

Trafficked? AIDS, Criminal Law and the Politics of Measurement

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Since early in the HIV epidemic, epidemiologists identified individuals who transact sex as a high-risk group for contracting HIV. Where the issue of transacting sex has been framed as sex work, harm-reduction advocates and scholars call for decriminalization as a primary legal solution to address HIV. Where the issue is defined as trafficking, advocates known as abolitionists argue instead for the criminalization of the purchase of sex.

Global health governance institutions are porous to these competing ideas and ideologies. This article first historicizes

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the contestation between harm-reduction and abolition in global governance on health. The paper then turns to a new arena in which these battles are playing out: measurement and indicators. The contested political environment of the sex work and trafficking debates has resulted in numerous calls to accurately measure “the problem” so that law and policy makers can identify appropriate legal solutions. Rather than being an objective technical tool for effective policymaking, however, I argue that data and indicators serve as a site of politics and governance. Building on literature from law and sociology, I analyze the political battles being waged through the data and indicators on trafficking that reproduce rather than resolve the larger debate on sex work and trafficking. Indicators become instrumental in providing the justification for the competing legal positions. In other words, how people and issues are counted and defined is instrumental for how laws and policy recommendations are made. Finally, in keeping with other critics of the over-emphasis on criminal solutions to trafficking and sex work, I argue that the ongoing legitimization of criminalization projects vis-à-vis indicators comes at a cost to structural solutions to address the underlying factors that lead to violence and exploitation associated with trafficking or sex work.

INTRODUCTION	98
I. COMPETING FRAMES	103
A. <i>Abolition</i>	103
B. <i>A New Paradigm: Harm-Reduction</i>	109
C. <i>Harm-Reduction or Neo-Abolition?</i>	115
II. THE POLITICS OF MEASUREMENT	131
A. <i>Measurement and Counting: The Theory</i>	134
B. <i>Counting Trafficking: The Legal Implications</i>	137
C. <i>Indicators on Gender, HIV, Violence, and Trafficking</i>	144
CONCLUSION.....	150

The Lancet series on HIV and sex workers showed that decriminalization of sex work would have the greatest effect on

the course of HIV epidemics across all settings, averting 33–46% of HIV infections in the next decade. Such a move would also reduce mistreatment of sex workers and increase their access to human rights, including health care. – The Lancet Editorial, August 2015¹

Extensive evidence shows the catastrophic effects of legalizing or decriminalizing pimping and brothels, demonstrated in Germany and the Netherlands, for example. With impunity for the commercial sexual exploitation of marginalized populations comes an increase in sex trafficking to satisfy the demand for prostitution. – Coalition Against Trafficking in Women, July 2015²

INTRODUCTION

In HIV law and policy making, scholars, technocrats, lawyers, and activists who debate legal solutions to sex work and trafficking mobilize two primary frames:³ harm-reduction and abolition. Each calls upon opposing responses from criminal law to address the issue of transactional sex—sex exchanged for money, goods, or services.⁴

¹ THE LANCET, *Keeping Sex Workers Safe*, [http://thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)61460-X/fulltext](http://thelancet.com/journals/lancet/article/PIIS0140-6736(15)61460-X/fulltext) (last visited Oct. 21, 2015) (The referenced study models the decriminalization of both the purchase and sale of sex.).

² CATW INTERNATIONAL, *Global Advocates Issue A Call to Amnesty International in Open Letter*, <http://www.catwinternational.org/Home/Article/617-global-advocates-issue-a-call-to-amnesty-international-in-open-letter> (last visited Oct. 25, 2015).

³ See Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 614–15 (2000) (explaining that the use of the verb “framing” “denotes an active, processual phenomenon that implies agency and contention at the level of reality construction.” In turn collective action frames are partly constructed to “negotiate a shared understanding of some problematic condition or situation . . . in need of change.”).

⁴ Throughout this paper, I use the word transactional sex as an umbrella term for all forms of sexual exchange for goods and services that some understand to be sex work and others describe as trafficking. While there may be forms of transacting sex that are unquestionably inside those respective categories, my article acknowledges that there is transactional sex that could be categorized either way

The difference lies in competing ideas of harm and exploitation. For harm-reduction practitioners and activists, it is not transacting sex itself that is necessarily harmful; rather, it is the lack of state protection from violence for those who sell sex and the criminalization of the purchase and sale of sex that create conditions that hamper public health efforts.⁵ In other words, decriminalizing sex work and enabling state protection is key to improving public health programs and outcomes.⁶ For abolitionists, the harm is transacting sex itself.⁷ Contrary to harm-reduction principles, abolitionists argue that the state should mobilize criminal law to prevent prostitution by prosecuting and punishing people who buy sex, but not those women who sell sex.⁸

Public health practitioners are largely supportive of harm-reduction due to the documented negative effect of criminal law on implementing public health programs. For example, in 2014, *The Lancet*, a leading public health journal, launched a special issue on sex work in advance of the 2014 World AIDS Conference.⁹ Amongst the conclusions offered by the papers, one finding stood out: based on sites modeled for the study, the structural intervention that could have the greatest effect on the course of the HIV epidemic in the

depending on the perspective of the person engaging in the transaction or the person collecting data. Further, there are many people who engage in transactional sex who do not identify as either trafficked or a sex worker. Unfortunately, whether or not one self-identifies as a sex worker or trafficked (or something in between or beyond) the legal paradigm at play could dictate their status as a victim or a perpetrator. See Suzanne Leclerc-Madlala, *Transactional Sex and the Pursuit of Modernity*, 29:2 SOC. DYNAMICS: J. AFR. STUD., 213, 215 (2003) (discussing the diversity of experiences transacting sex in South Africa).

⁵ Michael L. Rekart, *Sex-Work Harm Reduction*, 366 LANCET 2123, 2123 (2005).

⁶ See *id.*

⁷ For a description of feminist positions on criminal law, sex work, and trafficking, See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 338 (2006).

⁸ *Id.* Abolitionist feminists do not support the prosecution of sex workers. *Id.*

⁹ *HIV and Sex Workers*, THE LANCET (July 23, 2014), <http://www.thelancet.com/series/hiv-and-sex-workers>.

studied settings is the decriminalization of sex work.¹⁰ The pro-decriminalization position is pitted against the pro-carceral abolitionist position that seeks to *criminalize* all aspects of the sex industry (excepting the woman selling sex). This position conflates sex work and trafficking.¹¹

The pro-criminalization position is now associated with the mainstream¹² anti-trafficking movement that continues to garner money, resources, and celebrity endorsements to engage in pro-criminalization campaigns despite the harmful consequences of criminalization to public health programs.¹³ These campaigns largely seek to rescue women¹⁴ and criminalize the purchase of

¹⁰ Kate Shannon et al., *Global Epidemiology of HIV Among Female Sex Workers: Influence of Structural Determinants*, 385 LANCET 55, 55, 63, 65, 66 (2015) (explaining that decriminalizing sex work in Vancouver, India, and Kenya “would have the greatest effect on the course of HIV epidemics across all settings, averting 33–46% of HIV infections in the next decade.”).

¹¹ See Halley et al., *supra* note 7, at 338. The utilization of criminal law to enact feminist goals has come to be known as carceral feminism. See Elizabeth Bernstein, *Carceral Politics as Gender Justice? The “Traffic in Women” and Neoliberal Circuits of Crime, Sex, and Rights*, 41 THEORY SOC’Y 233, 235 (2012) [hereinafter Bernstein, *Carceral*]. The carceral feminist moment emerged from a larger American feminist project in the 1980s, which often went hand-in-hand with the war on crime. See *id.* at 234. This carceral feminist project was exported globally and has had enormous influence on the way the international community has addressed a range of “sex crimes”—through increasing criminal penalties for the crimes committed. *Id.* at 253. Most of this attention focuses on the clients of sex workers. See, e.g., *id.* at 241–42; Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism”*, 18 DIFFERENCES: J. FEMINIST CULTURAL STUD. 128, 143 (2007).

¹² There are anti-trafficking organizations who take a critical approach to the mainstream anti-trafficking movement. See, e.g., *Strategic Thematic Directions*, GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, <http://www.gaatw.org/what-we-do/2011-2013-strategic-direction> (last visited Oct. 22, 2015).

¹³ See Ronald Weitzer, *New Directions in Research on Human Trafficking*, ANNALS AM. ACAD. POL. SOC. SCI. 6, 7 (2014) [hereinafter *New Directions*].

¹⁴ See, e.g., *Rights or Rescue?*, SAVE US FROM SAVIORS, <http://saveus-fromsaviors.net/?p=31> (last visited Jul. 29, 2015) (discussing the negative effects of rescue missions and raids); see also Sangram Meena Sheshu, *An Update on the Raids and Rescues*, SCARLET ALLIANCE (Apr. 2006), <http://www.scarletalliance.org.au/nm/int/in/241005/view..> This critique has also surfaced in other parts of the world. In Southeast Asia, for example, sex work organizations have been very critical of raids and rescues. See, e.g., Dana Bruxvoort, *The Untold Side of Raids and Rescues: Rethinking Anti-Trafficking Efforts*, HUMAN TRAFFICKING

sex.¹⁵ They are largely the product of a coalition of feminist organizations, conservative politicians, and religious groups concerned with the sexual exploitation of women. Public health scholars and activists argue that there have been many negative consequences for health programs due to the conflation of sex work with trafficking.¹⁶ This is exemplified when health interventions that follow the public health best practice of distributing condoms to sex workers and their clients are charged with aiding and abetting in trafficking. Further, peer-educators who are sex workers may themselves be arrested or detained in “rescues” thus undermining HIV programs.¹⁷

Law and policy makers as well as advocates try to navigate the competing views on trafficking by calling for increased data gathering.¹⁸ But it is a serious mistake to view numerical measurement of trafficking as nothing more than an objective technocratic way to neutralize the debates. Instead, as this paper argues, the production and gathering of data is itself an essential part of staking out positions on the underlying issues. Drawing on scholarship that theorizes the politics of data, this article identifies how the data collection processes have become a site of contestation in which anti-trafficking activists pushing a criminalization agenda have made enormous progress. This contestation is evident not only in the general data collection on trafficking, but also in the realm of public health indicators. This push for criminalization follows the broader trend towards

CENTER (Jan. 29, 2014), <http://humantraffickingcenter.org/posts-by-htc-associates/the-untold-side-of-raids-and-rescues-re-thinking-anti-trafficking-efforts>; *see also*, Noy Thrupkaew, *Beyond Rescue: The Campaign Against Forced Prostitution Works When it Addresses Victims' Needs*, NATION (Oct. 8, 2009), <http://www.thenation.com/article/beyond-rescue#>.

¹⁵ *See, e.g.*, Priya Shetty, *Profile: Meena Saraswathi Seshu: Tackling HIV for India's Sex Workers*, 376 LANCET 17, 17 (2010); *see also* Joanna Busza, *Having the Rug Pulled From Under Your Feet: One Project's Experience of the US Policy Reversal on Sex Work*, 21 HEALTH POL'Y PLAN 329, 329 (2006).

¹⁶ *See* Sheshu, *supra* note 14.

¹⁷ Global Commission on HIV and the Law, *Risks, Rights, and Health*, 55 (July 2012).

¹⁸ *See* Frank Laczko, *Human Trafficking: The Need for Better Data*, MIGRATION POL'Y INST. 1, 1 (Nov. 1, 2002), <http://www.migrationpolicy.org/article/human-trafficking-need-better-data>; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-825, BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD 37 (Jul. 18, 2006), <http://www.gao.gov/assets/260/250812.pdf> [hereinafter BETTER DATA REPORT].

the criminal law as a site for addressing social concerns. In keeping with other critics of the over-emphasis on criminal solutions to trafficking and sex work,¹⁹ I further argue that the ongoing legitimization of criminalization projects comes at the cost to other structural solutions to address the underlying factors that lead to violence and exploitation associated with trafficking or sex work.

This article proceeds in two parts. In Part One, I describe the rise of two competing frames, abolition and harm-reduction, in global health governance.²⁰ Each of these frames comes with strengths and

¹⁹ See Joseph Garcia, *ASU, Phoenix Police Team Up to Help Victims of Prostitution*, ARIZ. STATE U. NEWS (Apr. 26, 2012), https://asunews.asu.edu/20120426_social_work; see also Molly Crabapple, *Project ROSE is Arresting Sex Workers in Arizona to Sell Their Souls*, VICE.COM (Feb. 26, 2014), <http://www.vice.com/read/in-arizona-project-rose-is-arresting-sex-workers-to-save-them>. New York City established Human Trafficking Intervention Courts, where individuals arrested for prostitution are channeled, and the charges may be dismissed or the file may be sealed if the arrested individual completes counseling sessions. See Melissa Gira Grant, *Flawed Justice for Sex Workers*, N.Y. DAILY NEWS, (Sep. 30, 2014, 7:15 PM), <http://www.nydailynews.com/opinion/gira-grant-flawed-justice-sex-workers-article-1.1958688>; see also N.Y. State Unified Court System, *Press Release, N.Y. Judiciary Launches Its First Statewide Human Trafficking Initiative*, N.Y. UNIFIED COURT SYS. (Sep. 25, 2013), http://www.nycourts.gov/press/PR13_11.pdf. Many criticize the courts for using arrests as the means to draw individuals into the program. Grant, *supra* note 19. The program has also been criticized for racial profiling. *Id.* Reports indicate that 70% of people sent to the trafficking courts are black. *Id.* In many cases around the U.S., the police utilize condoms carried by sex workers as evidence of intent to engage in prostitution. See HUMAN RIGHTS WATCH, *SEX WORKERS AT RISK: CONDOMS AS EVIDENCE OF PROSTITUTION IN FOUR U.S. CITIES*, 17, 37, 47, 58 (2012). For information on reforms of condoms-as-evidence programs, see Aziza Ahmed & J.M. Kirby, *Preventing HIV: The Decriminalisation of Sex Work*, OPENDEMOCRACY.NET (Aug. 11, 2014), <https://www.opendemocracy.net/5050/aziza-ahmed-jm-kirby/preventing-hiv-decriminalisation-of-sex-work>. Monica Jones advocates against efforts to rescue sex workers by arresting them. Tina Vasquez, *Fighting Back: Monica Jones Battles Phoenix's Project ROSE*, BLACK GIRL DANGEROUS (Mar. 13, 2014), <http://www.blackgirldangerous.org/2014/03/fighting-back-monica-jones-battles-phoenixs-project-rose/>.

²⁰ See JANET HALLEY, PRABHA KOTISWARAN, RACHEL REBOUCHÉ, AND HILA SHAMIR, *GOVERNANCE FEMINISM: AN INTRODUCTION* (Minn. Univ. Press, Forthcoming 2014/5) (developing a conception of governance and stating “[l]ike many other students of the contemporary legal order, we are struck by the real-world proliferation of forms of organized power that break the bounds of the classically imagined state[], and like them we find the term *governance* useful to describe the resulting expansion of institutional forms and social practices. These

weaknesses that contribute to ongoing disagreements about which position offers the better legal solution. In Part Two, I describe a new arena in which these battles are playing out: measurement and indicators.²¹ The political environment of the sex work and trafficking debates has resulted in numerous calls to accurately measure “the problem” so that law and policy makers can identify appropriate legal solutions. Rather than being an objective technical policy-making tool, however, I argue that the domain of numbers and indicators serve as a site of politics and governance despite their treatment as objective measurements in public health. Building on literature from law and sociology, I analyze the political battles being waged through the data and indicators on trafficking that reproduce rather than resolve the larger discourse and debate on sex work and trafficking. Indicators are instrumental in providing the justification for the competing legal positions. In other words, how people and issues are counted and defined is instrumental for how laws and policy recommendations are made.

I. COMPETING FRAMES

A. *Abolition*

The abolitionist movement predates a harm-reduction movement by over a century and has had an uneven engagement with public health. Early abolitionists²² borrowed their name from activists who sought to end slavery but with a new goal: the desire to end

are forms of power that operate immanently as well as top-down; that facilitate and inherit state power from outside the state; that shimmer back and forth across the private/public distinction.”).

²¹ See Kevin E. Davis, Benedict Kingsbury, & Sally Engle Merry, *Indicators as a Technology of Global Governance*, 46 L. & SOC’Y REV. 71, 73–4 (2012) (defining an indicator as “[a] named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon. The data, in this simplified and processed form, are capable of being used to compare particular units of analysis (such as countries, institutions, or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards.”).

²² Because abolitionists who utilize the criminal law to address trafficking in fact further marginalize people of color in the United States and globally, critics of the “abolition” frame find the term abolition itself problematic. See, e.g., Robyn

the exploitation of women vis-à-vis prostitution.²³ Histories of abolitionist activism often begin with the Ladies National Association (LNA), founded by Josephine Butler in the late 1860s, which fought against the Contagious Diseases Acts (CDAs).²⁴ The CDAs were a series of acts passed in 1864, 1866, and 1869.²⁵ The acts attempted to regulate prostitution in England²⁶ and in the colonies for the purpose of controlling the spread of venereal disease.²⁷ The CDAs mandated check-ups for women ordered to periodic examinations by a judge.²⁸ Prostitutes were specifically targeted by the CDAs.²⁹ Those

Maynard, *#Blacksexworkerslivesmatter: White-Washed 'Anti-Slavery' and the Appropriation of Black Suffering*, PORTSIDE (Sept. 9, 2015), <http://portside.org/2015-09-14/blacksexworkerslivesmatter-white-washed-%E2%80%98anti-slavery%E2%80%99-and-appropriation-black-suffering>.

²³ See ASHWINI TAMBE, *CODES OF MISCONDUCT: REGULATING PROSTITUTION IN LATE COLONIAL BOMBAY* 52 (2009).

²⁴ Margaret Hamilton, *Opposition to the Contagious Diseases Acts, 1864-1886*, 10 *ALBION: Q. J. CONCERNED WITH BRIT. STUD.* 14, 16 (1978).

²⁵ *Id.* at 14 n.1.

²⁶ The acts applied to “military stations, garrison and seaport towns.” *Id.* at 14–27.

²⁷ The driving rationales behind the acts shifted over time and are difficult to isolate. As argued by Judith Walkowitz, the acts may have been driven by concerns over sexuality in the Victorian period as well as venereal disease. JUDITH WALKOWITZ, *PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE* 70 (1980). However, the acts themselves were pushed forward by the impact of venereal disease on the army. *See id.* at 71–75.

²⁸ The Contagious Diseases Prevention Act 1864, 27 & 28 Vict. c. 84 & 85, §§ 12–14 (U.K.).

²⁹ The Contagious Diseases Prevention Act 1866, 29 & 30 Vict. c. 35, §§ 15–16 (U.K.). The 1866 Act states:

Where an Information on Oath is laid before a Justice by a Superintendent of Police, charging to the Effect that the Informant has good Cause to believe that a Woman therein named is a common Prostitute The Justice present, on Oath being made before him substantiating the Matter of the Information to his Satisfaction, may, if he thinks fit, order that the Woman be subject to periodical Medical Examination . . . for the Purpose of ascertaining at the Time of each such Examination whether she is affected with a contagious Disease.

who were found to have a venereal disease were detained at the hospital and treated.³⁰ Supporters of the CDAs often cited the health of British troops as a key reason for the acts.³¹

The regulation of women's sexuality for the protection of public health rubbed British feminists the wrong way. Butler argued that the medical regulation of prostitution, alongside the brothel system, exploited women's sexuality "for the gain of men and the state."³² As described by historian Jessica Pliley, Butler and her compatriots argued for the "reclaimability of all prostitutes, whom she considered to be the victims of sexist circumstances and male abuse."³³ This early women's rights movement, alongside the purity movement, argued that men should remain chaste and learn to control their sexual desires.³⁴ Butler and other abolitionists opposed the disrespectful manner in which medical exams were conducted, some arguing that the CDAs left poor women at the mercy of the police because the acts were easy to exploit for the purposes of harassment.³⁵ John Stuart Mill, perhaps one of the more well-known opponents of the CDAs, argued that "the wives and daughters of the poor are exposed to insufferable indignities on the suspicion of a police officer."³⁶ The vast mobilization of activists through media, letter-writing campaigns, and protest beginning in 1869 led to the eventual repeal of the acts in 1888.³⁷

³⁰ The Contagious Diseases Prevention Act 1864, 27 & 28 Vict. c. 84 & 85, §§ 12–14 (U.K.).

³¹ As argued by Walkowitz, statistics produced about venereal disease amongst soldiers played a large role in justifying the CDAs. *See* Walkowitz, *supra* note 27, at 75.

³² JESSICA R. PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI* 13 (2014).

³³ *Id.* at 14.

³⁴ *See id.* (explaining that although there was common ground between the Christian Purity movement and Butler's LNA, the religious actors were motivated by the desire to protect female innocence rather than enact a feminist politics); *see also* Walkowitz, *supra* note 27, at 34.

³⁵ Jeremy Waldron, *Mill on Liberty and on the Contagious Diseases Acts*, *J.S. MILL'S POLITICAL THOUGHT* 14 (Nadia Urbinati & Alex Zakaras eds., 2007) (quoting Josephine Butler).

³⁶ *Id.* at 16 (exploring how Mill's opposition to the Contagious Diseases Acts mandates a closer examination of Mill's harm principle).

³⁷ *See* Halley et al., *supra* note 7, at 368; Tambe, *Codes*, *supra* note 23, at 31.

The repeal of the CDAs did not mark the end of the movement to end prostitution. By the end of the 19th century and the beginning of the 20th, in the context of colonization and migration, concerns about prostitution became racialized and morphed into a new fear: white slavery.³⁸ As historian Ashwini Tambe argues, white slavery was essentially a moral panic about white women being transported to brothels in colonies.³⁹ White slavery became the primary discourse around prostitution in the United States, Britain, and the colonies.⁴⁰ The fear of white slavery's existence motivated a range of legal and regulatory interventions.⁴¹ The 1910 Mann Act became the first anti-trafficking law in the United States.⁴² Contemporaneously, the discourse of white slavery shaped a series of international conventions and treaties, including the 1904 Treaty on the International Agreement for the Suppression of White Slave Traffic⁴³ and the 1921 Convention for the Suppression of Traffic in Women and Children.⁴⁴ In 1949, the prior existing treaties were consolidated into the

³⁸ Tambe, *Codes*, *supra* note 23, at 52 (“In Europe and North America, the turn of the twentieth century was marked by a moral panic about white women being transported to brothels in colonies. This panic was expressed first through the idiom of ‘white slavery’ and then through laws against ‘trafficking.’ The anti-trafficking measures in Europe and North America such as the 1910 Mann Act gained emotive weight from the image of violated white women.”).

³⁹ See Tambe, *Codes*, *supra* note 23, at 53 (“Not all brothel workers who came to Bombay had been deceived, nor were they all ingenues whose sexual purity had been stolen. As I will show, the assumptions embedded in antitrafficking discourse in fact enabled Bombay police to sustain a racially stratified sexual order. I argue that while the idiom of antitrafficking demonized third-party procurers who trapped unknowing women and carried them across oceans, the locus of coercion for European brothel workers in Bombay more often lay elsewhere, in the restrictive protection they received from police and brothel keepers.”); see also PLILEY, *supra* note 32, at 15.

⁴⁰ See PLILEY, *supra* note 32, at 15.

⁴¹ See PLILEY, *supra* note 32, at 2; Tambe, *Codes*, *supra* note 23, at 52.

⁴² PLILEY, *supra* note 32, at 1; Tambe, *Codes*, *supra* note 23, at 52.

⁴³ International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 98 U.N.T.S. 101, *amended by* the Protocol signed at Lake Success, New York, May 4, 1949 [hereinafter Convention for Suppression of White Slave Traffic].

⁴⁴ International Convention for the Suppression of Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415, *amended by* a Protocol approved by the General Assembly on Oct. 20, 1947, 53 U.N.T.S. 13 [hereinafter Traffic in Women and Children Convention]. The conventions increasingly emphasized the welfare of the victims, an emphasis on controlling crime, and immorality. See

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. By 1949 the treaties had expanded the definition of trafficking to include other immoral acts alongside prostitution.⁴⁵

It was not until 2000 that trafficking reemerged as a central issue in global governance as a broader issue of crime control.⁴⁶ In the years between 1949 and 2000, however, two new major phenomena altered the way we would think about women, sex, and prostitution: second-wave feminism and AIDS. Beginning in the 1970s, second-wave feminists honed in on sex as a locus of women's subordination. Feminists identified pornography, and later prostitution, as two crucial sites of women's subordination. Debates on the possibilities and limits of agency and oppression in sado-masochism,⁴⁷ pornography,⁴⁸ and prostitution,⁴⁹ beginning in the 1970s, however, eventually led to splinters in the global women's rights movement around

ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 57 (2010).

⁴⁵ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 [hereinafter Convention for Suppression of Traffic and Exploitation]; see also PLILEY, *supra* note 32, at 184–135 (describing how the FBI's interest in trafficking dates back to the 1930s and the War on Crime waged by Hoover; the 1930s saw increased organized crime in the United States, and prostitution was seen as an effect of this type of crime.)

⁴⁶ Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609, 609–10 (2014).

⁴⁷ See generally UMMNI KHAN, *VICARIOUS KINKS: S/M IN THE SOCIO-LEGAL IMAGINARY* (2014) (examining perspectives from various fields, including film, feminism, the human sciences, and law, on sadomasochism).

⁴⁸ Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 304–05 (1995).

⁴⁹ See, e.g., KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 7–8 (1995) (“In the 1990s we have found that in the United States women's issues have become so dissociated from each other that there are separate movements for abortion rights under the euphemism of ‘choice’ while at the same time the euphemism ‘choice’ is turned into the rallying call for the promotion of sexual exploitation through pornography and prostitution as fostered by sexual liberals and the prostitution lobby, who ask, don't women ‘choose’ prostitution? pornography? (as if this question made an ounce of difference to the customer-, i.e., male-driven market). Meanwhile our movement has become so deconstructed that issues like teenage pregnancy and prochoice, which means girls' right to abortion, are dissociated from the very conditions that have produced a crisis in teenage

the issue of sex work and trafficking.⁵⁰ While some ‘dominance’ feminist ideas, held strong to the idea that prostitution was simply the manifestation of male power and authority, other ‘pro-sex’ feminists allied themselves with sex worker movements by arguing that women had the ability to choose to participate in transactional sex.⁵¹ By the 1990s, a recycled coalition of conservative politicians, the religious right, and abolitionist feminists, termed neo-abolitionism” by sociologist Elizabeth Bernstein, was making headway.⁵² The new movement explicitly referenced the days of the LNA and their shared project with religious forces in the early 20th century.⁵³ The neo-abolitionist move to end sex-trafficking had an important dynamic: it relied heavily on criminal law to effectuate their goals.⁵⁴ The abolitionist feminists, now spoken of as “carceral feminists,”⁵⁵

pregnancy: sexual exploitation—the wholesale sexualization of society and promotion of early sex through pornography and the legitimization of prostitution.”).

⁵⁰ See Aziza Ahmed, “*Rugged Vaginas*” and “*Vulnerable Rectums*”: *The Sexual Identity, Epidemiology, and Law of the Global HIV Epidemic*, 26 COLUM. J. GENDER & L. 1, 16–23 (2013).

⁵¹ See *id.*

⁵² Janie Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1664 (2010) [hereinafter Chuang, *Rescuing*].

⁵³ See *id.* at 1664–69 (describing the neo-abolitionist movement); see, e.g., BARRY, *supra* note 49, at 99 (praising and critiquing Josephine Butler). (“At the time, Butler was not only the first woman but also the most radical, in a feminist sense, to challenge prostitution. . . . The weakness of Butler’s campaign lay not in her outrage nor in her organizing skills but in her strategy. Instead of campaigning against prostitution as customer abuse of women, Butler confined her campaigns to action against third-party coercion by pimps and state regulation. In opposing state regulation, she refrained from action in relation to ‘freely chosen’ prostitution at a time when its industrialization made the women and the sex an ordinary commodity. Instead, by accepting the emerging concept of ‘forced prostitution,’ which referred to the young girls and women found on the street and forced to undergo medical exams only to be registered as prostitutes, Josephine Butler in her campaigns also had to implicitly accept that there was a prostitution that was not ‘forced.’ At that time, most of society considered prostitution to be harmful. Therefore, Butler’s position likely seemed to be making inconsequential distinctions between free and forced prostitution in the 1860s, a century before Western society became so thoroughly sexualized through pornography and the media.”).

⁵⁴ Chuang, *Rescuing*, *supra* note 52, 1702–05.

⁵⁵ See *id.* Carceral feminism is one of the most influential ideologies impacting governance on trafficking. Halley et al.’s analysis demonstrates how the carceral feminist agenda has successfully entered and shaped the response to rape and trafficking in global governance. See Halley et al., *supra* note 7, at 362. As

sought to utilize criminal law as a means of addressing a range of feminist issues including domestic violence, sexual violence, and trafficking.⁵⁶ This feminist emphasis on crime and punishment fit well with the domestic war on crime,⁵⁷ and often mirrored the broader push towards criminalization.⁵⁸ The new movement explicitly referenced the days of the LNA and their shared project with religious forces in the early 20th century.⁵⁹

Conflict about the role of law in shaping sexuality also deepened with the emergence of HIV in the 1980s. The epidemic reshaped global conversations on the way to address health issues emerging from transacting sex.⁶⁰ Public health practitioners, harm-reduction actors, and sex workers had successfully brought conversations about decriminalization onto the global stage as a key means of addressing the epidemic.⁶¹ This drew abolitionists back into the world of public health, mirroring 19th century activism around prostitution and venereal disease. The desire to utilize the criminal law as a site of enacting dominance feminist politics, however, placed neo-abolitionists in conflict with a new legal paradigm, harm-reduction, that itself was a site of resistance to a coercive public health response to HIV/AIDS.⁶²

B. A New Paradigm: Harm-Reduction

Understanding harm-reduction as a frame to address issues around transactional sex requires revisiting the early period of the

this article demonstrates, the rise of carceral feminism is patently evident inside of public health governance. *See id.*

⁵⁶ For a discussion on carceral feminism, see Halley et al., *supra* note 7, at 335. *See also*, Bernstein, *supra* note 11, at 233-259.

⁵⁷ *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4, 15 (2007) (discussing the war on crime in the United States).

⁵⁸ Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 750 (2007).

⁵⁹ BARRY, *supra* note 49.

⁶⁰ Ahmed & Kirby, *supra* note 19; Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women's Health*, 34 HARV. J. L. & GENDER 225, 234 (2011).

⁶¹ Ahmed & Kirby, *supra* note 19.

⁶² Ahmed & Kirby, *supra* note 19; Ahmed, *supra* note 60, at 234-39.

AIDS epidemic. HIV was discovered in the early 1980s.⁶³ Early in the epidemic, scientists noted that HIV was spread through sexual intercourse.⁶⁴ Much conjecture, however, existed about why some groups and not others contracted HIV.⁶⁵ In the United States epidemiologists recognized higher rates of HIV amongst “prostitutes.”⁶⁶ Other groups included the “4-H Club”: homosexuals, hemophiliacs, Haitians, and heroin users.”⁶⁷

The law became a site of activity for those seeking to control the spread of HIV. Outside of hemophiliacs, who were largely understood as the epidemic’s victims, the criminal and punitive legal responses to HIV bore down on those at high risk for contracting HIV and those that had HIV. For example, some legal scholars advocated that individuals who knowingly or intentionally spread HIV should be prosecuted.⁶⁸ Punitive measures prevailed in addressing the epidemic: states passed laws criminalizing intentional transmission of HIV,⁶⁹ HIV positive Haitians were detained in Guantanamo Bay,⁷⁰ and gay men became the target of increased public health surveillance.⁷¹ Prostitution, already criminalized, took on a new dimension.

⁶³ See *Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, MMWR (CDC, Atlanta, Ga.), Sep. 24, 1982, <http://www.cdc.gov/mmwr/preview/mmwrhtml/00001163.htm> [hereinafter *Current Trends Update*]. The CDC began reporting on an illness termed Acquired Immune Deficiency Syndrome (AIDS) in 1982. See *id.* HIV was not named “HIV” until 1986. See PAULA TREICHLER, *HOW TO HAVE THEORY IN AN EPIDEMIC* 30–31 (1999).

⁶⁴ *A Timeline of Aids: 1983*, AIDS.GOV, <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline/> (last visited Sept. 20, 2015).

⁶⁵ Ahmed, *supra* note 50, at 25–26.

⁶⁶ Phillippe Van De Perre et al., *Female Prostitutes: A Risk Group for Infection with Human T-Cell Lymphotropic Virus Type III*, 326 LANCET 524, 526 (1985).

⁶⁷ *History of AIDS Up to 1986*, AVERT, <http://www.avert.org/history-aids-1986.htm> (last visited Sept. 20, 2015).

⁶⁸ David Robinson, Jr., *AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 HOFSTRA L. REV. 91, 100–01 (1985) (arguing for a new criminal statute which would heighten penalties and create a specific crime for the knowing or reckless transmission of HIV).

⁶⁹ J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAVIOR 997, 998, 1002 (2014).

⁷⁰ Larry Rohter, *Haitians With H.I.V. Leave Cuba Base for Lives in U.S.*, N.Y. TIMES (June 15, 1993), <http://www.nytimes.com/1993/06/15/us/haitians-with-hiv-leave-cuba-base-for-lives-in-us.html>.

⁷¹ See *History of AIDS Up To 1986*, *supra* note 67.

Those arrested were no longer simply engaging in an illegal activity, they were now spreading a new deadly disease.⁷² Carceral and punitive approaches became central to a vision of how to control a growing epidemic. The rise of a criminal justice based response to HIV fit neatly into rising reliance on criminal law as a political and social tool to address “social-ills” in the 1980s.⁷³ The growing “war on crime” mentality of the United States in the 1980s helped to structure the HIV response globally.⁷⁴

The highly punitive public health response to HIV was met with resistance at the local and international level.⁷⁵ Domestically, civil rights and civil liberties groups organized to contest this carceral approach.⁷⁶ In global fora, a health and human rights movement gained momentum with the appointment of Jonathan Mann as director of the first WHO Global AIDS Programme in 1986.⁷⁷ Health and human rights scholars and activists relied on civil rights doctrines enshrined in human rights treaties to resist the coercive and punitive

⁷² See, e.g., Robinson, *supra* note 68, at 99 (“Prostitution may be a more efficient mode of transferring the AIDS virus than most noncommercialized sexual encounters; prostitutes are often intravenous drug abusers, and multiple partners of prostitutes present greater opportunities for spreading the prostitutes’ infections. Moreover, previously-deposited semen may itself be contacted by subsequent male patrons in the course of a prostitute’s work. Thus, deterrence of some behavior which risks spreading AIDS could be attempted through vigorous enforcement of laws against prostitution and patronizing prostitutes.”).

⁷³ See SIMON, *supra* note 57, at 4, 15 (arguing that the use of criminal law to govern increased in the 1960s and that “[a]cross all kinds of institutional settings, people are seen as acting legitimately when they act to prevent crimes or other troubling behaviors that can be closely analogized to crimes.”) It is arguable that the rise of criminalizing HIV transmission and exposure fit within this broader crime and punishment agenda that granted leaders legitimacy in addressing the HIV epidemic.

⁷⁴ See, e.g., *Legislation Contagion: The Spread of Problematic New HIV Laws in Western Africa*, 12 HIV/AIDS POL’Y & L. REV., no. 2/3, Dec. 2007, at 5 [hereinafter *Legislation Contagion*] (providing a more contemporary example of how the U.S. is implicated in spreading a carceral response to HIV, including funding initiatives resulting in several West African countries criminalizing exposure and/or transmission of HIV).

⁷⁵ See AIDS AGENDA: EMERGING ISSUES IN CIVIL RIGHTS 242 (Nan D. Hunter & William B. Rubenstein eds., 1992).

⁷⁶ See *id.*

⁷⁷ Philip J. Hiltz, *Jonathan Mann, AIDS Pioneer, Is Dead at 51*, N.Y. TIMES (Sept. 4, 1998), <http://www.nytimes.com/1998/09/04/us/jonathan-mann-aids-pioneer-is-dead-at-51.html>.

state response to HIV, including mandatory HIV testing, the use of criminal laws for public health, and quarantine.⁷⁸ Importantly, sex workers resisted characterization as vectors of the HIV epidemic; building on the pre-existing sex worker movement, sex workers worked to reframe their status as victims, rather than vectors, of the HIV crisis.⁷⁹ The result of these efforts was a transformation inside of public health.⁸⁰ Sex workers are seen as a vulnerable population as well as potential change-agents in face of the HIV epidemic.⁸¹

The success of these allied efforts is partly attributable to the importation, rise, and stabilization of the harm-reduction frame as the predominant way to address high-risk behavior in the face of HIV.⁸² Harm-reduction originated in the Netherlands in the 1970s.⁸³ Although experts and advocates contest the definition of harm-reduction, scholarship on harm-reduction is distinct from the two other predominant approaches—the often-punitive abolitionist perspective or the disease model (based on medicine).⁸⁴ Both the abolition and disease model seek to eradicate drug use.⁸⁵ Rather than focus on eradicating the use of drugs, however, harm-reduction takes a pragmatist approach that seeks to address the harms arising from the act itself (i.e. drug use).⁸⁶ Lenton and Single explain that a harm-reduction policy or program is one

‘(1) where the primary goal is the reduction of drug related harm rather than drug use per se; (2) where

⁷⁸ Jonathan M. Mann & Kathleen Kay, *Confronting the Pandemic: The World Health Organization's Global Programme on AIDS, 1986–1989*, 5 AIDS S221, S226 (1991).

⁷⁹ Ahmed, *supra* note 50, at 40.

⁸⁰ *Id.* at 41.

⁸¹ *Id.* at 40–46.

⁸² *Harm Reduction and HIV Prevention*, AVERT (June 1, 2015), <http://www.avert.org/harm-reduction-hiv-prevention.htm>.

⁸³ Diane Riley and Pat O'Hare, HARM REDUCTION: HISTORY, DEFINITION, PRACTICE IN HARM REDUCTION NATIONAL AND INTERNATIONAL PERSPECTIVES 1-3 (eds. James Inciardi and Lana Harrison 1999) (arguing that harm-reduction emerged from the Netherlands, the United Kingdom, and North America). *See also*, Michael T. Wright, *Harm Reduction*, THE BODY (1998), <http://www.the-body.com/content/art14023.html>.

⁸⁴ G. Alan Marlatt, *Harm Reduction: Come as You Are*, 21 ADDICTIVE BEHAVIORS 779, 785–87 (1996).

⁸⁵ *See id.*

⁸⁶ *See id.*

abstinence-oriented strategies are included, strategies are also included to reduce the harm to those who continue to use drugs; and (3) strategies are included which aim to demonstrate that, on the balance of probabilities, it is likely to result in a net reduction in drug related harm.⁸⁷

In other words, reduce drug related harms rather than drug use per se while keeping an eye upon the potential for abstinence. As law professor Scott Burris argues:

[Harm-reduction] has two key elements: the first, quite compatible with a rights orientation, is the acceptance of the drug user as she is, as a valid, complicated, ultimately typical human being—comprehension. The second, equally a mindset of public health, is taking responsibility to promote the welfare of the drug user—action.⁸⁸

A diverse set of advocates including physicians, activists, and public health officials imported the harm-reduction model as an alternative to the harsh punitive approaches taken in the war on drugs.⁸⁹ This broad based alliance advocated for harm-reduction over abolitionist frames.⁹⁰ The HIV epidemic provided a new impetus to find solutions to the spread of HIV that led to reductions in new rates of infection. Harm-reduction activists and scholars successfully mobilized this frame as the most effective means of addressing the large impact of HIV on drug users.⁹¹ Civil liberties organizations championed the cause of harm-reduction.⁹² By the

⁸⁷ Linda Cusick, Commentary, *Widening the Harm-Reduction Agenda: From Drug Use to Sex Work*, 17 INT'L J. DRUG POL'Y 3, 3 (2006) (citing Simon Lenton & Eric Single, *The Definition of Harm Reduction*, 17 DRUG ALCOHOL REV. 213 (1998)).

⁸⁸ Scott Burris, Response, *Harm Reduction's First Principle: "The Opposite of Hatred"*, 15 INT'L J. DRUG POL'Y 243, 243 (2004).

⁸⁹ See Marlatt, *supra* note 84, at 780–83.

⁹⁰ See *id.*

⁹¹ Gordon Roe, *Harm Reduction as Paradigm: Is Better than Bad Good Enough? The Origins of Harm Reduction*, 15 CRITICAL PUB. HEALTH 243, 243 (2005).

⁹² See Ahmed, *supra* note 50, at 44.

1990s, harm-reduction was widely accepted as the most effective means to address drug use, and, in 1990, the first international harm-reduction conference took place.⁹³ By 1995, the American Journal of Public Health published recommendations to redefine the American drug policy that advocated for harm-reduction.⁹⁴ Importantly, US Surgeon General Jocelyn Elders came forward supporting the exploration of legalization as a means to address drug use.⁹⁵

While formal harm-reduction programs remained focused on drug use, harm-reduction as a principle became increasingly central to the sex work response.⁹⁶ Local and global sex worker activist groups were early adopters of harm-reduction principles to address issues arising from sex work.⁹⁷ In the early days of adopting a harm-reduction style approach into sex work programs, the language of harm-reduction was reserved for the intersection of programs working with sex workers engaged in drug use.⁹⁸ However, the harm-reduction style of sex worker programming greatly expanded beyond drug use.⁹⁹ This broader set of ideas, which will be called harm-reduction plus (HR+) in this paper, draws on the core ideas of a traditional harm-reduction model but applies them specifically to sex work. Here, the key point is that the major challenge stems not from the sex work itself but from an unsafe sex work environment.¹⁰⁰

Public health practitioners saw sex workers as subject to harms including sickness, violence, discrimination, prosecution, debt, and exploitation (including trafficking).¹⁰¹ Like with drug users, the pragmatist principles of harm-reduction enabled public health practitioners to focus on the harms surrounding transactional sex and not

⁹³ MELISSA HOPE DITMORE, WHEN SEX WORK AND DRUG USE OVERLAP: CONSIDERATIONS FOR ADVOCACY AND PRACTICE 9 (2013).

⁹⁴ See Marlatt, *supra* note 84, at 780.

⁹⁵ Marlatt, *supra* note 84, at 782; Laura Flanders, *Dr. Jocelyn Elders: Marijuana, Masturbation and Medicine*, THE NATION: HEALTHCARE POLICY (Oct. 20, 2010), <http://www.thenation.com/blog/155500/dr-joycelyn-elders-marijuana-masturbation-and-medicine#>.

⁹⁶ Rekart, *supra* note 5, at 2123.

⁹⁷ See DITMORE, *supra* note 93, at 9.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ Rekart, *supra* note 5, at 2124–25.

the sex itself.¹⁰² This growing union of harm-reduction and sex worker activism resulted in funding for sex worker initiatives that supported improving the lives of sex workers rather than focusing in on abolition.¹⁰³ For example, the Global Network of Sex Work Projects (then the Network of Sex Work Projects) was founded in 1990 and published the guide *Making Sex Work Safe* in 1997.¹⁰⁴ It is important to note that the idea that transactional sex might be framed as trafficking or inherently exploitative did not enter the harm-reduction framing in a way that would alter the harm-reduction emphasis on decriminalization.¹⁰⁵ Harm-reduction's inability to take on questions of exploitation inherent in the debates on prostitution taking place outside of public health, and more specifically in the realm of feminism, however, created room for a counter-frame to emerge—neo-abolitionism.

C. Harm-Reduction or Neo-Abolition?

As women began getting detected with HIV, feminists identified women's subordination as a reason for women's vulnerability to the virus.¹⁰⁶ Feminist lawyers and activists imported debates on sex and sexuality into projects to address the epidemic.¹⁰⁷ This included disagreements between feminists about trafficking and sex work.¹⁰⁸ While harm-reduction's influence in public health grew, abolitionist feminists banded together with conservatives and religious organizations to influence in anti-trafficking lawmaking domestically and internationally outside of public health.¹⁰⁹ First, domestically, in 2000 the United States passed the Trafficking Victims Protection Act (TVPA).¹¹⁰ Second, U.N. negotiations on trafficking resulted in

¹⁰² See generally *id.* (applying harm reduction principles to address the harms of sex work).

¹⁰³ See, e.g., NSWP, <http://www.nswp.org> (last visited Sept. 10, 2015).

¹⁰⁴ *Making Sex Work Safe*, NSWP, <http://www.nswp.org/page/making-sex-work-safe> (last visited Sept. 10, 2015).

¹⁰⁵ See Rekart, *supra* note 5, at 2123.

¹⁰⁶ Ahmed, *supra* note 60, at 226.

¹⁰⁷ *Id.* at 226–27.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 238. See also, Chuang, *Rescuing*, *supra* note 52, at 1655–172.

¹¹⁰ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat.1464 (2000) (codified as amended in scattered sections of 8, 12, 18, 20, 22, 27, and 42 U.S.C.).

the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, also known as the Palermo Protocol.¹¹¹ Both documents reveal a tilt towards the neo-abolitionist pro-carceral approach to ending trafficking.¹¹² The TVPA defines sex-trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”¹¹³ Thus, the general definition of sex-trafficking includes all commercial sex work. In order to qualify for services, however, you must be a victim of a severe form of sex-trafficking defined as follows:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹¹⁴

The Palermo Protocol definition reflects the tension between a neo-abolitionist position and the sex work position and is partly the product of lobbying efforts of two NGO blocs at the negotiations for the Palermo Protocol: the Human Rights Caucus¹¹⁵ and a network

¹¹¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, December 23, 2003, 2237 U.N.T.S. 319, 343–45, 349 [hereinafter Protocol to Prevent Trafficking].

¹¹² *See id.*; Victims of Trafficking and Violence Protection Act of 2000.

¹¹³ Victims of Trafficking and Violence Protection Act of 2000 §103(9).

¹¹⁴ Victims of Trafficking and Violence Protection Act of 2000 §103(8)(A) & (B).

¹¹⁵ *See* Melissa Ditmore & Marjan Wijers, *The Negotiations on the U.N. Protocol on Trafficking in Persons*, 4 NEMESIS 79, 80–82 (2003) (reviewing the alliances and negotiations during the drafting of the Palermo Protocol); Chuang, *Rescuing*, *supra* note 52, at 1672–76. The Human Rights Caucus also had anti-trafficking activists within it. *See* Ditmore & Wijers, *supra* note 115, at 80–82. However, these anti-trafficking activists were supportive of the sex work agenda and interested in resisting the sex-work/trafficking conflation. *See id.*

led by the Coalition Against Trafficking in Women (CATW).¹¹⁶ The final definition of trafficking reads:

For the purposes of this Protocol: (a) ‘Trafficking in persons’ shall mean 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used. . . .¹¹⁷

Neo-abolitionists claimed victory with the inclusion of “exploitation of the prostitution of others.” Yet, the *travaux préparatoires* suggests that the drafters wanted states parties to have discretion in determining the legal position on prostitution and that the inclusion of force, coercion, abduction, fraud, and deception allows for a country-by-country position on the issue of prostitution.¹¹⁸ Sex worker organizations, as well as countries that did not want to reverse their current legal framework that did not criminalize prostitution, supported the latter interpretation.¹¹⁹

¹¹⁶ See Ditmore & Wijers, *supra* note 115, at 80–82; Jo Doezema, *Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiations*, 14 SOC. & L. STUD. 61, 62, 67–68 (2005) [hereinafter Doezema, *Now You See Her*].

¹¹⁷ Protocol to Prevent Trafficking, *supra* note 111, at 344.

¹¹⁸ Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 986, 990 (2001).

¹¹⁹ Ditmore & Wijers, *supra* note 115, at 84.

Further, now that the epidemic impacted women, and violence against women was identified as a potential point of vulnerability for women contracting HIV, there was fertile ground to import a larger abolitionist frame into global HIV legislation. Now crystallized in the TVPA, the rhetoric of sex trafficking emphasizing male dominance over women plugged in neatly to the larger discourse surrounding women's rights. Abolitionist feminists, with their conservative allies, turned to HIV as a new site in which to enact the project of eradicating prostitution. The world of HIV and harm-reduction, however, proved to be a site of resistance for the neo-abolitionist position as engaging sex workers was understood as integral to successful HIV programs.

Thus, the 2000s also saw a neo-abolitionist return to the disease focus of the abolitionist movement that had begun with Josephine Butler's worries about the Contagious Diseases Acts of the late 1800s.¹²⁰ As discussed, Butler's activism focused on how the Contagious Diseases Acts, as attempts to regulate prostitution, controlled women's bodies and facilitated male dominance.¹²¹ The neo-abolitionist interventions into health programs today display a similar anxiety with a different emphasis. For dominance feminists, the primary concern remained: the maintenance of male domination of women through a public health intervention.¹²² A key difference, however, is that Butler's feminism criticized the CDAs for marginalizing women through testing and quarantine-style requirements.¹²³ Today's abolitionist movement does not attack the public health response as overly coercive. Nor do contemporary feminist abolitionists weigh in on HIV as a civil rights or human rights issue. Instead, today's abolitionist feminists seek to engage the coercive and punitive power of the state to enact a particular political agenda: ending "sex-trafficking" through criminalizing demand.¹²⁴ Defined broadly enough, all harm-reduction programs working to aid sex workers or those transacting sex were aiding in trafficking or in perpetuating the harm of supporting prostitution as understood by abolitionists.¹²⁵

¹²⁰ Chuang, *Rescuing*, *supra* note 52, at 1668.

¹²¹ *See supra* Part I.A.

¹²² Ahmed, *supra* note 60, at 233.

¹²³ Waldron, *supra* note 35, at 14.

¹²⁴ Ahmed, *supra* note 60, at 238.

¹²⁵ *See, e.g.*, Rachel Thomas, *Spotlight on Meena Seshu*, *SANGRAM: Sex Worker Rights in Rural India*, OPEN SOC'Y FOUND. (July 26, 2006),

Thus, realizing the goals of the contemporary abolitionists requires a reversal of the current hold that harm-reduction has on public health's framework for how to address the health concerns arising from sex work.

The position of abolitionists in global HIV policy making is directly counter to that of harm-reduction.¹²⁶ Rather than abolish the practice, HR+ activists sought to make sex work safer.¹²⁷ Harm-reduction and HR+ highlighted challenges that increased health risks to sex workers that were separate from a determination of whether or not the act of sex work itself was wrong or immoral.¹²⁸ The HR+ movement took on a range of violations experienced by sex workers including violence experienced in the course of sex work, HIV and other sexually transmitted infections, and extortion from police.¹²⁹ Importantly, clients themselves weren't understood as a problem for sex workers; clients and sex workers were simply part of a larger network of individuals engaged in transactional sex.¹³⁰ Clients could also be seen as vulnerable to contracting HIV and other sexually

<http://www.opensocietyfoundations.org/voices/spotlight-meena-seshu-sangram-sex-worker-rights-rural-india>; see also *Trafficking in Women and Children in East Asia and Beyond: A Review of U.S. Policy: Hearing Before the S. Subcomm. on East Asian and Pacific Affairs of the S. Comm. on Foreign Relations*, 108th Cong. 21 (2003) (statement of Dr. Donna M. Hughes, Professor and Carlson Endowed Chair in Women's Studies, Univ. of R.I., Kingston, R.I.) (criticizing the U.S. Government for supporting harm-reduction efforts for sex workers) [hereinafter *Hearing*].

¹²⁶ Ahmed, *supra* note 60, at 238.

¹²⁷ DITMORE, *supra* note 93, at 9.

¹²⁸ See World Health Org. et al., *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries: Recommendations for a Public Health Approach*, 16 (Dec. 2012), available at http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf; see generally Rekart, *supra* note 5 (addressing the harms experienced by sex workers without addressing morality of sex work).

¹²⁹ See World Health Org et al., *supra* note 128, at 16; see generally Rekart, *supra* note 5 (addressing the harms experienced by sex workers).

¹³⁰ See World Health Org et al., *supra* note 128, at 16.

transmitted infections.¹³¹ HR+ focused on prevention efforts and increasingly on care and treatment.¹³²

An increase in HIV funding, agitation by sex work activists, and a desire to implement a rights-based participatory approach allowed sex workers to engage and influence policy at the level of global governance. In 2002, for example, UNAIDS explicitly called for the decriminalization of sex work to develop programs not just for sex workers but for all players in sex work:

It is essential that these strategies be implemented concurrently so that they can strengthen and complement one another—i.e., using peer education and outreach approaches while ensuring the provision of basic health and social services and *moving to decriminalize sex work* [emphasis added]. By using this approach, ‘creating supportive environments’ becomes a predictable outcome. The most effective actions design an appropriate mix of interventions into a community-development-oriented programme that is geared not just towards sex workers but towards *all players* in sex work.

...

In India, the basic approach of the STI/HIV Intervention Project, better known as the Sonagachi Project, in Kolkata, India, has been to create an enabling environment based on the ‘three Rs’: ‘respect’ for sex work and those engaged in it; ‘reliance’ on those involved in sex work to run the programme; and

¹³¹ UNAIDS, *UNAIDS Guidance Note on HIV and Sex Work*, UNAIDS/09.09E / JC1696E, Annex, 17 (Mar. 2012), available at http://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf [hereinafter *2012 Guidance Note*]; *PrEP: What It Is and How Sex Workers Can Use It*, AVAC (Oct. 22, 2014), <http://www.avac.org/blog/prep-what-it-and-how-sex-workers-can-use-it> (discussing pre-exposure prophylaxis as a means of preventing HIV transmission for sex workers).

¹³² See UNAIDS, *2012 Guidance Note*, *supra* note 131, at 17; see generally Rekart, *supra* note 5 (discussing preventative measures for sex workers).

‘recognition’ of their professional and human rights.¹³³

Despite this momentum internal to HIV agencies and programs, abolitionist activism paid off in the United States. In 2003, President Bush announced the President’s Emergency Plan for AIDS Relief (PEPFAR).¹³⁴ PEPFAR dedicated 15 billion dollars to address HIV/AIDS.¹³⁵ PEPFAR placed restrictions, however, on the way funds could be used with regard to sex work.¹³⁶ The original restrictions (now partly modified by a U.S. Supreme Court decision) required that organizations receiving U.S. funding on HIV/AIDS through PEPFAR sign a pledge saying that they oppose prostitution and agree not to engage in advocacy that promotes legalization of sex work.¹³⁷ The PEPFAR restrictions represent the influence that the abolitionist frame has achieved in public policy and preceded what would become an ongoing struggle between the harm-reduction and abolitionist approaches. The US State Department lists PEPFAR as an anti-trafficking initiative.¹³⁸ The anti-sex trafficking movement had successfully embedded the abolitionist frame in a key piece of HIV legislation.

This abolitionist position countered the HR+ advocacy and programs that had proven successful in reducing the spread of HIV amongst sex workers. Rather than arrest the purchasers of sex, supporters of HR+ worked to have increased access to condoms and form sex workers collectives.¹³⁹ The collectives were an integral part of the HIV response and seen as one of the most effective ways

¹³³ Joint United Nations Programme on HIV/AIDS (UNAIDS), *Sex Work and HIV/AIDS*, 10, 15 (June 2002), available at http://data.unaids.org/publications/IRC-pub02/jc705-sexwork-tu_en.pdf.

¹³⁴ United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, H.R. 1298, 108th Cong. § 2(25) (2003) (codified as amended in scattered sections of 22 U.S.C.).

¹³⁵ *Id.* § 2(28).

¹³⁶ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2324 (2013) (finding the pledge requirement unconstitutional for U.S. based organizations).

¹³⁷ *Id.* at 2332.

¹³⁸ *U.S. Laws on Trafficking in Persons*, U.S. DEP’T STATE, <http://www.state.gov/j/tip/laws> (last visited Oct. 29, 2015).

¹³⁹ Rekart, *supra* note 5, at 2126–27; World Health Org et al., *supra* note 128, at 19.

to address HIV amongst sex workers.¹⁴⁰ In these collectives, sex workers engage in community building and empowerment activities, alongside an informal regulation of the local industry.¹⁴¹ For example, sex workers might identify violent clients so that others could ban them from brothels and protect other sex workers from harm by acting as guards.¹⁴²

The abolitionist conflation of sex work and trafficking, however, was not only positioned in opposition to the harm-reduction position, but it indicted the harm-reduction activists for engaging in sex-trafficking.¹⁴³ In other words, giving women condoms or treating them for STIs, enabling them to go back to practice sex work safely, supported the traffic of these women for men. Abolitionist feminists and conservatives led a push to enforce the PEPFAR provisions leading to the closure of HIV programs.¹⁴⁴ The consequences on the ground were immense. Some of the only services being provided to poor, marginalized women around the world shut down.¹⁴⁵ These included programs in Bangladesh and on the Cambodia-Vietnam border.¹⁴⁶ In India, projects celebrated for their HIV efforts were publicly accused of trafficking women.¹⁴⁷

It is important to note that sex work interventions have not denied the existence of trafficking. In fact, several sex worker organizations, and organizations that support sex workers and decriminalization, have anti-trafficking initiatives.¹⁴⁸ Sex worker organizations

¹⁴⁰ See World Health Org et al., *supra* note 133, at 20–21.

¹⁴¹ *Id.* at 19.

¹⁴² See DITMORE, *supra* note 93, at 22.

¹⁴³ See Global Commission on HIV and the Law, *supra* note 17, at 40.

¹⁴⁴ *Id.*

¹⁴⁵ Ahmed, *supra* note 60, at 256–58.

¹⁴⁶ *Id.* at 257.

¹⁴⁷ *Id.*

¹⁴⁸ See, e.g., *About the Sex Workers Project*, SEX WORKERS PROJECT, <http://sexworkersproject.org> (last visited July 29, 2015) (“The Sex Workers Project provides client-centered legal and social services to individuals who engage in sex work, regardless of whether they do so by choice, circumstance, or coercion. One of the first programs in the nation to assist survivors of human trafficking, the Sex Workers Project has pioneered an approach to service grounded in human rights, harm reduction and in the real life experiences of our clients. . . . As the only US organization meeting the needs of both sex workers and trafficking victims, the Sex Workers Project serves a marginalized community that few others reach. We engage in policy and media advocacy, community education and

simply see the sale of sex on a spectrum of possibilities that range from the potential for agency to coercion.¹⁴⁹ This enables sex workers to see alternatives to criminal law in designing methods to address the needs of non-coerced sex workers. By not collapsing all prostitution into trafficking, the possibility of harm-reduction remains possible.

The contestation between the two frames continues in global governance. In 2006, following their various victories of the early 2000s including the TVPA and Anti-Prostitution Loyalty Oath in PEPFAR, abolitionist activists attended a UNAIDS-sponsored Global Consultation on Sex Work and AIDS in Rio de Janeiro.¹⁵⁰ Abolitionists spoke about the need to focus on “harm elimination” rather than “harm-reduction” to address sex work, and to penalize clients of sex workers.¹⁵¹ Further, reports published by sex worker activist attendees by the Sex Worker’s Rights Advocacy Network suggested that the US also placed pressure on UN officials to adopt an abolitionist position.¹⁵²

The intervention by abolitionist organizations made a difference. In 2007, UNAIDS issued a new Guidance Note that backed away from its earlier stance on decriminalization in 2002 and instead stated that “[a] significant number of women and girls are trafficked into sex work, knowingly or unknowingly, with the promise of a better life for themselves and their families.”¹⁵³ The abolitionist tone of the 2007 Guidance Note prompted an immediate backlash by sex worker organizations that held influential positions on the UNAIDS

human rights documentation, working to create a world that is safe for sex workers and where human trafficking does not exist.”); *see generally* Global Alliance Against Traffic in Women, *Moving Beyond ‘Supply and Demand’ Catchphrases: Assessing the Uses and Limitations of Demand-Based Approaches in Anti-Trafficking* (2011), available at http://www.gaatw.org/publications/MovingBeyond_SupplyandDemand_GAATW2011.pdf (explaining the connections between trafficking and the demand for sex work and between trafficking and the demand for “exploitative labour practices”).

¹⁴⁹ Chuang, *Rescuing*, *supra* note 52, at 1671.

¹⁵⁰ *Id.* at 238.

¹⁵¹ *Id.*

¹⁵² *Id.* at 239.

¹⁵³ *Id.*

Programme Coordinating Board.¹⁵⁴ Another guidance note was released in 2009, and though it mentions law as a barrier to accessing care and the need for positive steps towards a non-discriminatory legal system for sex work, it stops short of calling for decriminalization.¹⁵⁵ The release of the 2009 Guidance Note marked the launch of an advisory group co-chaired by the Global Network of Sex Work Projects and UNAIDS.¹⁵⁶ The group was guided by the experiences of sex workers, and punitive laws became an important area of focus.¹⁵⁷

In 2012, UNAIDS released an updated Guidance Note which was partly the outcome of the consultative process in 2009.¹⁵⁸ The 2012 guidelines called for the decriminalization of various aspects of the sex industry including the purchase and sale of sex.¹⁵⁹ The UNAIDS Guidance Note states:

States can take many actions to establish legal and policy environments that are conducive to universal access to HIV services for sex workers. Among these are the following: States should move away from criminalising [sic] sex work or activities associated with it. Decriminalisation [sic] of sex work should include removing criminal laws and penalties for purchase and sale of sex, management of sex workers and brothels, and other activities related to sex work. To the degree that states retain non-criminal administrative law or regulations concerning sex work, these should be applied in ways that do not violate

¹⁵⁴ Joint United Nations Programme on HIV/AIDS (UNAIDS), *Report of the Twentieth Meeting of the Programme Coordinating Board*, UNAIDS/PCB(20)/07.20, at 5–6 (July 26, 2007), available at http://www.unaids.org/sites/default/files/media_asset/pcb_20_final_report_edited_en_3.pdf [hereinafter *Report of the Twentieth Meeting*].

¹⁵⁵ Joint United Nations Programme on HIV/AIDS (UNAIDS), *UNAIDS Guidance Note on HIV and Sex Work*, UNAIDS/09.09E/JC1696E, at 8 (Mar. 2009), available at http://reliefweb.int/sites/reliefweb.int/files/resources/32DD702753103A1DC12576090043A954-UNAIDS_mar09.pdf [hereinafter *2009 Guidance Note*].

¹⁵⁶ Ahmed, *supra* note 60, at 241.

¹⁵⁷ *Id.*

¹⁵⁸ *2012 Guidance Note*, *supra* note 131.

¹⁵⁹ *Id.* at 6.

sex workers' rights or dignity and that ensure their enjoyment of due process of law.¹⁶⁰

While actively acknowledging that trafficking is a problem that must be addressed, the UNAIDS 2012 Guidance Note¹⁶¹ and the 2010 Report by the UN Special Rapporteur on the right to health¹⁶² specifically distinguished their recommendations on sex work from the Palermo Protocol definition of trafficking. The Guidance Note distinguishes the harms associated with sex work from the sale of sex itself:

However, it is important to understand that being trafficked is often a temporary situation: people who are trafficked do not necessarily remain in situations of powerlessness and coercion. For example, individuals who have been trafficked into the sex industry, or those who find themselves tricked or coerced once within the sex industry, can find their way out of situations of coercion but remain in sex work operating more independently and usually with support from their fellow sex workers, their clients, their intimate partners and their managers or agents.¹⁶³

Between 2008 and 2012, several key events bolstered the strength of borrowing harm-reduction principles for sex work and calling for a decriminalization of sex work and related practices. In 2008, prominent Indian attorney Anand Grover became the UN Special Rapporteur for the Right to Health.¹⁶⁴ In 2010, Grover submitted

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Anand Grover (Special Rapporteur On The Right Of Everyone To The Enjoyment Of The Highest Attainable Standard Of Physical And Mental Health), *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development*, U.N. Doc. A/HRC/14/20 (Apr. 27, 2010), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf> [hereinafter Special Rapporteur's Report].

¹⁶³ 2012 Guidance Note, *supra* note 131, at 15.

¹⁶⁴ *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS,

a report in his capacity as Rapporteur that specifically highlighted the challenges that the criminalization of sex work and related practices posed to realizing the right to health:

Historically, sex work has been criminalized in two major ways. First, through the criminalization of the selling of sexual services, with the imposition of penalties upon sex workers themselves. Second, through the criminalization of various practices around sex work: these include, but are not limited to, keeping a brothel; recruiting for or arranging the prostitution of others; living off the proceeds of sex work; solicitation; and facilitating sex work through the provision of information or assistance. Although the former is not directly criminalized in many States worldwide, sex workers are nonetheless treated as criminals where activities around sex work are criminalized, or through the use of other pre-existing laws (not specific to sex work) to harass, intimidate or justify the use of force against sex workers. Examples include the use of vagrancy or public nuisance laws to detain or arrest street sex workers, or the use of laws prohibiting homosexual acts in relation to male and transgender sex workers.¹⁶⁵

In 2010, the United Nations Development Program (UNDP) established an independent commission: the Global Commission on HIV and the Law.¹⁶⁶ The purpose of the commission was to assess legal and regulatory barriers to slowing the HIV epidemic with three primary areas of focus: criminal laws, laws pertaining to women's rights, and intellectual property law.¹⁶⁷ Advisory group members produced reports on areas of concern to the commission to guide the

<http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx> (last visited Oct. 10, 2015).

¹⁶⁵ Special Rapporteur's Report, *supra* note 162, at ¶ 29 (footnote omitted).

¹⁶⁶ Global Commission on HIV and the Law, *supra* note 17, at 3. I served on the Technical Advisory Group to the Commission.

¹⁶⁷ *See generally id.* (discussing the three primary areas of focus: criminal laws, laws pertaining to women's rights, and intellectual property law).

recommendations of the commissioners.¹⁶⁸ Importantly, the Global Commission hosted a series of regional meetings that brought together activists, NGOs, and academics to discuss regional issues pertaining to law and human rights.¹⁶⁹ Organizations submitted reports to be considered in the drafting of key recommendations.¹⁷⁰ The Commission recommended the decriminalization of all consensual adult sex.¹⁷¹

In 2012 UNAIDS released a report in partnership with the United Nations Population Fund, the World Health Organization, and the Global Network of Sex Work Projects titled *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income-countries: Recommendations for a Public Health Approach*.¹⁷² The document placed their recommendations in tiers: “good practice recommendations” and “evidence-based recommendations.”¹⁷³ Good practice recommendations are “overarching principles derived not from scientific evidence but from common sense, ethics and human rights principles.”¹⁷⁴ With regard to good practice, the report recommends that “all countries should work toward decriminalization of sex work and elimination of the unjust application of non-criminal laws and regulations against sex workers.”¹⁷⁵ In doing so, the report cites to the Report of the Global Commission on HIV and the Law.¹⁷⁶

These developments were quickly met with resistance from neo-abolitionist groups who mobilized the abolitionist frame to critique the harm-reduction approach adopted by UNAIDS and the Global

¹⁶⁸ UNAIDS Programme Coordinating Board, *Report of the Thirty-Fifth Meeting of the Programme Coordinating Board*, ¶ 9, UNAIDS/PCB (35)/14.24 rev. 1, at 7 (Dec. 11, 2014), available at http://www.unaids.org/sites/default/files/media_asset/20141211_35PCB%20_StigmaDiscrimination_rev.pdf [hereinafter *Report of the Thirty-Fifth Meeting*].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Global Commission on HIV and the Law, *supra* note 17, at 99.

¹⁷² World Health Org., *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries: Recommendations for a Public Health Approach*, at 8 (Dec. 2012), available at http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf.

¹⁷³ *Id.* at 8–9.

¹⁷⁴ *Id.* at 8.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

Commission on HIV and the Law. The prominent women's rights organization Equality Now led a letter-writing campaign to the heads of UNAIDS, UNDP, and UNFPA: Michel Sidibé, Helen Clark, and Babatunde Osotimehin.¹⁷⁷ A key point of contention for Equality Now and its partners was the Palermo Protocol definition of exploitation to separate sex work from trafficking.¹⁷⁸ In other words Equality Now places the Palermo Protocol on trafficking as oppositional to the harm-reduction work being done in the context of HIV. As stated:

In 2000, Equality Now, sex trafficking survivors and our partners worked to ensure that the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the 'UN Trafficking Protocol') defined trafficking to reflect the wide variety of sex trafficking survivors' experiences. The UN Trafficking Protocol's definition was the result of years of discussion and negotiation by countries and reflects a carefully drawn political consensus that should not be challenged by UN agencies. However, the two UN reports recommend revising and narrowing this definition, which would prevent many victims of trafficking from being recognized as such. This would also jeopardize their ability to access support and justice, and reduce accountability for their traffickers.¹⁷⁹

¹⁷⁷ Letter from Equality Now to Michel Sidibé, Exec. Dir., Joint United Nations Programme on HIV/AIDS (Nov. 15, 2012), *available at* http://www.equalitynow.org/sites/default/files/Letter_UNAIDS_Sidibe.pdf [hereinafter Letter to Michel Sidibé]; Letter from Equality Now to Helen Clark, Administrator, United Nations Development Programme (Nov. 15, 2012), *available at* http://www.equalitynow.org/sites/default/files/Letter_UNDP_Clark.pdf [hereinafter Letter to Helen Clark]; Letter from Equality Now to Babatunde Osotimehin, Exec. Dir., United Nations Population Fund (Nov. 15, 2012), *available at* http://www.equalitynow.org/sites/default/files/Letter_UNFPA_Osotimehin.pdf [hereinafter Letter to Babatunde Osotimehin].

¹⁷⁸ See Letter to Michel Sidibé, *supra* note 177, at 1–2; Letter to Helen Clark, *supra* note 177, at 1–2; Letter to Babatunde Osotimehin, *supra* note 177, at 1–2.

¹⁷⁹ *United Nations: Listen to Survivors—Don't Jeopardize Efforts to Prevent Sex Trafficking*, EQUALITY NOW (Sept. 20, 2013), http://www.equalitynow.org/sites/default/files/UN_51_1_EN.pdf.

Equality Now's concern for "narrowing" is a reference to efforts by HIV institutions to separate trafficking from sex work. The abolitionist organizations seek the expansive definition of trafficking, which they assert was the end result of the Palermo Protocol. The abolitionist position continues to be in tension with the mainstream public health and harm-reduction perspective that largely reflects the shift brought by sex workers and human rights activists through the HR+ model. For example, in 2012 the leading public health journal, *The Lancet*, stated:

Discriminatory laws and policies, stigma, violence, and social exclusion all impede efforts to reach sex workers and their clients with effective HIV prevention, treatment, care, and support programmes. Individual-level behaviour change in the form of traditional peer education, condom promotion, and screening for sexually transmitted infections does not work without substantial community mobilisation, leadership, and participation of sex workers themselves to tackle the social and structural factors that influence their vulnerability.¹⁸⁰

Two years later, a *Lancet* editorial made an explicit call for decriminalization as one of the most effective interventions to address the HIV epidemic:

The Lancet series on HIV and sex workers showed that decriminalisation of sex work would have the greatest effect on the course of HIV epidemics across all settings, averting 33–46% of HIV infections in the next decade. Such a move would also reduce mistreatment of sex workers and increase their access to human rights, including health care.¹⁸¹

The implications of this claim are clear: decriminalization is the best approach for HR+ as well as for addressing the HIV epidemic.

¹⁸⁰ Editorial, *Sex Workers and HIV—Forgotten and Ostracized*, 380 THE LANCET 188 (2012).

¹⁸¹ *Keeping Sex Workers Safe*, LANCET, [http://thelancet.com/journals/lan-cet/article/PIIS0140-6736\(15\)61460-X/fulltext](http://thelancet.com/journals/lan-cet/article/PIIS0140-6736(15)61460-X/fulltext) (last visited Oct. 21, 2015).

Lessening criminal sanctions could allow for public health services to reach marginalized groups.

The two frames, HR+ and abolition, propose conflicting criminal law paradigms. For the abolitionist organizations, the victims of HIV and trafficking are primarily women and girls, and the perpetrators of trafficking and of spreading HIV are men.¹⁸² The men—seeking to subordinate—use and exploit women; prostitution epitomizes this subordination.¹⁸³ HIV is a collateral consequence. Carceral feminists actively rely on the police to end sex-trafficking. Unlike harm-reduction, the primary tool of the abolitionist agenda has been to ramp up the criminal law through seeking the prosecution of individuals who aid or abet in the selling of sex, profit off the sale of sex, or purchase sex.¹⁸⁴ In other words, the motto of anti-trafficking efforts: “prevent, protect, and prosecute.”¹⁸⁵ For abolitionists, any support for sex work represented trafficking. Therefore HIV programs providing services for sex workers without making efforts to end sex work are aiding and abetting in trafficking.¹⁸⁶ For anti-

¹⁸² See *Best Practices: Ending the Demand*, COALITION AGAINST TRAFFICKING IN WOMEN, <http://www.catwinternational.org/BestPractices/EndingDemand> (last visited July 30, 2015).

¹⁸³ BARRY, *supra* note 49 (“I am taking prostitution as the model, the most extreme and most crystallized form of all sexual exploitation. Sexual exploitation is a political condition, the foundation of women’s subordination and the base from which discrimination against women is constructed and enacted.”)

¹⁸⁴ See *Best Practices: Ending the Demand*, *supra* note 182.

¹⁸⁵ U.S. DEP’T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, THE 3PS: PREVENTION, PROTECTION, PROSECUTION (June 2011) (explaining that Hillary Clinton announced a “fourth P” of partnership).

¹⁸⁶ The carceral turn in feminism has been met with resistance from feminists skeptical of relying on criminal law to achieve feminist goals as well as those who are concerned about the rise of criminalization inside of feminism. See, e.g., Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1 (2009) (arguing that the shift of decisionmaking authority to the state in the realm of domestic violence has negative implications for the autonomy of women); Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000) (arguing for a “material resources” test to determine which domestic violence laws and policies should be given priority); Aya Grueber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007) (arguing that feminist criminal law reform has reinforced inequality and strayed from underlying feminist values). The carceral project has taken hold in several key international institutions drawing criticisms from critical feminist and post-colonial scholars writing about international law, war, and development. See, e.g.,

sex-trafficking activists, people that purchase sex from women, or live off of the earnings of a woman selling sex, should be prosecuted and punished, regardless of the potential consequences this might have on the spread of HIV or the care and treatment of those that have HIV.¹⁸⁷

II. THE POLITICS OF MEASUREMENT

The view that power and politics shapes each aspect of global governance on health, from evidence-gathering to program-implementation and policy-making, is in tension with the idea that managing an epidemic, from identifying who carries a particular disease to building the best response, must happen from a purely technical perspective that relies first on objective evidence, not on ideology. Yet, ideological battles shape global health governance as actors carry their own politics into governance institutions.¹⁸⁸ These institutions include intergovernmental agencies with mandates on health,

Karen Engle, “*Calling in the Troops*”: *The Uneasy Relationship Among Women’s Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189 (2007) (arguing that international law has facilitated crisis-generating military and nonmilitary interventions); Vasuki Nesiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 HARV. HUM. RTS. J. 75, 76 (2004); Reju Cole, *The White-Savior Industrial Complex*, THE ATLANTIC (Mar. 21, 2012), <http://www.theatlantic.com/international/archive/2012/03/the-white-savior-industrial-complex/254843/> (arguing for more “due diligence” before interfering “in the lives of others”).

¹⁸⁷ There is no stated concern for the HIV consequences this would have for the men that could end up in prison—a place where many people contract HIV. There are also race and class implications of the abolitionist strategy. In most countries, many people in prison are poor. The United States, which has the highest number of incarcerated people in the industrialized world, most are people of color. The profile of a prisoner may likely fit the description of other marginalized groups as well, including migrants and racial or ethnic minorities. To strengthen the police force during anti-trafficking efforts would likely mean bearing down further on these already marginalized groups. In public health terms this places communities at an elevated risk of HIV since prisons are a place where individuals frequently contract HIV. See Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259 (2011) (discussing rape in prisons). See also, WORLD HEALTH ORGANIZATION, EFFECTIVENESS OF INTERVENTIONS TO ADDRESS HIV IN PRISONS, http://apps.who.int/iris/bitstream/10665/43806/1/9789241596190_eng.pdf.

¹⁸⁸ See Janet Halley et al., *supra* note 7 (describing the engagement of feminists inside of governance institutions). The focus is on the way feminists with

including the UNAIDS and the World Health Organization (WHO) or UN agencies with stakeholder specific interests such as UN Women.¹⁸⁹ Each of these institutions is vulnerable to the influence of ideological actors carrying with them their own frames for understanding the realities of HIV and shaping the law and policy response to the epidemic.¹⁹⁰ Rather than the imagined top-down, co-

power inside of institutions have mobilized punitive measures to accomplish feminist goals. *See id.* The paper highlights the way carceral projects became the primary ways of addressing sexual violence and trafficking. *See id.* The definition of governance offered by Halley and colleagues is helpful for tracking feminist projects in international institutions:

I like the word ‘governance’ here precisely because it suggests multiplicity, mobility, fragmentation, a regulatory or bureaucratic legal style, as well as ready facility with non-state and para-state institutional forms (NGOs, law school clinics, ad hoc expert groups doing letter writing campaigns). I use it to dodge the assumption that all legal power inheres in the state and comes down from a pinnacle of legitimate coercive power.

Id. at 341.

¹⁸⁹ The distributional consequences of global health were recently placed in the center of discussions on global health. *See* Ole Petter Ottersen et al., *The Political Origins of Health Inequity: Prospects for Change*, 383 LANCET 630 (2014). The report places politics and power as squarely inside of the larger project for health equity: “Global governance processes involve the distribution of economic, intellectual, normative, and political resources, and to assess their effect on health requires an analysis of power.” *Id.* at 630. For a critique of the report of the Global Commission on the grounds that the report does not adequately take on ideas of power elaborated in the social sciences, see Robert Marten et al., *Commission on Global Governance for Health: What About Power?*, 383 LANCET 2207 (2014) (“Yet the Commission’s recommendations, as the companion Youth Commission noted, ‘are likely to be influenced by the same diverging interests and power asymmetries described by the Commission.’”).

How should global governance on health take place? Jennifer Prah Ruger argues that a set of shared ethical standards based on the idea of human flourishing should drive global lawmaking on public health. *See* Jennifer Prah Ruger, *Global Health Governance as Shared Health Governance*, 66 J. EPIDEMIOLOGY & COMMUNITY HEALTH 653 (2012).

¹⁹⁰ Martha Fineman’s articulation of institutions as vulnerable is instructive. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008). Of course, societal institutions can ameliorate or complicate our vulnerability, but they should also be understood as vulnerable entities in and of themselves. *Id.* at 12. We know that

ordinated response to HIV, we see a fragmented and fractured response to an epidemic based on politics and ideology.¹⁹¹ As described in Part I, ideas of sex work and trafficking infuse policy recommendations and prescribed legal solutions of global health governance institutions.

As a way to remedy the ideological battles that shape proposed legal remedies for transactional sex, policy makers have pushed for a turn to quantitative data.¹⁹² In the world of health and development, a call to quantification also often involves the development and use of indicators.¹⁹³ Most optimistically, this turn to quantitative data might resolve heated debates by providing a numerical basis upon which to build more appropriate policy responses.¹⁹⁴ From this perspective, quantification represents a politically neutral way of surmising the true character of the challenge. This perspective is blind, however, to the role numbers and indicators play in shaping realities and distributing resources based on larger ideologies.¹⁹⁵

“societal institutions themselves are not foolproof shelters, even in the short term. . . . They may fail in the wake of market fluctuations, changing international policies, institutional and political compromises, or human prejudice.” *Id.* Further this institutional vulnerability is almost always obscured, and those in control of institutions have a powerful interest in disclaiming the appearance of any vulnerability. *Id.* at 12–13.

¹⁹¹ As argued by David Fidler, global public health efforts often do not give much weight to the criminal law as a useful site of global public health intervention. Instead, public health has historically turned to public health regulatory agencies, i.e. the World Health Organization, to proliferate rules and policies around improving global health. A range of international institutions, including the World Health Organization and United Nations institutions, also disseminate knowledge, provide technical assistance, coordinate institutions, and work directly with individuals. See David P. Fidler, *Criminal Law and Global Health Governance* in *CRIMINAL LAW, PHILOSOPHY AND PUBLIC HEALTH PRACTICE* 259 (A.M. Viens, John Coggon, & Anthony S. Kessel eds., 2013).

¹⁹² AnnJanette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 *BERKELEY J. INT’L L.* 253, 254 (2009) (“Quantitative data has been forwarded as a central tool in the drive for better methods of assessment, monitoring, and advocacy.”). See also *BETTER DATA REPORT*, *supra* note 18.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52 *CURRENT ANTHROPOLOGY*, S83, S98–S90 (2011).

Data is the product of political contestation.¹⁹⁶ Defining the categories to count helps to produce the very problem being measured, and categories carry the promise of distributing resources towards particular stakeholders or to support an ideological goal.¹⁹⁷ This final section of the paper explores how the turn towards data simply reproduces the ideological battles we have seen thus far between abolitionist and HR+ perspectives.

In Part A, I begin by describing the theoretical literature on the politics of data. In Part B, I describe how numbers play a role in the governance of global anti-trafficking efforts. I focus on how indicators maintain a larger pro-criminalization project in support of the abolitionist criminal law reform agenda. In Part C, I highlight how these larger frames are mobilized in the context of HIV indicators and the stakes of this contestation for public health.

A. *Measurement and Counting: The Theory*

Quantitative indicators, numbers, and measurement have a legitimacy-granting power in contemporary modes of governing.¹⁹⁸ Sociologists have long argued that rather than seeing numbers as abstracted representations of facts, we should interrogate the political judgments inherent in determining what, how, and how often to measure a particular phenomenon. Data becomes a technology of governance: it provides legitimacy to political power; justifies mechanisms of rule; and, importantly, can be a site of resistance mobilized also by citizens as a means of resistance.¹⁹⁹ The production

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at S84–S85.

¹⁹⁸ Nikolas Rose, *Governing by Numbers: Figuring Out Democracy*, 16 ACCT. ORGS. & SOC'Y 673 (1991) (reviewing two books related to numeracy) [hereinafter *Governing by Numbers*]; Patricia Cline Cohen, *A CALCULATING PEOPLE: THE SPREAD OF NUMERACY IN EARLY AMERICA* (1982) (explaining the development of numeracy); see also *THE POLITICS OF NUMBERS* (William Alonso & Paul Starr eds., 1987) (discussing the social and political forces behind statistics). Rose highlights the historical arguments of Cohen and her history of the growth of “‘numeracy’ in the American population.” *Governing by Numbers*, *supra* note 198, at 674. Rose describes the “unmistakable power” of numbers in “modern political culture.” *Id.* at 673.

¹⁹⁹ *Governing by Numbers*, *supra* note 198, at 675. In arguing for a more critical view of numbers, Rose highlights the work of Paul Starr and William Alonso, who argue that “political judgments are implicit in the choice of what to measure, how to measure it, how often to measure it and how to present and interpret the

of data for the purpose of governing, and the distributional consequences that follow, necessitate a deeper investigation into the political context from which it emerges.²⁰⁰ As argued by sociologist Nikolas Rose, to the extent that numbers can be “composed and stabilized,” they call on us to ask what, where, and how the numbers were produced and deployed.²⁰¹ Significantly, in the context of international governance there are many ways in which numbers reproduced in charts, tables, and graphs simplify the world and reduce complexity, rendering them comparable.²⁰² In the literature on health and development, these comparisons flatten the world, removing context and paving the way for “global” solutions to local problems—designed without regard to local concerns or needs.²⁰³

Despite the inherent political foundations of numbers, part of the “magic” of numbers is their ability to appear as depoliticized.²⁰⁴ As argued by Rose:

Paradoxically, in the same process in which numbers achieve a privileged status in political decisions, they

results.” *Id.* at 675; *see also* Nikolas Rose, Pat O’Malley, & Mariana Valverde, *Governmentality*, 2 ANN. REV. L. & SOC. SCI. 83 (2006).

²⁰⁰ See Ian Hacking, *How Should We Do the History of Statistics?*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 181 (Grahm Burchell et al. eds., 1991) (describing statistics as part of the technologies of power of the modern state).

²⁰¹ Rose, *supra* note 198, at 691 (“Democracy, if it be taken seriously as an art of government rather than as philosophy or rhetoric, depends upon the delicate composition of relations of number and numeracy enabling a calculated and calculating government to be exercised over the persons and events to be governed.”).

²⁰² *Id.* at 680 (“[T]echnical processes which materialize the world—in graphs, figures and other traces—necessarily perform an act of simplification more akin to the ‘realization’ of theoretical categories *in* the world than the ‘representation’ of the world in thought.”) (citation omitted).

²⁰³ Merry, *supra* note 195, at S84.

²⁰⁴ Alongside sociology and law, Science and Technology Studies (STS) enriches an analysis of health governance as we see that public health evidence, epidemiology in particular, plays an important role in legitimizing claims in health governance. STS allows us to interrogate the political and ideological influence on the development of data and indicators deemed otherwise objective and neutral. *See generally* Sheila Jasanoff, *A Field of Its Own: The Emergence of Science and Technology Studies*, in *THE OXFORD HANDBOOK OF INTERDISCIPLINARITY* 191 (Robert Frodeman et al. eds., 2010).

simultaneously promise a ‘de-politicization’ of politics, redrawing the boundaries between politics and objectivity by purporting to act as automatic technical mechanisms for making judgments, prioritizing problems and allocating scarce resources.²⁰⁵

This aspirational depoliticization allows one to make a statement of fact about a particular global phenomenon—seemingly removed from context or an analysis of politics and power.

In the world of health, law, development, and human rights, quantitative data and indicators have become key methods of assessing and measuring problems as well as the success of interventions.²⁰⁶ Legal scholars Sally Engle Merry, Benedict Kingsbury, and Kevin Davis have imported the insights of sociologists studying the politics of quantification into a careful study of the production of indicators in global governance.²⁰⁷ An indicator as defined by Merry, Kingsbury, and Davis is:

[A] named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon. The data, in this simplified and processed form, are capable of being used to compare particular units of analysis (such as countries, institutions, or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards.²⁰⁸

Like prior theories aiming to examine the political origins of data, Davis, Merry, and Kingsbury highlight that “use of indicators in global governance have the potential to alter the forms, the exercise, and perhaps even the distributions of power in certain spheres of global governance.”²⁰⁹ In other words, the data has the capacity

²⁰⁵ Rose, *supra* note 198 at 67–75 (highlighting the work of Michel Foucault, a French philosopher, who described how statistics became a way not only of understanding, but also of producing the knowledge necessary to govern).

²⁰⁶ See Rosga & Satterthwaie, *supra* note 192, at 255.

²⁰⁷ Davis et al., *supra* note 21, at 73–74.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 72.

to legitimate particular ideas, distribute resources to various actors, and govern the behavior of the state or person being studied. Further, they argue indicators are also productive: they play an important role in both capturing and constituting material realities.²¹⁰ How we define a problem leads to how we count the problem, and, in turn, how we know the challenge that is to be addressed.²¹¹ Merry, Kingsbury, and Davis consider these dynamics as part of the knowledge and governance effect of indicators. The knowledge effect, Merry argues, stems from the use of numerical measures that appear detached from context and history rendering them comparable, objective, and scientific.²¹² The second is a governance effect, where counting and measuring becomes a tool with which to govern.²¹³

These theoretical insights teach us that data collection efforts, including those in public health and HIV, are a means of enacting a particular set of political interests. When the abolitionist movement can define trafficking broadly, counting all acts of transactional sex as trafficking, the result is a statement of fact represented numerically. In turn, the anti-trafficking project mobilizes the criminal law frame with a renewed vigor: the need for a criminal response to trafficking is not based in ideology alone—it is now a quantifiable fact. Where individuals are counted as sex workers, efforts to decriminalize receive legitimacy.

B. *Counting Trafficking: The Legal Implications*

In this section, I seek to draw out the particular line of argumentation emphasized thus far in Part II: it is not simply the ability to count trafficking more accurately that matters, as some have claimed. Rather, it is also the role this data plays in defining what trafficking is (and is not) and legitimizing particular legal prescriptions—namely the criminalization of the purchase of sex. As described, this particular intervention assumes that all transactional sex is trafficking, and thus all purchasers of sex are participating in the traffic of women. Through examining indicators, we see how punitive legal solutions are mobilized and continue because of the way the issue is measured, notwithstanding the claim that care is

²¹⁰ Merry, *supra* note 195, at S89.

²¹¹ *Id.*

²¹² *Id.* at S84.

²¹³ *Id.*

being taken to disaggregate trafficking and sex work. HIV programming on harm-reduction, as well as efforts to measure transactional sex, take place inside this larger environment that pushes a carceral response. This leaves harm-reduction activists swimming against a larger tide.

The varied definitions of trafficking contribute to a vast discrepancy in information on trafficking. The data has important consequences: it confers legitimacy on chosen legal interventions.²¹⁴ For example, if all transactional sex is trafficking, as abolitionists claim, then the men who purchase sex must be held accountable vis-à-vis the criminal law per the abolitionist strategy. At the most basic level, the vastly different estimates of who is trafficked reflect the challenge of both collecting and representing data, as well as seeing how it is mobilized for political purpose. Nicholas Kristof and his wife and co-author Sheryl WuDunn, for example, estimate that 3 million women, girls, and boys are currently “enslaved in the sex-trade.”²¹⁵ The frequently cited 2005 U.S. State Department report suggests that between 600-800,000 individuals are trafficked, 80% are women and girls, and the majority of those women and girls for the purpose of sex-trafficking.²¹⁶ The Global Slavery Index states that 35.8 million people are currently enslaved.²¹⁷ Despite their discrepancies, these numbers are circulated through the media and reproduced as part of advocacy efforts.²¹⁸ The lack of reliability about

²¹⁴ See Rose, *supra* note 198, at 686 (“To problematize drunkenness, idleness or insanity requires it to be counted. Reciprocally, what is counted—slavery, pauperism, insanity—is what is problematized. To count a problem is to define it and make it amenable to government.”); see also SIMON, *supra* note 57, at 17 (“The forms of knowledge through which the field of action is structured in the broadest sense, according to Foucault, constitute a kind of rationality of government. When we govern through crime, we make crime and the forms of knowledge historically associated with it . . . available outside their limited original subject domains as powerful tools with which to interpret and frame all forms of social action as a problem for governance.”).

²¹⁵ *Sex Trafficking*, HALF THE SKY MOVEMENT, <http://www.halftheskymovement.org/issues/sex-trafficking> (last visited Aug. 13, 2015); see also Chuang, *supra* note 46, at 610 (describing the history of the use of the word slavery and ideas of exploitation).

²¹⁶ BETTER DATA REPORT, *supra* note 18, at 12.

²¹⁷ WALK FREE FOUND., THE GLOBAL SLAVERY INDEX 2014, 17 (2014), available at http://d3mj66ag90b5fy.cloudfront.net/wp-content/uploads/2014/11/Global_Slavery_Index_2014_final_lowres.pdf.

²¹⁸ See *id.*

trafficking data is widely acknowledged. Sociologist Ronald Weitzer argued that

there are no reliable statistics on the magnitude of trafficking, and the figures can only be described as guesswork. Even ballpark estimates are dubious, given the clandestine and stigmatized nature of the sex trade.²¹⁹ The United Nations Global Initiative to Fight Human Trafficking has similarly acknowledged that “there has been a ‘boom’ in information on trafficking in persons. However, lack of data on the nature and severity of the problem of trafficking in persons, as well as regarding the reliability of available data, remains a problem with most data sources. If figures on trafficking are given, they are often based on estimates of the level of trafficking and usually no explanation is given on how the figures were calculated. In many cases, they are used primarily for advocacy or fund-raising purposes.”²²⁰

The U.S. Government Accountability Office (USGAO) stated that the U.S. government’s estimate of 600,000–800,000 persons trafficked is questionable:

The accuracy of the estimates is in doubt because of methodological weaknesses, gaps in data, and numerical discrepancies. For example, the U.S. government’s estimate was developed by one person who did not document all his work, so the estimate may not be replicable, casting doubt on its reliability. Moreover, country data are not available, reliable, or comparable. There is also a considerable discrepancy between the numbers of observed and estimated victims of human trafficking. The U.S. government has

²¹⁹ See Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 *POL. & SOC’Y* 447, 455 (2007) [hereinafter *The Social Construction of Sex Trafficking*].

²²⁰ United Nations Global Initiative to Fight Human Trafficking, *Human Trafficking: An Overview*, at 6 (2008), available at http://www.un-gift.org/doc/knowledgehub/resource-centre/GIFT_Human_Trafficking_An_Overview_2008.pdf.

not yet established an effective mechanism for estimating the number of victims or for conducting on-going analysis of trafficking related data that resides within government entities.²²¹

The stakes of this debate are high—millions of dollars are funneled into the anti-trafficking sector each year—much of this channeled into ending sex-trafficking.²²²

Alongside efforts to simply count people who are trafficked, there have been several attempts to monitor efforts to combat trafficking. The most important of these is the U.S. State Department Trafficking in Persons Report which gives countries a numerical ranking based on efforts to combat human trafficking.²²³ Because a lack of responsiveness on a country's part can trigger sanctions, these rankings have been influential and successful in pressing countries to take action according to U.S. government guidelines.²²⁴

²²¹ BETTER DATA REPORT, *supra* note 18, at 2–3.

²²² See *New Directions*, *supra* note 13, at 6, 9, 15 (Ronald Weitzer, a leading sociologist who studies sex work and trafficking, has challenged the four primary assertions that are made with these numbers: first, “[t]he number of trafficking victims worldwide is huge”; second, “[t]he magnitude of trafficking is steadily growing worldwide”; third, “[h]uman trafficking is the second or third largest organized criminal enterprise in the world, after illegal drug and weapons trading”; and fourth, “[s]ex trafficking is more prevalent and/or more serious than labor trafficking.” Weitzer argues that none of these factors can be empirically proven and that much of the evidence that exists actually offers a counter narrative that calls these assertions into question. Why keep making false assertions? Weitzer and others argue that the anti-trafficking industry benefits with both economic and professional gain.).

²²³ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 37 (2012) [hereinafter TIP 2012].

²²⁴ *Id.* at 44 (TVPA sanctions may include a withholding or withdrawal of “nonhumanitarian, non-trade-related foreign assistance.” Countries may also be denied funding for “government employees’ participation in educational and cultural exchange programs.” Moreover, “governments subject to sanctions would also face U.S. opposition to assistance (except for humanitarian, trade-related, and certain development-related assistance) from international financial institutions such as the International Monetary Fund and the World Bank.”); see also Daniel Ten Kate, *U.S. Eases Restriction on IMF, World Bank Assistance in Myanmar*, BLOOMBERG (Feb. 6, 2012), <http://www.bloomberg.com/news/articles/2012-02-07/u-s-eases-restriction-on-imf-world-bank-assistance-in-myanmar> (providing an example of sanctions being applied, and then modified, in Burma); Janie

Countries rated “tier one” fully comply with the minimum standards outlined in the TVPA.²²⁵ Poorly performing countries may end up in “tier three,” the lowest rank, which indicates poor compliance with the minimum standards and no significant efforts to comply.²²⁶

The TVPA minimum standards list emphasizes punitive measures as a means to end trafficking, and these punitive measures shape the response to sex-trafficking as well.²²⁷ This is in keeping with the three-part goal to “prosecute, protect, and prevent” outlined in a list of minimum standards put forward in the TVPA.²²⁸ Several minimum standards are specific to sex-trafficking. For example,

Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 439 (2006).

²²⁵ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 43 (2014) [hereinafter TIP 2014].

²²⁶ *Id.* (“Tier 1 - Countries whose governments fully comply with the TVPA’s [Trafficking Victims Protection Act] minimum standards. Tier 2 - Countries whose governments do not fully comply with the TVPA’s minimum standards but are making significant efforts to bring themselves into compliance with those standards. Tier 2 Watch List - Countries whose governments do not fully comply with the TVPA’s minimum standards, but are making significant efforts to bring themselves into compliance with those standards, and for which: a) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; b) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year . . . ; or c) the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional steps over the next year. Tier 3 - Countries whose governments do not fully comply with the TVPA’s minimum standards and are not making significant efforts to do so.”).

²²⁷ See Anne T. Gallagher & Janie Chuang, *The Use of Indicators to Measure Government Responses to Human Trafficking*, in GOVERNANCE BY INDICATORS 317, 328–29 (Kevin Davis et al. eds., 2012) (providing an in-depth review).

²²⁸ See Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7106 (2012) (“Minimum standards - For purposes of this division, the minimum standards for the elimination of trafficking applicable to the government of a country of origin, transit, or destination for a significant number of victims of severe forms of trafficking are the following: (1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking. (2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault. (3) For the knowing commission of any act of a severe form of trafficking in persons, the

(2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, *the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.*

(3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.²²⁹

This tiered ranking system propels forward a carceral response to trafficking that conflates sex-trafficking with commercial sex. For example, although the U.S. government often makes a distinction between commercial sex and trafficking in the front matter of its reports by utilizing language such as “forced prostitution”²³⁰ or “involuntary prostitution” rather than simply prostitution, it is not clear that there are any efforts to disaggregate collected data based on the voluntary or non-coercive nature of the activity in the data-collection process.²³¹ Instead, it may be the case that the minimum standards list and U.S. State Department’s data-gathering process incentivize countries to pass criminal laws that allow for the prosecution of purchasing sex. In other words, the TIP reports continue the abolitionist “end demand” strategy vis-à-vis the data gathering process. With specific regard to sex-trafficking, countries might be assessed based on whether they have ensured that there have been serious

government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense. (4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.”); U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 5 (2010) [hereinafter TIP 2010].

²²⁹ § 7106 (emphasis added).

²³⁰ See, e.g., TIP 2010, *supra* note 228.

²³¹ See *id.* at 8–9.

steps to reduce the demand for sex.²³² Doing so could contribute to a higher ranking in the U.S. State Department TIP report, while not doing so could contribute to a lower ranking, because the country response to trafficking is measured by compliance with the TVPA minimum standards.²³³ This is evident in the U.S. State Department country reports in which governments are reprimanded for not taking steps to end the demand for commercial sex.²³⁴ Efforts to end the demand for commercial sex are praised, or at minimum, noted.²³⁵ For example, the 2014 TIP country report on Ghana states:

In an effort to reduce the demand for commercial sex acts, AHTU [Anti-Human Trafficking Unit] continued to conduct a joint operation with Nigeria's National Agency for the Prohibition of Traffic in Persons and Other Related Matters, which focused on arresting suspected sex traffickers and potential clients.²³⁶

On Canada, the TIP report notes that

Canadian authorities continued to prosecute individuals who solicited commercial sex, and there were no known efforts to address demand for forced labor.²³⁷

²³² § 7106 (“(12) Whether the government of the country has made serious and sustained efforts to reduce the demand for (A) commercial sex acts; and (B) participation in international sex tourism by nationals of the country.”).

²³³ TIP 2014, *supra* note 225, at 43.

²³⁴ *See id.* at 70, 73, 75, 78 (providing the country reports of Afghanistan, Algeria, Angola, and Armenia).

²³⁵ *See id.* (Some of the highlighted programs focus on prevention rather than punishment.).

²³⁶ *Id.* at 187. (The report on Ghana utilizes the term “forced prostitution” and later “commercial sexual exploitation” thus it is unclear where the line between trafficking and sex work is being drawn.).

²³⁷ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 122 (2013) [hereinafter TIP 2013]; *see also id.* at 119 (Some of the reports acknowledge the unintended consequences of anti-trafficking efforts. For example, the Cambodia report states that “[i]n an effort to decrease the demand for commercial sex acts, the government continued to conduct police raids on brothels. Although there were no reports that identified victims were punished for crimes committed as a result

On Croatia, the TIP report states:

To address demand for commercial sex acts, the Croatian government adopted a new law punishing the clients of prostitution.²³⁸

The focus on criminalizing clients, or ending demand, as a means to rise in the tiers renders any efforts to distinguish between sex-trafficking and sex work moot. The neo-abolitionist solution to sex-trafficking—criminalize demand—is sustained through the measurement process. Criminalization is successfully pushed through the end-demand requirement that effectively collapses any prior efforts made to distinguish sex work from sex-trafficking. Instead, the focus on ending demand in the sex industry reveals an underlying belief that there is no difference between voluntary commercial sex and sex-trafficking.²³⁹ Abolitionists can then successfully mobilize the rhetorical force of numbers and moral claims about prostitution and effective responses.²⁴⁰

The material effect of U.S. State Department efforts on trafficking becomes clear: the tiered ranking system incentivizes prosecutions of sex workers' clients. The abolitionist position to ramp-up the criminal justice system is given weight, while the decriminalization agenda, in keeping with harm-reduction efforts, are deprioritized. Health organizations are implicated in this: HIV organizations doing work supporting sex workers could be shut down or undermined by arrests for providing services to clients or empowering brothel owners to run safe brothels.

C. *Indicators on Gender, HIV, Violence, and Trafficking*

Against the backdrop of the pro-carceral program of the U.S. TIP report sits data collection in the realm of health, development,

of being trafficked, improved efforts to proactively identify victims among vulnerable groups would ensure unidentified victims were not punished as law violators.”).

²³⁸ See *id.* at 144.

²³⁹ See generally WALK FREE FOUND., *supra* note 223 (The Walk Free Foundation's Global Slavery Index highlights the limited research available to demonstrate that criminalizing the clients of sex workers is actually effective in preventing sex-trafficking).

²⁴⁰ See *Governing by Numbers*, *supra* note 204, at 673–74.

and HIV. Importantly, the U.S. State Department TIP report in 2013 explicitly called for service delivery professionals, including health care professionals, to identify victims of trafficking.²⁴¹ We once again see that the chosen frame, abolition or HR+, structures the way individuals are counted and play a role in both producing the problem and the solutions. In turn, indicators, which will classify people are identified as trafficked or not, become an active site of contestation between the HR+ and abolition frame. Allies of the decriminalization position, for example, understand that if trafficking rather than sex work becomes the category for disaggregation of populations there will be a shift internal to measurements on HIV that will aid in legitimating the abolitionist perspective inside of HIV governance. The indicators, designed to be an objective assessment of HIV programs, instead become an opportunity to shape what may become the foundations of a particular legal strategy. The transplantation of these debates into the arena of HIV demonstrates how frameworks can shape and shift the legal response to an epidemic.

A set of 2014 indicators produced by the United States Agency for International Development (USAID), UNAIDS, UN Women, PEPFAR and Measure Evaluation called *Compendium of Gender Equality and HIV Indicators* (“2014 Compendium”) provides an example.²⁴² The indicators differ from the U.S. State Department rankings. They are not designed to monitor anti-trafficking initiatives. Nor are they explicitly calling for criminalization or decriminalization. The indicators are an attempt to understand how service delivery organizations are engaging with the broader issue of violence against women in HIV and non-HIV settings. The stated goal of the Compendium is as follows:

²⁴¹ TIP 2013, *supra* note 237, at 11 (“For reasons discussed throughout the *Report*, it is important for a variety of government officials, private sector professionals, community workers, and others who may encounter trafficking victims to be trained, legally empowered, and given incentives to identify victims. Individuals who maybe particularly well placed to identify trafficking victims include: . . . Health care professionals who often encounter trafficking victims—emergency room personnel, health clinics, doctors, nurses, dentists, OB/GYNs, and practitioners at family planning clinics and HIV/AIDS clinics.”).

²⁴² SHELAH S. BLOOM & SVETLANA NEGROUSTOEVA, *COMPENDIUM OF GENDER EQUALITY AND HIV INDICATORS 2* (2014) [hereinafter 2014 COMPENDIUM].

[T]o provide program managers, organizations, and policy makers with a menu of indicators to better “know their HIV epidemic/know their response” from a gender perspective in order to:

- strengthen national and subnational stakeholders’ understanding of their HIV epidemic and response from a gender equality perspective,
- monitor progress towards eliminating gender-based inequities in HIV responses, and
- monitor and evaluate programs that address specific types of gender equality interventions in the context of HIV.²⁴³

The 2014 Compendium identifies sex workers as a key population.²⁴⁴ The list contains two indicators that suggest disaggregating sex workers as a key population, and two indicators on sex work specifically.²⁴⁵ The indicators that require disaggregation are: “[p]ercentage of key populations reached with HIV prevention programs,”²⁴⁶ “HIV prevalence in key populations,”²⁴⁷ and “[p]ercentage of the populations with active syphilis.”²⁴⁸ Sex work specific indicators include “[s]ex workers: prevention programs,” defined as the “[p]ercentage of sex workers reached with HIV prevention programs,” and “[s]ex workers: condom use,” defined as the “[p]ercentage of sex workers reporting the use of a condom with their last client.”²⁴⁹

The Compendium explicitly refuses to use trafficking terminology in the indicators. After reproducing the text of Article 3 of the Palermo Protocol and acknowledging that trafficked people are very vulnerable to HIV, the document offers three reasons why they have chosen not to include trafficking indicators:

²⁴³ *Id.*

²⁴⁴ *Id.* at 57.

²⁴⁵ *Id.* at 57–58, 61.

²⁴⁶ *Id.* at 57.

²⁴⁷ *Id.* at 58.

²⁴⁸ *Id.* at 61.

²⁴⁹ *Id.* at 57–58.

First, the indicators that were available on trafficking reflected a conflation of trafficking and sex work, which can lead to laws and interventions that can potentially negatively impact (e.g. harm or lead to further abuse and exploitation of) sex workers, and at the same time undermine efforts to stop trafficking. The UNAIDS Guidance Note on HIV and Sex Work clearly states that trafficking in persons for the purposes of sexual exploitation is a gross violation of human rights. At the same time, the Guidance Note strongly and clearly states that trafficking in persons or any distinct purpose, including commercial sexual exploitation, should never be implicitly or explicitly conflated with sex work.

Second, the indicators on trafficking need to reflect the evidence on what is “good practice” or effective programming to prevent trafficking and respond to the HIV-related needs of trafficked individuals while at the same time not harming or violating sex worker rights. Currently, such evidence on “good practices” needs to be identified and compiled in order to then identify appropriate indicators for measuring progress.

Third, discussions on trafficking indicators need to be *subjected to a further consensus building process within a broader discussion on policy and programmatic responses* to trafficking and with stakeholders engaged in preventing and responding to trafficking including relevant UN partners, civil society groups, researchers, donors and national stakeholders.²⁵⁰

These three positions call for a distinction between sex work and trafficking acknowledging that sex work itself is not the source of the harm.²⁵¹

²⁵⁰ *Id.* at 82 (emphasis added).

²⁵¹ *See id.*

The approach of the HIV-related Compendium differs considerably from the approach taken by USAID East Africa, Measure Evaluation, and the Interagency Gender Working Group in a separate 2008 compendium of indicators, in which trafficking is the primary frame.²⁵² The 2008 Compendium is entitled *Violence Against Women and Girls* and was not done in partnership with HIV institutions or with UN Women.²⁵³ The 2008 Compendium mentions HIV as a reason for addressing violence against women and girls.²⁵⁴

Although acknowledged as a “newer emergent” area “in which research on sound measurement” is still in process, trafficking features prominently, while the words “sex work” do not appear at all.²⁵⁵ There are three indicators dedicated solely to trafficking:

- “Number of specialized services provided to trafficked women and children in a targeted area of destination countries,”²⁵⁶
- “Number of women and girls assisted by organizations providing specialized services to trafficked individuals, in a destination region or country,”²⁵⁷
- “Proportion of people in origin and destination communities who have been exposed to public awareness messages about TIP.”²⁵⁸

The 2008 Compendium does not define trafficking and it does not make any mention of sex work. The Palermo Protocol language is not reproduced in the 2008 indicators as it is in the 2014 Compendium.²⁵⁹ The police and criminal law are infrequently mentioned in the 2014 Compendium,²⁶⁰ whereas in the 2008 indicators several indicators are designed to measure the engagement and effectiveness

²⁵² SHELAH S. BLOOM, *VIOLENCE AGAINST WOMEN AND GIRLS: A COMPENDIUM OF MONITORING AND EVALUATION INDICATORS 32 (2008)* [hereinafter 2008 COMPENDIUM].

²⁵³ *Id.*

²⁵⁴ *Id.* at 83.

²⁵⁵ *Id.* at 146.

²⁵⁶ *Id.* at 171.

²⁵⁷ *Id.* at 173.

²⁵⁸ *Id.* at 174.

²⁵⁹ The 2014 Compendium does not name the Palermo Protocol; however, it quotes directly from the document. 2014 Compendium, *supra* note 242, at 82.

²⁶⁰ Criminalization is noted as a barrier to accessing services for men who have sex with men and not for sex workers. 2014 COMPENDIUM, *supra* note 242, at 80 (“MSM [men who have sex with men] activities in many countries are highly

of police and the criminal justice system.²⁶¹ This likely reflects the tension around the way the criminal justice system is understood to be useful or not in effectuating the goals. In other words, in the context of HIV, the criminal justice system has lost favor with academics, practitioners and activists while in the context of violence against women (VAW) the carceral response reflects mainstream approaches to addressing VAW.

As stated, indicators shape how we document and understand transactional sex. With these indicators as an example, we see that in the context of indicators designed for HIV programs, where sex is transacted it will potentially be understood as sex work. In the 2008 indicators, where sex is transacted it will potentially be measured as trafficking. In the latter case, the harm is the sex itself. This draws attention to the limitations of both modes of enumeration. To be counted when utilizing the sex work/harm-reduction frame, one must self-identify as a sex worker; individuals who engage in transactional sex but do not identify as sex workers are left out. The data will also ignore individuals who refuse to identify as sex workers because of an unwilling engagement in sex work. The former limitation highlights an important aspect of the sex work frame: that one must identify as a sex worker or be noticeably transacting sex (in the eyes of the surveyor) to be counted.²⁶² The data collection process

criminalized yet face tremendous risks in acquiring HIV. The need for HIV services is great, but criminalization means that MSM who access services can face death or jail.”).

²⁶¹ For example, under the heading of “Justice and Security” several indicators measure the engagement of police and the criminal justice system. Indicators include the proportion of VAW/G cases that were investigated by the police, the proportion of VAW/G cases that were prosecuted by law, and the proportion of prosecuted VAW/G cases that resulted in a conviction. 2008 COMPENDIUM, *supra* note 252, at 120, 122, 124.

²⁶² In 2014, USAID, PEPFAR, and Measure Evaluation also produced a set of indicators entitled *Trafficking in Persons and Health*. ABBY C. CANNON, ET AL., TRAFFICKING IN PERSONS AND HEALTH (2014), <http://www.cpc.unc.edu/measure/resources/publications/ms-14-97> [hereinafter *Trafficking Indicators*]. Unlike the 2008 indicators which only mention trafficking and not sex work, the *Trafficking Indicators* makes a distinction between sex work and trafficking and notes the problems associated with conflating sex work and trafficking in data collection. *Id.* at 49. The *Trafficking Indicators* indicators rely on the Palermo Protocol definition of trafficking. The document does not make reference to the critique of trafficking indicators offered in the 2014 Compendium. The focus of the *Traffick-*

might encourage individuals to self-identify with a particular category.²⁶³

The active work being done by those holding a HR+ perspective in the indicators process is integral to maintaining the decriminalization position inside of public health governance. In the world of HIV, the implications of who gets measured and the way that the problem of sex work or trafficking is understood has large implications for the types of legal interventions and health programs that get funded. When the problem is defined as trafficking, efforts trend towards criminalization of clients and often criminalization of the sex industry. When the challenge is defined as sex work, monies are dedicated towards harm-reduction and working to lessen the role of the criminal law in the HIV response.²⁶⁴ Perhaps most importantly, however, although harm-reduction does not center on issues of consent and coercion, it does provide an opening for broader structural solutions outside of the criminal law for people who are trafficked or who need support services to make their life safer. These structural solutions, which include improving health care access, decreasing incarceration, and creating safe places to live and work, can and will be better solutions to addressing exploitation and harm arising from transacting sex.

CONCLUSION

Social and political forces have long shaped the response to disease and public health crises as demonstrated by the long history of

ing in Persons and Health report includes both sex-trafficking and labor trafficking. The 2014 indicators also make little mention of the criminal justice system; however, trafficking is articulated as a crime from the outset. *See id.*

²⁶³ This is true in the case of funding. *See, e.g.*, Kimberly Walters, Presentation at Annual South Asia Conference: Force is a Form of Trafficking: The Shifting Sands of Transnational Sympathy and the Epistemology of Commercial Sex, (Apr. 3, 2014) (on file with author).

²⁶⁴ *See* Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 *UCLA L. REV.* 76, 135 (2012). In regards to victim-frame in trafficking, the sex work paradigm calls on a larger more systemic arrangement of state resources to support programming, including altering the status of those engaged in transactional sex as workers with the benefits of working offered by the state: occupational health, unionization, and worker's rights. The victim-oriented frame of sex-trafficking calls upon a criminal justice response: prosecute the perpetrators, save the victims. *See*, Chuang, *supra* note 46.

contestation on how to regulate prostitution, trafficking, and venereal disease. As contemporary debates on trafficking enter and shape the realm of HIV law and policy, we see that the production of data about the epidemic becomes a central site of contestation between ideological positions. The two frames utilized in HIV governance to address the transaction of sex and concomitant vulnerability to HIV, harm-reduction and anti-trafficking, come with distinct assumptions that lead to differing legal solutions. Harm-reduction does not see the exchange of sex itself as the harm. Rather this approach focuses on eliminating harms emerging from the act of transacting sex. Importantly, harm-reduction incorporates concern for the clients of sex workers. Harm-reduction sits inside and in contention with a broader discourse of anti-trafficking carried by neo-abolitionists who push for criminal law responses to HIV. While measurement and indicators are treated as an objective and neutral way to move away from ideological debates and towards documenting realities, this paper argues that measuring and data-gathering itself is a political process. It is important and necessary to remain attune to the ideological backdrop to data-gathering given the potential for the data itself to underpin and justify legal prescriptions on criminal laws.