

⁸⁰ Hyland, *supra* note 13 at 32.

⁸¹ *Id.*

⁸² *Id.* at 32-33.

⁸³ *Id.*

trafficking came in 1998 when President Clinton created the President's Interagency Council on Women [hereinafter the Council]. This Council's mandate was to draft domestic as well as international policy on trafficking in persons.⁸⁴ The definition of trafficking that came out of the Council was as follows:

Trafficking is all acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of persons; within national or across international *33 borders; through force, coercion, fraud or deception; to place persons in situations of slavery or slavery-like conditions, forced labor or services, such as forced prostitution or sexual services, domestic servitude, bonded sweatshop labor or other debt bondage.⁸⁵

It was progress on the U.S.'s commitment to human rights and anti-trafficking. However, many countries used the Palermo Protocol as the source for domestic legislation whereas the U.S. policy was to take the Protocol and improve upon it both internationally and as it is implemented domestically.⁸⁶

The Council's definition was limited in its application as a purely policy based definition.⁸⁷ A legal definition that could be used in the arresting and prosecuting of perpetrators was not developed until the drafting of the TVPA.⁸⁸ The drafting of

The need for comprehensive legislation addressing trafficking has become apparent, as human trafficking is now the third most pervasive international criminal enterprise, after drugs and firearms.⁸⁹ The leading U.S. legislation on human trafficking

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ See Hyland, *supra* note 13 at 31-33 (noting how the various signatories valued the implementation of the protocol's definition of trafficking while the U.S. sought to establish its own agency to evaluate the problem and draft a definition).

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Trafficking Victims, *supra* note 68 at 2186.

prevention is the afore-mentioned Trafficking Victims Protection Act.⁹⁰ The support for the TVPA was obvious by its unanimous passage in the U.S. senate. This bi-partisan acceptance shows that Congress has not forgotten the importance of legislation that supports the basic human liberties set forth in the Bill of Rights.⁹¹ This is also exemplified by the fact that the TVPA only received one nay when it came before the U.S. House of Representatives.⁹²

The TVPA was initially enacted in 2000 and it has been reauthorized in 2003, 2005, and 2008 respectively.⁹³ The language in the 2005 reauthorization even includes the congressional finding that “[t]he United States has demonstrated international leadership in combating human trafficking and slavery through the enactment of the [TVPA].” However, its evolution into existence began with the call for tougher legislation that was separate and distinct from the existing anti-prostitution statutes.⁹⁴

This statute is unique in that the argument can be made that its approach to combating trafficking is at times narrow and at other times broad.⁹⁵ The TVPA is narrow in that it seeks to address the specific epidemic of slavery and trafficking in America in a more salient way than anti-prostitution statutes and other legislation.⁹⁶ It is broad,

⁹⁰ Trafficking Victims Protection Act of 2000, PUB. L. NO. 106-386, 114 STAT. 1466 (2000) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.) [hereinafter TVPA].

⁹¹ See Hyland, *supra* note 13 at 61 (noting the importance of drafting TVPA for women’s rights).

⁹² *Id.*

⁹³ Trafficking Victims, *supra* note 68 at 2188.

⁹⁴ See *Id.* at 2187-88 (outlining the rise of trafficking as a prevalent crime in the U.S. and the TVPA’s inclusion of commercial sex activity in the definition of trafficking if done by “force, fraud, or coercion”).

⁹⁵ *Id.*

⁹⁶ *Id.* at 2188.

however, in its definitions of trafficking and the remedies available to victims who fall under its jurisdiction.⁹⁷ Additionally it can be debated whether it is too broad to effectively combat human sex trafficking as numbers suggest the amount of people being trafficked in the U.S. has gone up since its passage in 2000.⁹⁸

The narrow scope of the TVPA is best illustrated by its definition of those who can seek remedy under the act as those who have been subject to “severe” forms of trafficking. The term “severe” is defined by the statute as:

[S]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or . . . the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.⁹⁹

The three P’s mentioned in the above excerpt of the TVPA are important elements to understand how the act relates to the doctrine of exceptionalism. The first “P” represents prevention efforts.¹⁰⁰ It has been argued that this is the prong of the TVPA that gets the least attention.¹⁰¹ I will save this P for later in the analysis as its lack of attention can be directly attributable to exceptionalist ideology and has hindered the overall impact or “teeth of the TVPA.

⁹⁷ *Id.* at 2188-89.

⁹⁸ Karen E. Bravo, Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade, 25 B.U. INT’L L.J. 207, 269 (2007).

⁹⁹ TVPA, *supra* note 87.

¹⁰⁰ *Id.*

¹⁰¹ Trafficking Victims, *supra* note 68 at 2194-95.

The Second “P” from the TVPA stands for protection of victims of human trafficking.¹⁰² This element is largely implemented through relaxed immigration policies when victims of trafficking aid the police in the apprehension of traffickers.¹⁰³ This provision however, loses its teeth for two important reasons. The first is that many victims of trafficking are ignorant of this specific provision of U.S. immigration legislation.¹⁰⁴ Additionally, it is unrealistic to rely on young girls coming forward to law enforcement when they have been coerced and dominated by pimps and johns systematically for years.¹⁰⁵ For these reasons, the TVPA, while it attempts to, is not able to go far enough to truly protect victims.

The final “P” stands for prosecution. The TVPA has made arguably the most progress through this procedural installation of harsh sentences and criminal felony charges as well as authorizing civil charges and damages awards against perpetrators of human sex trafficking.¹⁰⁶ The number of prosecutions has increased with the passage of the TVPA however, the afore-mentioned issue of victims having the capacity to come forward causes the number of prosecutions to be far lower than the frequency of trafficking crimes.¹⁰⁷

¹⁰² Id.

¹⁰³ Kara C. Ryf, *The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000*, 34 CASE W. RES. J. INT'L L. 45, 57 (2002).

¹⁰⁴ Information Campaigns Against Trafficking, TRAFFICKING IN MIGRANTS Q. BULL. (International Organization for Migration, Geneva, Switz.), Dec. 1999/Jan. 2000, at 1, at http://www.iom.int/iom/Gov_Body_Docs/entry.htm.

¹⁰⁵ See Trafficking Victims, *supra* note 68 at 2194-95 (describing what is necessary of the victim's rather than law enforcement, when deciding if a victim falls under the TVPA).

¹⁰⁶ Id.

¹⁰⁷ Id.

Coming back to the prevention element of the TVPA it is clear through its implementation, or lack thereof, that competing exceptionalist notions have hindered its progress. The most tangible example of this is the exhaustive government rhetoric on the subject without any tangible accompanying action. For instance, take H.R. 3244, providing that “specific efforts” as vaguely stated in the TVPA should include the Secretary of State evaluating the minimum efforts of other governments towards combating human sex trafficking.¹⁰⁸

The manifestation of this “clarification” is the U.S.’s Annual Report on Trafficking in Persons. A report that has historically held the U.S. virtually unaccountable for anti-trafficking efforts within its own borders while still putting pressure on other countries to implement higher standards for human rights with regards to trafficking in persons.¹⁰⁹ 2011 saw the first time the U.S. including itself on this list.¹¹⁰ Does this suggest a change in thinking? The answer, I believe is no. The effects of this decision will, however, be discussed in the section *infra* focusing on the way in which exceptionalism hinders an effective response to trafficking.

For the reasons outlined above, it is evident that the TVPA needs more legislative assistance in the area of prevention because merely implementing the last two “p’s” does not serve to keep trafficking from happening. It only serves as a procedural guide after the damage has already been done.

¹⁰⁸ H.R. 3244, 106th Cong. §110(b)(1)(A)-(C) (2000).

¹⁰⁹ U.S. Department of State, *Trafficking in Persons Report* (2001-2012) available at <http://www.state.gov/g/tip/rls/tiprpt/2010/index.htm>.

¹¹⁰ *Id.*

Conclusion

*Every year, we come together to release this report, to take stock of our progress, to make suggestions, and to refine our methods. Today, we are releasing a new report that ranks 184 countries, including our own. One of the innovations when I became Secretary was we were going to also analyze and rank ourselves, because I don't think it's fair for us to rank others if we don't look hard at who we are and what we're doing.*¹¹¹

Secretary of State Hillary Clinton on the Inclusion of the US to its annual report on human trafficking after 10 years of only ranking other countries progress. The US's primary diplomatic policy is reflected in its annual Trafficking in Persons Report.¹¹² This report best reflects the desire of the US to maintain human rights as a policy issue with regards to foreign affairs.

Additionally, the report is the manifestation of the US governments desire to be considered a “global leader” in the area of combating human trafficking.¹¹³ In these respects the U.S. uses the report to put pressure on other nations to pass comprehensive legislation to combat human trafficking within their borders. This fact, which the US so proudly proclaims in its report, has been overshadowed for ten years by its refusal to include itself in the rankings. The reason for the omission is speculative, however it seems that the omission could really only stem from the belief within US administration

¹¹¹ Id.

¹¹² See Id. (Secretary of State's comment's explicitly state goals set forth for the future of anti-human trafficking policy)

¹¹³ Id.

that the US does not have a human trafficking problem, and therefore does not find it necessary to rank itself and provide some transparency for its anti-trafficking efforts.

It appears that the two leading views are American exceptionalism serve to compliment one another in domestic politics. They support the current US policy that pats itself on the back as a leader in the world while still supplying the requisite escape hatch to avail the US of any real international accountability. These notions, in tandem have created a culture of skin deep-activism. It hinders the US from enacting legislation that really looks at the root of human trafficking as a transnational issue that in many cases starts and ends within US borders.