

From human rights to law and order: The changing relationship between trafficking and prostitution in Aotearoa/New Zealand policy discourse

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Abstract

At any given time, multiple and potentially conflicting discourses are circulating in public policy debates. This article uses critical discourse analysis to examine why and how the discourses about the prevalence, causes, and remedies for exploitation in sex work that won the day in the Prostitution Reform Act 2003 debates in Aotearoa/New Zealand have been reinterpreted and reordered in recent debates on trafficking provisions (Section 98D) in the Crimes Amendment Act 2015. Gender equity and human rights were successfully married to a social welfare and harm-minimisation approach in the Prostitution Reform Act debates, whereas they were tied more closely to a law-and-order framework in the latest revisions to Aotearoa/New Zealand's anti-trafficking policies. This paper argues that the influence of the United States in interpreting and enforcing international anti-trafficking treaties – particularly the 'Palermo Protocol' – has facilitated shifts in Aotearoa/New Zealand's domestic policy and provided leverage to discursive framings that were less successful when prostitution reform was debated at the turn of the twenty-first century.

Keywords

Prostitution, trafficking, Prostitution Reform Act, Palermo Protocol, discourse analysis

Introduction

With the passage of the Prostitution Reform Act (PRA) in 2003, Aotearoa/New Zealand became the first country in the world to decriminalise prostitution.¹ This law recognised the right to consensual sex work and the need to protect those engaged in it, and in so doing resisted conflating sex work with sex trafficking. Lawmakers cited gender equality, human rights, labour rights, and public health as their primary motivations for passing the bill; indeed, it was seen as part of the country's long tradition of promoting citizens' well-being, a tradition increasingly situated within contemporary human rights discourse. However, in 2015, Aotearoa/New Zealand yielded to pressure from the United States to change its legal definition of trafficking to conform to international norms that often blur distinctions between prostitution and trafficking. This move has nudged Aotearoa/New Zealand closer to the prostitution neo-abolitionist position that sex work is *ipso facto* violence against women, through the implicit acceptance of the discursive construction of prostitution as exploitation.

This article assesses the benefits and risks of this 2015 policy change to Aotearoa/New Zealand's unique decriminalisation framework and its important human rights and gender equity protections. Using the tools of critical discourse analysis (CDA), I examine the political

discourses employed by members of parliament (MPs) as bills on prostitution and trafficking were being debated. I specifically focus on parliamentary debates because MPs' speeches – publicised texts articulating key values and understandings of social relations – frame policy objectives and direct the normative agenda on major issues. While parliament is hardly the only actor shaping the discursive context, it is a significant one that interacts with the judicial, media, academic, and economic sectors.²

Method

In adopting CDA, I am looking both at how discourses are produced by the socio-political context in which they arise and at how they create meaning (Phillips & Hardy, 2002). This meaning-making process is driven by the strategic interests of any number of actors. In the case analysed here, these actors include feminist and sex worker social activists and government officials across the globe. Further, the goal of CDA is not simply to uncover what social meanings exist or have been created, but to reveal *how* these social meanings have been produced (Hardy, Harley, & Phillips, 2004). As such, a single policy or non-governmental organisation (NGO) report does not create meaning, but each document or policy is made meaningful through connections to other texts and in relationship with specific socio-political contexts. To see this meaning-making process, what I examine here are '*bodies* of texts' (Phillips & Hardy, 2002, p. 5) – speeches and government documents – produced over time that together generate new understandings of a policy problem and the groups of people (the targets of the policy) served by – indeed constructed through – this policy.

While multiple discourses circulate during a complex policy debate, dominant 'norms, frames, and narratives' enable policy makers and the public to conceptualise, and reconceptualise, the world (Schmidt, 2010, p. 13). Through a dynamic process of cultural framing, institutional norms and rules become part of a governing discourse, and the interaction of these culturally framed norms and rules generates new discourses (Schmidt, 2010). I describe this process by looking at how and why definitions of 'trafficking' in Aotearoa/New Zealand are shifting in the face of the global reach of policies guided by U.S. norms as they are embedded in its enforcement of United Nations (UN) protocols, and then at how these changes in defining 'trafficking' redound to understandings of prostitution. There was not an abrupt shift from 'human rights and gender equity' to 'exploitation and trafficking' in framing prostitution in Aotearoa/New Zealand; both discourses were available in 2003 as they are today. What has shifted is the relative weight they are given and the degrees to which they resonate. While a number of political and social changes over the past 15 years have moved Aotearoa/New Zealand closer to 'law and order' as a dominant policy approach, my argument is that the growing role of the United States as the hegemonic enforcer of UN trafficking protocols is one of the most significant forces rearranging the dominant meaning systems used to understand trafficking, which challenges understandings of prostitution as well.

Here we see what Norman Fairclough (2010, p. 126) calls 'technologisation of discourse,' defined as 'attempts by dominant social forces to direct and control the course of the major social and cultural changes which are affecting contemporary societies.' Fully understanding the technologisation of discourse means seeing both the macro level of policy formulation and the micro ways in which the 'discourse is received and appropriated by those who are subjected to it, through various forms of accommodation and resistance' (Fairclough, 2010, p. 127). My focus is on the first part of the process, tracing discursive change in Aotearoa/New Zealand in response to international normative pressure at points where sex, exploitation, human rights,

and national and international governance overlap.

To obtain the materials for this CDA, I and a research assistant searched HANSARD (the official record of parliamentary debates and legislation), Index NZ, Google Scholar, Gender Studies Database, Academic Search Premier, and EBSCOhost for all instances of the words ‘trafficking,’ ‘sex work,’ and ‘prostitution’ (plus ‘New Zealand’ in the international databases). This provided both MPs’ speeches and media reports that suggested how the public was responding to legislative action. Then, honing in on the parliamentary debates, we used grounded theory to group MPs’ comments into themes that emerged from their speeches. Here, I report on these themes, breaking the discourses on prostitution and trafficking into two time periods or ‘events’: (1) the three readings of the PRA (2000–2003) and (2) the parliamentary debates over the Organised Crime and Anti-Corruption Legislation Bill (2014–2015).³ This second bill led to changes in Section 98D of the Crimes Amendment Act of 2015, deleting ‘transnational movement’ from, while adding ‘exploitative purpose’ to, the definition of trafficking.

Given space constraints, I extracted only those speeches and themes directly relevant to my topic (how sex work and trafficking are understood), choosing quotes that conveyed most succinctly and/or explicitly the discursive frames used by multiple MPs. Using extracts rather than full speeches enables me to show more of the range of discourses that both supported and challenged both policies, and to show the range of ways MPs defined and discussed prostitution and trafficking over time.

Parliamentary discourses on trafficking and prostitution

Event #1: Debating the PRA (2000–2003)

International efforts to confront human trafficking took off in the year 2000 when the UN’s three ‘Palermo protocols’⁴ addressing people smuggling and human and weapons trafficking were adopted. This launched what we might call the ‘Palermo era,’ marking a significant shift in international anti-trafficking efforts.⁵ The *Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* distinguishes between ‘forced’ and ‘voluntary’ prostitution and sets out the three elements that constitute ‘trafficking’: force, fraud, or coercion; exploitation; and movement or receiving of persons. However, the treaty was framed primarily as a crime-control bill and included only weak human rights protective language. Further, it ‘did not prevent a nation from using a moral lens to focus on women’s sexuality, playing a major role in how U.S. trafficking policy was developed’ and, thus, how the United States interpreted the Palermo Protocol when it came time to enforce it (Desyllas, 2007, p. 64; see also Chuang, 2014). Indeed, the protocol was intentionally neutral regarding states’ definitions and treatment of prostitution (Chuang, 2014; Saunders, 2005). Hence, both neo-abolitionist groups, who conflate trafficking and prostitution, and sex workers’ rights activists, who distinguish these phenomena, were able to claim victory in the definitions the Protocol set forth (Saunders, 2005).

Globally, ‘sex workers’ rights’ activists who promote decriminalisation of prostitution share discursive space with ‘neo-abolitionists’ who have adopted an ‘end-demand’ approach to prostitution, attempting to eliminate prostitution by criminalising the purchase of sexual services. (They are ‘neo’-abolitionist because criminalising the selling of sex is no longer a focus.) ‘End-demand’ is often called the ‘Swedish’ or ‘Nordic’ model because Sweden first adopted it in 1999, but it has since gained wider traction, having been adopted or being currently considered by a number of countries. In the United States, a mix of older and newer abolitionist models prevail – the result of political efforts of a ‘coalition of strange bedfellows’

(Bernstein, 2010, p. 47), including religious right politicians, neoconservatives, and feminist NGOs, most prominently the Coalition Against Trafficking in Women (CATW).⁶ In this model, prostitution is ‘a violation of human rights’ (CATW, n.d.; Desyllas, 2007, p. 59), ‘female sexual slavery’ (Barry, 1984), and, thus, ‘no person can truly consent to prostitution’ (Desyllas, 2007, p. 59). As Outshoorn (2005, p. 146) explained, for neo-abolitionists, ‘trafficking is seen to be caused by prostitution, making the best way to fight trafficking the abolition of prostitution.’

Two months before the Palermo conference, Labour MP Tim Barnett had introduced the PRA into the New Zealand Parliament. The first reading of the bill was in October 2000, and the third reading came nearly three years later, in June 2003. In the intervening period, Aotearoa/New Zealand ratified the Palermo anti-trafficking protocol. Thus, the domestic and international efforts to deal with prostitution, human rights, exploitation, and labour rights were happening simultaneously, and the international context was, even initially, pushing at the edges of the parliamentary debates.

Trafficking discourse in the PRA debates

Although trafficking was rising on the international community’s treaty agenda, and lobbying efforts to link trafficking and prostitution were long underway internationally, trafficking concerns played only a minimal role in the early PRA parliamentary debates. When trafficking did arise, it was in the second and third readings, and then usually by PRA opponents arguing that decriminalisation of prostitution would lead to an increase in trafficking and in trafficking of women in particular. For example:⁷

[If this bill passes] there will be more *trafficking in women*. I would suggest that in this country trafficking in women is fairly low-key. But in Europe, where prostitution has been liberalised, it is a big industry in itself. (Oppose, Peter Brown, NZ First, second reading, February 19, 2003)

I am a woman and I object very strongly to voting for a bill that legitimises those people who *traffic in women*. This bill makes it legal for people to live off the earnings of prostitutes ... it legitimises them. It gets rid of pimps and turns them into managers. (Oppose, Janet Mackey, Labour, third reading, June 25, 2003)

In speaking to the title, *one title could be the “Opening up the Trafficking of Men and Women into Prostitution Bill”*. That could be a different title, because that is significantly what the legislation will do. (Oppose, Craig McNair, NZ First, CommitteeCWH, March 26, 2003)

Given these concerns, which arose after the first reading of the bill and after Aotearoa/New Zealand signed onto the Palermo protocol, some opponents of decriminalising prostitution argued that, instead, Aotearoa/New Zealand should promote gender equality by adopting the ‘Swedish model’:⁸

We should look at what Sweden is doing, with a considerable degree of success. New Zealand First has worked hard behind the scenes on the Swedish law, and we have produced a bill. To this day, *a bill entitled the Prostitution (Client Liability and Prostitutes Care) bill* sits in the name of my colleague Brent Catchpole. That bill is in the ballot right now, and it would improve things no end. (Oppose, Peter Brown, NZ First, second reading, February 19, 2003)

I have put forward an amendment that could be *called the ‘Swedish amendment’*, because it is based on the law in Sweden. It basically says, let us get rid of the prosecution of prostitutes and let us get rid of the anomalies of prostitution in the law and in this country. Let us not decriminalise, or even criminalise, prostitution or make prostitution a legitimised occupation. It says, let us prosecute the clients. Let us get rid of the demand and we will not need prostitutes, *and we will comply with the UN declaration about exploitation*. (Oppose, Dianne Yates, Labour, in committee, March 26, 2003)

At a later point, Yates also articulated a position that a few other opponents, such as Larry

Baldock, also argued: that Aotearoa/New Zealand should pass a law that would conform to the UN convention on the elimination of all forms of discrimination against women (CEDAW) as well as the Palermo Protocol:

If one person were trafficked into New Zealand as a result of this bill, we would be failing *our obligations under the UN charter*, and, surely, that must be of concern to this Labour Government, which is so committed to the United Nations and to its obligations under those treaties. Clause 9.5 of those obligations says that member States should do everything they can to reduce the demand that leads to the trafficking of women and children (Oppose, Larry Baldock, United Future, third reading, June 25, 2003)

In contrast, supporters of the PRA couched their claims in the context of Aotearoa/New Zealand's own history of protecting human rights and individual privacy. I disaggregate here the speeches that respond directly to the claims about international treaty obligations from those raised in the next section, on the linked themes of human rights and gender equity. Note that supporters of the PRA argued that trafficking was already criminalised in Aotearoa/New Zealand, and they repeatedly reminded their colleagues that trafficking and prostitution are not the same phenomenon. The argument they developed, albeit often implicitly, was that decriminalising (voluntary) prostitution would make these distinctions between prostitution and trafficking even clearer while addressing the harms to human rights that often come with criminalisation of prostitution:

The other evil associated with prostitution is the evil of coercion. *Last year this House made trafficking or smuggling of people an offence*. The sentence for that is up to 20 years in prison, and a fine of \$500,000. There was no way this House could have made it more clear that it was against the use of coercion to force people into a trade such as prostitution. (Support, Phil Goff, Minister of Justice, CommitteeCWH, March 26, 2003)

Mr Brown also talked about there being perverse incentives to encourage child sex and to encourage trafficking of women. Again, nothing could be further from the truth. *This bill makes it very clear that there are very, very high penalties against any form of coercion. There are very high penalties against people who use sex workers who are under 18*. The young people under 18 will not be criminalised, but those who use them will be. *This bill strengthens the changes to the Crimes Act that were made several years ago*. (Support, Sue Bradford, Green, CommitteeCWH, March 26, 2003)

[Bradford had also earlier addressed the proposed Swedish-style law that had been introduced]: *The Swedish experience shows that all that does is drive prostitution underground* ... (Support, Sue Bradford, Green, second reading, February 19, 2003)

I believe that *if we adopt something like the Swedish model* and the view that we can somehow drive this industry underground, the youngest and most vulnerable will still be involved. They probably become involved because they come from broken families. They probably do have a hurt past, and I wish they were not there. (Support, John Key, National, in committee, March 26, 2003)

Finally, while some opponents argued that decriminalising prostitution would cause the industry – both coerced and voluntary – to explode in size, supporters rejected these claims in many speeches, none more colourfully than the man who would become prime minister five years on:

If this bill becomes law, I will not be skipping home to my lovely wife and telling her, 'Just before I came home tonight I popped into the local brothel, because it is legal now, honey.' She will have a message for me, and it will not be a very nice one. I also say that just because homosexuality has been legalised in this country, I am not gay; nor will I ever be. (Support, John Key, National, CommitteeCWH, March 26, 2003)

In short, between the first and third readings of the bill, international discourses on trafficking became a more prominent theme in the debates – and concerns that legalised prostitution leads to trafficking were articulated explicitly. In response, some MPs, such as Sue Bradford and John Key, argued that international criminalisation efforts actually made trafficking worse

or made the harms already in prostitution worse. Most comments simply shifted the debate into a different frame, claiming Aotearoa/New Zealand's identity as a leader in human rights, gender equity, and labour rights promotion. The discourses that carried the day were those arguing that harm minimisation, gender equity, and human rights are best achieved through decriminalization and that criminalisation is based on a moralising double standard about men and women's sexuality.

Gender equity, human rights, and harm reduction discourses

While other discourses emerged from the PRA debates, e.g. family values and pimping, the more prevalent and dominant arguments in favour of the bill were that the PRA would be a harm-reduction measure, both in terms of reducing violence against prostitutes (or at least allowing them to have better relations with police in combating violence) and in reducing public health concerns related to commercial sex, particularly HIV/AIDS.⁹ As harm reduction and gender equity were often framed as a result of protecting human rights, the three themes emerged together in many members' speeches, and were connected most clearly and explicitly in Anne Tolley's floor argument. Hence, I quote it here at length:

Our current laws are unworkable and just plain discriminatory. They stigmatise and punish mostly the female workforce, but protect mainly male clients and business operators ... I will support the bill, and I have four very clear reasons for doing so. *First, I support the bill on the basis of equity. The current law promotes double standards.* Why should it be illegal to sell something that it is not illegal to buy? Common justice demands a change. ... New Zealand laws represent the "Eve tempted Adam" argument. The woman sex worker is the temptress, luring the unsuspecting and defenceless male into wrongdoing. What garbage! What an archaic male view of a purely fantasy world. ... *The second reason I support the bill is one of basic human rights.* Sex workers are extremely vulnerable. They can suffer arbitrary and unfair work rules, unreasonable bonds, and hefty fines. Withholding payments for very minor reasons is quite common practice. The worker has few rights and little redress, and is at the whim of massage parlours and escort agencies. ... *The bill also recognises that sex workers are people* – that they are real human beings who have the right to say no, and it is their right to have that taken seriously. ... *The third reason I support the bill is to do with health.* The explanatory note states that the purpose of the bill is "to promote the welfare and occupational health and safety of sex workers, to create an environment that is conducive to public health". That spells it out My [fourth] and *final reason for supporting this bill is the very strong stand it takes on prohibiting the exploitation of children.* There is much more protection in this legislation than in our current laws. (Support, Anne Tolley, National, first reading, November 8, 2000)

Like many of his colleagues, Maurice Williamson supported Tolley's claims and linked public health with human rights:

It is with a great deal of *pragmatism* that I approach this issue ... There are [also] many other reasons that this bill should be supported, *such as issues of human dignity, equity, safety* – a whole range of things. *I have never seen such old laws that certainly come under the category of being written by blokes for blokes, as the old prostitution laws do* – that is, we could do no wrong, we could have the best time we liked, spend up large, and enjoy ourselves, and it was those dreadful harlots who had attracted us to it. We were pretty good guys. On that basis alone, the laws are dreadfully outdated. (Support, Maurice Williamson, National, first reading, October 11, 2000)

Further, in response to the claim in the Swedish model that all prostitution is coercive and exploitative, some supporters joined harm reduction with human rights concerns by highlighting the distinction between voluntary and involuntary sex work and arguing that voluntary sex work can be made safer under a decriminalisation regime than a criminalised one:

I support the bill because it makes it illegal to coerce anyone into providing sexual services. This bill makes it illegal to provide or assist child prostitutes. This bill *allows educational and health resources to be made available.* It is unacceptable that the current laws inhibit the dissemination of safer-sex information and related

products. (Support, Katherine Rich, National, second reading, February 19, 2003)

Others emphasised the sexual double standard and gender inequity of laws that punish women – but not men – for voluntary commercial sexual activity. Former sex worker Georgina Beyer spoke passionately about this issue at each stage of the PRA debates. For example:

We [sex workers] never got any justice from the point of view of the client being made responsible for having been the other party in the transaction, and therein lies *a great injustice*, as far as I am concerned. (Support, Georgina Beyer, Labour, first reading, November 8, 2000)

I support this bill for all the prostitutes I have ever known who have died before the age of 20 because of the inhumanity and hypocrisy of a society that would not ever give them the chance to redeem whatever circumstances made them arrive in that industry ... I think of all the people I have known in that area who have suffered because of the hypocrisy of our society, which, on the one hand, can accept prostitution, while, on the other hand, wants to push it under the carpet and keep it in the twilight world that it exists in ... I will conclude by saying that right now we have a sex industry, and *we have legislation based on an outmoded double standard. Let us change, please, the part we can.* (Support, Georgina Beyer, Labour, third reading, June 25, 2003)

Additional support for getting rid of a sexual double standard came both from other Labour MPs and from members of parties not always allied with Labour's policy goals:

The objections I have heard do not hold the slightest weight against *the basic injustice that is written into our laws*. That injustice is that women can be prosecuted for so-called soliciting, which essentially means making customers aware that a service is for sale, while men cannot be prosecuted for purchasing the service. Such a law has no place in the new century. (Support, Liz Gordon, Alliance, first reading, October 11, 2000)

There has always been *a double standard in this sort of case, whereby women can be arrested for soliciting, yet the man is protected from the law*. Sex workers are often exploited and treated unfairly, and similarly the current legislation that makes it an offence to live off the earnings of the prostitution of another person could put innocent persons such as dependents in the position of committing a criminal offence. (Support, Penny Webster, Act, first reading, November 8, 2000)

The *double standard of morality* that operates, which allows a sex worker to be arrested for soliciting a man for the purposes of prostitution, but protects him from the law should he be the one to approach her, *is totally indefensible*, in my view. I cannot accept that this sort of double standard exists in this century. (Support, Katherine Rich, National, second reading, February 19, 2003)

The current law as we see it now is a blokes' law. ... The law penalises a sex worker if he or she is found soliciting, but lets off the paying customer who seeks that service and happily pays for it. (Support, Steve Chadwick, Labour, second reading, February 19, 2003)

It is high time we moved into an era where the *Victorian hypocrisy* of convicting and condemning women who sell sexual services, while protecting the men who buy them, is discarded once and for all. (Support, Sue Bradford, Greens, third reading, June 25, 2003)

Other MPs argued that the double standard was not just unfair – a matter of violating basic justice – but also actively harmful. Protecting gender equity and reducing harm within the sex industry were seen as linked concerns. Here, many parliamentarians wanted to make it clear that they disapproved of sex work but did not want to impose their moral view on someone else's choices. Thus, part of the emphasis on harm reduction and human rights involved replacing one kind of moral discourse with another:

I would be heartbroken if one of my children decided to enter the sex industry – prostitution plays no part in my dreams for them – *but if they did*, I would want to know that they had the same rights as any other New Zealander. *I would want to know that my daughter had the same rights as my son.* (Support, Katherine Rich, National, second reading, February 19, 2003)

Most important to me, I support the bill as a mother. *Prostitution would not be the occupation of choice for my children*, but neither would selling tobacco, and neither, quite frankly, would be sitting in the Opposition benches. However, given that my children have that choice, *I would want them to be safe and secure* and to have the best life possible in that choice. That is why I support this bill. (Support, Lynne Pillay, Labour, second reading, February 19, 2003)

If someone asked me *whether I would like my daughter to be a prostitute when she grows up, my answer would be no. I do not particularly like the idea that my sons might grow up to be homosexual, but they might. If it does happen, it will be best to live with it in a way that tries to minimise the harm and the damage to those people, rather than sitting in judgment, and saying, 'I'm going to outlaw and ban it.'* (Support, Maurice Williamson, National, CommitteeCWH, March 26, 2003)

Finally, in the connection of human rights and harm reduction, both supporters and opponents of the PRA discussed the push factors into prostitution as being poverty, lack of education, or addiction and abuse, and they declared a desire to invest more heavily in social welfare provisions that would make prostitution either less attractive or less necessary. That is, an 'end supply' perspective was notably present on both sides of the debate:

I believe there is a strong need to ensure that young women in particular have *alternative education and training* options so that they are not forced into prostitution. But the way to do that is not by keeping this sexist and archaic law in place The way to do it is to *develop good opportunities in the community* so that young women do not have to go into prostitution if they do not want to. (Support, Liz Gordon, Alliance, first reading, November 8, 2000)

We argue that attention must be turned to solving the underlying causes of the issue. The first step is to *pay attention to poverty* ... There needs to be consistent and cohesive action to *combat drug abuse*, particularly amongst the young. (Oppose, Matt Robson, Progressive, second reading, February 19, 2003)

This parliament has seen a huge amount of passion and energy regarding this bill over the last few months. *If only that passion and energy were put into ensuring that all New Zealand children had the opportunity of accessing first-class education and health from the time they were conceived*, it would contribute hugely to breaking the cycles of disadvantage that so often lead towards prostitution. (Oppose, Paul Hutchison, National, third reading, June 25, 2003)

What we see in the debates around the PRA is that trafficking concerns were briefly mentioned in the first reading and had taken greater prominence by the second and third readings, aided in part by Aotearoa/New Zealand's signing of the Palermo protocol and increasing publicity around the Swedish model. But the prevailing arguments situated human rights on the side of gender equity in protecting sex workers' rights to work as they opted for prostitution for reasons of poverty or choice and to have safety in their job. Prostitution was explicitly figured as separate from coercion, or trafficking, against which Aotearoa/New Zealand also took a strong stance – both in the Crimes Bill and in the PRA itself – with provisions punishing both coercion and the purchase of sexual services from a minor aged under 18 years.

Event #2: Debating the Organised Crime and Anti-Corruption Legislation Bill (2014–2015)

After the passage of the PRA, the Palermo era in international anti-trafficking efforts burgeoned. The growing influence of the Palermo protocol put serious pressure on Aotearoa/New Zealand's understandings of 'trafficking' and 'human rights' and the links between them. This is for two reasons. First, the Palermo trafficking protocol was developed as part of the UN Convention on Transnational Organised Crime, thereby taking trafficking from its previous home in the human rights domain and shifting it into a criminal justice one (Chuang, 2014). With the United States leading the treaty negotiations (Desyllas, 2007), 'trafficking was framed

as a crime perpetrated by criminal syndicates, unwittingly suffered mainly by innocent women and children, and best addressed by aggressive criminalization' (Chuang, 2014, p. 615) – a framing promoted by both the United States and neo-abolitionist NGOs during the Palermo debates (Chuang, 2014; Ditmore, 2010).

Second, since the Protocol was adopted as a criminal justice mandate with no enforcement mechanism, the United States has filled the vacuum by

policing other states' anti-trafficking responses – primarily by utilizing the powerful economic sanctions established in U.S. domestic anti-trafficking legislation, the Trafficking Victims Protection Act (TVPA). Since the sanctions threat is triggered by states' noncompliance with a set of "U.S. minimum standards," the United States has been able to shape anti-trafficking law and policy responses worldwide. (Chuang, 2014, p. 613)

Because the U.S. view of prostitution and trafficking becomes the norm against which states are judged, it is important to understand how the United States frames these issues.

Understanding the U.S. discourse

As with the policy discourses in Aotearoa/New Zealand, the legal and rhetorical landscape in U.S. anti-trafficking efforts is complex and often contradictory, and different norms and rules hold sway at different times and places. Specifically, the *degree to which* prostitution and trafficking are conflated in U.S. policy rhetoric has shifted over time, though actual law remained more similar than not throughout the Bush and Obama administrations. The Bush administration was ready 'to champion the anti-prostitution cause at home and abroad' as a signature humanitarian initiative (Chuang, 2010, p. 1680). There are two key elements of this initiative. First is the National Security Presidential Directive 22 stating that U.S. anti-trafficking

policy is based on an abolitionist approach to trafficking in persons, and ... the United States Government opposes prostitution and any related activities ... as contributing to the phenomenon of trafficking in persons. These activities are inherently harmful and dehumanizing. The United States Government's position is that these activities should not be regulated as a legitimate form of work for any human being. (White House, 2002)

The second key element was the 'anti-prostitution loyalty oath' installed in the 2003 TVPA reauthorisation and the 2003 President's Emergency Plan for AIDS Relief (PEPFAR), which states:

No funds ... may be used to provide assistance to any group or organisation that does not have a policy explicitly opposing prostitution and sex trafficking [and] No funds ... may be used to promote or advocate the legalisation or practice of prostitution or sex trafficking. (Cited and discussed in Richter, 2016, paragraphs 5, 6; see also Moshman, 2005)

Refusing this pledge renders NGOs ineligible for United States Agency for International Development (USAID) HIV/AIDS prevention monies.

Hence in the Bush era, USAID and the TVPA were used explicitly to conflate sex trafficking and prostitution, interpreting 'prostitution as an activity that is intrinsically inseparable from human trafficking' (Lerum, McCurtis, Saunders, & Wahab, 2012, p. 86; see also Chuang, 2014; Ditmore, 2010). In 2007, the *Trafficking in persons* (TIP) report section titled *Learning more: The forms and impact of human trafficking* (Department of State, 2007) maintained both that 'sex trafficking is considered the largest specific subcategory of transnational modern-day slavery' and that

sex trafficking would not exist without the demand for commercial sex flourishing around the world Prostitution and related activities ... encourage the growth of modern-day slavery by providing a façade behind which traffickers for sexual exploitation operate. Where prostitution is tolerated, there is a greater

demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery.

But as with Aotearoa/New Zealand, U.S. discourse is not static, and the Obama administration re-evaluated the State Department's understanding of the relationship between prostitution and sex trafficking. Specifically, the 2010 TIP report sidebar titled *What is not trafficking in persons* stated that 'prostitution by willing adults is not human trafficking' including only 'forced prostitution' in its trafficking definition (see also Chuang, 2014; Lerum et al., 2012). Further, the 2014 TIP report includes a significant shift from the 2007 document, noting that journalists need to be careful not to use 'trafficking' and 'prostitution' interchangeably, and that someone who has previously engaged in voluntary prostitution can later become a victim of trafficking. Yet despite these changes, the Obama era TIP reports continued to distinguish 'prostitution' from 'labour', e.g. in explaining in 2010 *What is trafficking in persons*, the U.S. Department of State wrote, 'The ILO estimates that for every trafficking victim subjected to forced prostitution, nine people are forced to work.' Indeed, *Forced labour* and *Sex trafficking* are two different sub-sections of the 2010 report, as they are in the current *What is modern slavery* (Department of State, n.d.) section of the Office to Monitor and Combat Trafficking Persons site on the U.S. State Department web page (the page on which the TIP reports and anti-trafficking legislation fact sheets are housed).

Further, while the Obama State Department rhetorically indicated a willingness to change policy course, it in fact 'left a great deal of the Bush approach intact' (Lerum et al., 2012, p. 100). Despite disavowing the 'absolute link between trafficking and sex work ... Obama defended the anti-prostitution loyalty oath' (Lerum et al., 2012, p. 100). And even though multiple U.S. courts have ruled the oath unconstitutional, as of 2017 it remains 'in effect for the vast majority of organizations seeking PEPFAR funding worldwide' (Lerum et al., 2012, p. 101). Indeed, as the oath is embedded in the 2003 Global AIDS Act, only Congress – not the Executive Branch – can remove it. One result that many NGOs have flagged is the ongoing and troubling conflation of trafficking and prostitution in the United States' global anti-HIV/AIDS and anti-trafficking efforts.¹⁰ The interpretation and enforcement of these policies affect each other, especially as prostitution is criminalised in nearly all jurisdictions in the United States, and many of the activists and politicians who inaugurated the TVPA remain in place and committed to an abolitionist model.

The point of this sidebar into U.S. law and discourse is to note that discourses are neither static nor unitary, and, in the United States, the relationship between prostitution and trafficking remains muddled, retaining elements of the legal and discursive conflation of prostitution and trafficking that dominated the debates and passage of the TVPA, alongside recognition that prostitution can be voluntary, but never considering it 'labour.' This matters because, as noted above, the United States enforces the Palermo protocol, and Aotearoa/New Zealand takes the U.S. evaluation of it in the country's TIP reports very seriously, as evidenced in the parliamentary debates discussed below. I circle back to the significance of the differences between the Aotearoa/New Zealand and U.S. discursive and policy views of prostitution in the discussion section that concludes this article.

Prostitution, sex trafficking, and Section 98D of the Crimes Act

The mechanism through which the United States evaluates whether a country is meeting U.S. 'minimum standards' is the annual TIP reports. Each report evaluates countries on how they meet the 'Three Ps' framework set out by the U.S. State Department: prosecution, (victim) protection, and prevention (through the prosecution of individual traffickers) (<https://www.state.gov/j/>

tip/3p/index.htm). The Aotearoa/New Zealand TIP reports featured heavily in the 2014–2015 parliamentary debates over the proposed Organised Crime and Anti-Corruption Legislation Bill.

As with the previous years' TIP reports, the 2015 country profile continued Aotearoa/New Zealand's 'Tier 1' rating despite ongoing concerns about points of misalignment between domestic and international law, noting specifically that Aotearoa/New Zealand defined trafficking through transnational movement – 'an offense akin to smuggling' (Department of State, 2015, p. 261) – and that it does not 'include exploitation as an element of the crime.'¹¹ In addition, the 2014 TIP report stated that when Aotearoa/New Zealand does prosecute persons in the context of investigations opened as trafficking cases, usually the victim is awarded damages (e.g. back pay) but is not designated a trafficking victim. The 2014 report chided Aotearoa/New Zealand because in the previous year it 'continued to provide temporary working visas to 18 potential victims' (p. 261). (These cases have involved farm and fisheries labour trafficking, not sex trafficking.) That is, the TIP reports suggest that Aotearoa/New Zealand is too focused on human rights violations as *labour* violations but not *also* as trafficking violations: 'A case involving Fijian nannies alleged to have been subjected to domestic servitude resulted in an acquittal on trafficking charges, although the nannies were awarded back pay and damages for underpayment of wages and excessively long work hours.' The two other cases resolved in 2013 'resulted in fines' (Department of State, 2014, p. 292). Though every TIP report from 2005 through 2015 noted failures in Aotearoa/New Zealand law to conform to U.S. and UN understandings of trafficking, Aotearoa/New Zealand was never demoted to Tier 2 status.

Still, there was ongoing concern by both government officials and the media that Aotearoa/New Zealand would lose its ranking – and have its international reputation damaged – if it did not bring its anti-trafficking laws into line with U.S. codes (see, e.g. Metherell, 2015). In 2013, the Ministry of Justice's Regulatory Impact Statement for the proposed Organised Crime bill noted

While this is not considered to be a considerable risk in New Zealand, in recent years New Zealand has come under criticism for perceived gaps in the trafficking in persons offence from the United Nations Human Rights Committee and from the United States in their *Trafficking in Persons Report*'. (Ministry of Justice, 2013, p. 11)

Labour MP Megan Woods cited this statement to remind her colleagues 'how swiftly we do have to move' to amend the Aotearoa/New Zealand trafficking definitions (first reading, November 4, 2014). Similarly, in commenting on the bill, the Minister of Justice noted that

The United States' Trafficking in Persons Report has repeatedly criticised New Zealand's inclusion of the transnational requirement, while the United Nations has recommended that New Zealand consider removing this requirement in order to ensure that domestic trafficking is also criminalised. The United States has also recommended that the offence explicitly identify the element of an 'exploitative purpose'. I recommend that the trafficking in persons offence in Section 98D of the Crimes Act be amended to remove the transnational element of the offence. I further recommend the trafficking in persons offence is refined to ensure that the use of an 'exploitative purpose' is covered as a means of trafficking in persons.' (Office of the Minister of Justice, n.d., p. 9)

Without comment, the fact of the U.S. recommendation is taken as justification for changing Aotearoa/New Zealand law. Further evidence that the judgment of the United States seems to weigh heavily on the government's assessment of its own law is that the 2015 TIP report was specifically cited and discussed extensively in the debates after the second reading of the omnibus Crimes Bill, in particular by Jacinda Ardern and Iain Lees-Galloway. Their discussions of the report are too extensive to reproduce here, but I have pulled out selections of the relevant speeches to substantiate the point:

The Organised Crime and Anti-Corruption Legislation Bill in large part makes sure that we are compliant with international treaties and overseas obligations New Zealand is a signatory of [the Palermo] protocol and currently we are not entirely compliant with it. ... in New Zealand it is the Crimes Act that covers our

trafficking requirements, and ... it does not allow there to be cover ... of trafficking within New Zealand with an exploitative purpose and the definition is too narrow, based on what the UN would otherwise require us to do. There are rankings internationally of countries and how they performed in the area of exploitation, and this is in the *Trafficking in Persons Report*. This is a report that puts countries on to different tiers. It is produced by the United States, and *New Zealand currently is in tier 1. There is, however, a concern that we may lose our ranking within that report because of the way that we currently define the exploitation and trafficking of people ...* So you can see from that reference that we do have specific provisions in things like the Prostitution Reform Act and our labour laws that might criminalise these areas, but, according to this report, that, of course, does leave some gaps and may not cover all situations and circumstances that we need to cover. So *this bill seeks to remedy that situation and does so reasonably successfully ...* (Support, Jacinda Ardern, Labour, CommitteeCWH, October 21, 2015)

While Ardern extensively cites the 2015 TIP report in support of removing cross-national movement as an element of trafficking, later in her call she draws on the case of an internationally trafficked Eastern European woman to illustrate the horrors of trafficking, suggesting that trafficking is still discursively tied to migration and movement, particularly for adults. There is, additionally, a clear emphasis on how Aotearoa/New Zealand is perceived by the rest of the world, and the need for approval from the United States and the UN drives her comments. Lees-Galloway spoke immediately after Ardern in support of her submission:

The Trafficking in Persons Report 2015, did identify some issues with our ability under current legislation and under section 98D as it is currently written to actually identify some forms of labour exploitation as forced labour and to prosecute them under the Crimes Act ... Overall, in my view this new section 98D is a significant improvement on what we have in the current legislation, and it certainly looks to address some of the issues with New Zealand's approach to these matters that have been identified by overseas agencies. (Support, Iain Lees-Galloway, Labour, CommitteeCWH, October 21, 2015)

In addition to emphasising Ardern's concerns about Aotearoa/New Zealand's international 'credibility,' in other parts of his statement to Parliament, Lees-Galloway assumes that increased criminalisation will deter crime and that exploitation is best addressed by vesting state agencies with investigative powers rather than by strengthening workers' rights in order to empower them to report exploitation to the authorities. These arguments parallel the development of anti-trafficking policy in the United States in the early 2000s, where and when 'feminists directly join[ed] forces with a neoliberal project of social control' (Bernstein, 2010, p. 57) adopting a mode of 'carceral feminism' that equates 'social justice directly with criminal justice' (Bernstein, 2010, p. 61).

In response to these concerns, on November 7, 2015, the Crimes Amendment Act 2015 was enacted, replacing Section 98D in the Crimes Act 1961. It added 'exploitation' to the purposes of the crime of trafficking, and 'exploitation' was defined as causing a person, through an act of deception or coercion, to be involved in one of three activities, the first of which is 'prostitution or other sexual services' (Crimes Amendment Bill). Finally, transnational movement was removed from the definition of 'trafficking,' emphasising that – in line with the updated U.S. TVPA – 'trafficking' is defined through the *purpose* (exploitation), regardless of means (movement). This rather dramatic reinterpretation of 'trafficking' is in line with the Obama administration's position that the conditions of labour define trafficking, regardless of movement (Chuang, 2014, p. 619): forced labour and trafficking are now the same crime.

So what? What does this change have to do with women, sex workers, or the PRA? And even if there is some connection, are stronger anti-trafficking laws not better? Is there anything wrong with Aotearoa/New Zealand following the United States' lead on this front? To answer the last question first: potentially. There is now a budding conflict between the PRA and the updated section 98D that has been introduced through the discursive contexts, and the definitions of concepts these contexts produce, which together provide the interpretative

guides for making meaning of the law. So, on the one hand, we might see the changes to the Crimes Bill as strengthening the PRA's focus on decriminalising prostitution in part to protect sex workers *from* exploitation, as explicitly laid out in Part 1 of the Act. On the other hand, the Crimes Bill now adopts the implicit U.S. definition of prostitution as exploitation (even when voluntary) and distinct from 'labour', while the PRA defines prostitution as 'the provision of commercial sexual services' (PRA, Section 1, Part 4[1]). Specifically, Section 98D states:

For the purposes of this section, *exploit*, in relation to a person, means to cause, or to have caused, that person, by an act of deception or coercion, to be involved in— (a) *prostitution* or other sexual services: (b) slavery, practices similar to slavery, servitude, *forced labour*, or other forced services: (c) the removal of organs.

Prostitution is separate from 'labour' in this amendment, holding out prostitution as a specific form of exploitation, whereas the PRA folds prostitution into the category of labour.

The point is not that trafficking and exploitation are not horrific – they are. Nor is the point that they are not questions of gender equity and human rights – they are both of these as well. The concern is in how human rights and gender equity will be conceived in Aotearoa/New Zealand as it has mirrored the 2000 Palermo treaties in shifting trafficking from a context of human rights to a carceral domain with trafficking embedded in the Crimes Act, and labour exploitation redefined as 'trafficking'.

Discussion: Sneaking neo-abolitionism into Aotearoa/New Zealand law?

While the PRA successfully linked human rights with harm reduction – so that opponents of prostitution could still support decriminalisation and a social welfare state response to the harms of sex work – in anti-trafficking law (specifically the updated Section 98D), human rights are tied more closely to a criminal justice response to exploitation. CDA helps us evaluate the contexts that allow for the same group of discourses to mix in different ways so that some succeed where they previously failed.

First, the view of the neo-abolitionists was present in Aotearoa/New Zealand early on in proposed 'Swedish model' amendments, holding that all sex work/prostitution is violence against women. Their failure to carry the day then spurred those who supported a different outcome to organise (Abel, Fitzgerald, & Healy, 2010). Second, whereas the PRA emphasised the social and economic conditions pushing people into sex work, and gender equity was seen to be promoted when sex workers are protected as workers, a trafficking frame follows the 'Swedish model' and emphasises 'bad men' and organised crime as push factors. With the changes in Section 98D, this individualising shift in policy risks redefining gender equity as something achieved through carceral approaches – and enforcing better morals – than something attained by addressing economic inequality, cuts to social welfare, and 'the social dynamics of migration' (McSherry & Cullen, 2007, p. 205).

Third, as Harrington (2010) has argued, the PRA is an ambivalent bill that reflects a nation's and a government's conflicted regard for the institution of prostitution and the people who work in it. What Warnock and When (2012) have labelled 'moral majoritarianism' is in the PRA as a result of the regulationism introduced to keep prostitution 'decriminalisation' from failing after the first reading. Opponents of the PRA knew that if they could not kill the bill outright, they could effectively kill large parts of it through the implementation rules for the bylaws (Section 14) and resource consents (Section 15) provisions (Warnock & When, 2012, p. 434). As implemented, the PRA has benefitted large brothels at the expense of small owner-operated ones and made it more difficult for some sex workers to move out of street work into safer conditions, impeding the implementation of a rights-based response at the local level

(Warnock & Wheen 2012; Ministry of Justice, 2008) and undermining the argumentative framework distinguishing trafficking from prostitution.

So, on the one hand, concerns about trafficking, exploitation of women, and disdain for sex work (and sex workers) were present in the parliamentary debates from the first reading. On the other hand, the explicit wording of the legislation and many of the winning arguments offered in its favour suggest a real concern with gender equity, human rights, and public health. In contrast, current parliamentary debates regarding trafficking are more ‘law and order’ focused, and one result is that the ‘moral majoritarianism’ about prostitution in general that threaded through the early discussion is reinvigorated through the enforcement role the United States has taken in policing trafficking through the Palermo protocol. In this vein, as Abel, Fitzgerald, and Brunton (2009) demonstrate,

although New Zealand has been applauded for developing policy based on the human rights of sex workers, the privileging of sexual morality common to many other countries has dominated public discourse in New Zealand post-PRA’. (pp. 515–516)

My argument in this paper has been that international discourse around human trafficking, sex trafficking, and prostitution neo-abolitionism has facilitated that shift, despite the fact that such moral majoritarianism sits in an uneasy relationship with what the PRA suggests is required for gender equity in labour practices.

In international debates, the primary discursive shift that has facilitated the re-weighting of the discourses at play in legitimating trafficking policy is what law professor Janie Chuang (2014) terms ‘exploitation creep.’ Under the compelling goal of trying to minimise exploitation by widening the net of what counts as trafficking, international anti-trafficking efforts have in reality become

a technique to protect the hegemony of a particular U.S. anti-trafficking approach ... to fend off competing approaches calling for labor rights and migration policy reforms that are particularly contentious in the U.S. context’. (p. 611)

The success of neo-abolitionism in capturing the U.S. discourse and law enforcement (Chuang, 2010) – and the hegemony of U.S. trafficking definitions across the globe achieved through their TIP country reports – means that recent shifts in Aotearoa/New Zealand anti-trafficking law have opened the door for domestic neo-abolitionist arguments to gain ground.

Even though the Obama administration distinguished ‘prostitution’ from ‘forced prostitution/trafficking,’ it also expanded the definition of trafficking by making ‘exploitation’ the key element defining it. While the move to ‘exploitation’ as *the* distinguishing feature of trafficking *could* introduce a structural critique of labour into anti-trafficking policy, in practice this expansion of what counts as trafficking has emboldened the individualised ‘carceral protectionism’ and ‘militarized humanitarianism’ approach already favoured under U.S. law (Chuang, 2014). ‘Exploitation’ collapses the process with the purpose so that ‘the abuse and violence inherent in trafficking is mistaken for the actual site of work and form of labor’ (e.g., prostitution) (Sanghera, 2010, p. 11). Rather than a structural critique of exploitation under capitalism and globalisation, then, ‘exploitation creep’ facilitates ‘criminalisation creep.’ Whereas the dominant framing of the PRA linked harm reduction to decriminalisation, allowing those opposed to prostitution to vote for the bill (Abel et al., 2010; Harrington, 2010), now trafficking has become a more high-profile government concern, has been redefined to include domestic activities, and has been linked more closely to prostitution. This makes it harder to be in favour of harm minimisation and to support sex worker rights *qua* workers.

This matters because discourse matters. The discourse of neo-abolitionism and its assumptions about prostitution as inherently degrading have shaped how the United States

has interpreted and enforced the TVPA and, by extension, the Palermo agreements: to get rid of trafficking, we must get rid of prostitution. To see this position in action, we need look no further than the 2016 TIP report on Aotearoa/New Zealand (Department of State, 2016). Here, the United States found Aotearoa/New Zealand's anti-trafficking efforts to be mixed, noting specifically (and unfavourably) under the 'prevention' metric that 'the government did not make efforts to reduce the demand for commercial sex acts.' That is, Aotearoa/New Zealand is falling short in its anti-trafficking efforts by not adopting the 'end demand' model of prostitution.

Discourses are a way of exercising power. They do not simply reflect meaning, they also generate it, and they do so by creating regularities in uses and understandings that 'emerge and become systematized in and through the articulation and reiteration of particular norms and practices' (Berman, 2003, as cited in Chuang, 2010, p. 1694). Such changes in values or in the conception of a policy area occur through a process of 'endogenous construction' that includes reframing problems through ongoing deliberative exchanges (Schmidt, 2010, p. 5) such as those outlined in this article. To maintain the conceptual distinction between trafficking and prostitution in Aotearoa/New Zealand policy and public discourse, one must be wary of the obsessive drive to label all forms of exploitation 'trafficking,' effectively ceding more ground to 'carceral humanitarianism' while retreating from the social welfare state.¹² As Aotearoa/New Zealand has shown over the past 14 years, it is possible to be opposed to exploitation and to protect sex workers' labour rights. But it is not inevitable that Aotearoa/New Zealand will continue to do so.

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Notes

- 1 Technically, while the PRA is generally considered to have *decriminalised* prostitution, it in fact introduced a *mixed* approach, as it also includes elements of *regulationism* or *legalisation*, in that it permits territorial authorities to use their bylaw-making powers to limit or corral the geographies of sex work in various ways. This has affected the viability of small owner-operated brothels and also encouraged (so far failed) efforts to curb or outlaw street sex work (e.g., the Manukau City Council (Control of Street Prostitution) Bill). For more on how the mixed nature of the PRA undermines its human rights goals and imports moral majoritarianism into the bill's implementation, see Warnock and Wheen (2012).
- 2 Though media and government discourses affect each other, an integrative analysis of the two fields is beyond the scope of this short article. In addition, excellent CDAs of media coverage of the PRA have been already been conducted, notably by Farvid and Glass (2014) and Pascoe (2007).
- 3 The Organised Crime and Anti-Corruption Legislation Bill was an omnibus bill dealing with issues such as money laundering, people trafficking, identity theft, bribery and corruption, and a number of other related offenses. It was split in the third reading. I focus only on the anti-trafficking elements of the bill and debates.

- 4 So named because they were accepted and opened for ratification at the signing conference in Palermo, Italy.
- 5 Prior to the Palermo protocols, the guiding international treaty was the 1949 Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others.
- 6 CATW works to end sex trafficking and was a key participant in shaping and passing the UN's anti-trafficking protocol. According to their website, 'CATW supports the Nordic Model, the world's first law to recognize prostitution as violence against women and a violation of human rights' (<http://www.catwinternational.org/ProjectsCampaigns/Projects>).
- 7 All italics in the excerpts are mine.
- 8 For an excellent analysis of the different ways Aotearoa/New Zealand and Sweden defined and implemented their views of gender equality in reforming their prostitution laws, see Harrington (2012).
- 9 For a more extensive discussion of the human rights focus of the debate and bill, see Abel et al. (2010).
- 10 See, for example, Richter (2016). Chung (2010) extensively details the growing influence of prostitution abolitionism on U.S. TVPA amendments and the success of the neo-abolitionist movement in using the global enforcement of anti-trafficking policies through TIP reports, sanctions, and the like to achieve an anti-prostitution agenda. See also Bernstein (2010).
- 11 Tier 1 designates 'countries whose governments fully comply with the TVPA's minimum standards.' Tier 2 refers to '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' (<https://www.state.gov/j/tip/rls/tiprpt/2015/243366.htm>).
- 12 'Carceral humanitarianism' is a play on Elizabeth Bernstein's analysis of U.S. prostitution and trafficking policy: 'Militarized humanitarianism meets carceral feminism.'

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