The Lost Sanctuary: Examining Sex Trafficking Through the Lens of *United States v. Ah Sou*[†]

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Introduction

> From the evidence in this case, I find that the appellant is a Chinese woman; that she was sold as a slave by her foster mother, in China, and was by her purchaser, with the assistance of another Chinaman, brought into the United States for immoral purposes. They were successful in imposing upon the immigration officers by means of false representation, and skillful use of photographs identifying the girl as a daughter of the accomplice, and a native of this country. By beatings and abuse, her master compelled her to earn money for him as a prostitute, until she escaped, and took refuge in the Chinese Women's Home of the Presbyterian Church, in the city of Portland, where she lived for a time, and was there married to a Chinese inhabitant of this country, who is registered as a Chinese laborer.[1]

With these words, in 1904 Judge Cornelius Hanford of the federal district court in Seattle, Washington, captured the plight of Ah Sou, a young Chinese woman trafficked into the United States as a slave and then forced into prostitution. Although Judge Hanford granted Ah Sou sanctuary in the United States, the United States Court of Appeals for the Ninth Circuit, expressing regret, reversed that judgment.[2] The story of Ah Sou is more than a hundred years old,[3] but it is remarkably rich in contemporary lessons. The implicit assumption underpinning much of the research on human trafficking[4] is that it is a relatively modern phenomenon, one that is precipitated and fueled by the spread of market capitalism, globalization, and increasing economic inequality around the world.[5] The International

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1. United States v. Ah Sou, 132 F. 878 (D. Wash. 1904), *rev'd*, 138 F. 775 (9th Cir. 1905).

2. United States v. Ah Sou, 138 F. 775 (9th Cir. 1905).

3. The United States Court of Appeals for the Ninth Circuit heard Ah Sou's appeal in the San Francisco courthouse in 1905, the year the court moved into its headquarters building. *See* U.S. General Services Administration, James R. Browning U.S. Court of Appeals Building, San Francisco, California, http://159.142.162.71/Portal/gsa/ep/contentView.do?programId=9593&channelId=-17573&ooid=19383&contentId=19977&pageTypeId=8195&contentType=GSA_BASIC&programPage=%2Fep%2Fprogram%2FgsaBasic.jsp&P=PMHP (last visited Sept. 19, 2008). The courthouse, an architectural masterpiece, has been described as "a post office that's a palace," an early example of Beaux-Arts classical or American Renaissance architecture that has been widely praised for the quality and splendor of its craftsmanship. *Id.* At the centennial celebration of the courthouse, judges re-enacted the appellate argument in Ah Sou's case. *See* CENTENNIAL CELEBRATIONS, CIRCUIT CELEBRATES CENTENNIAL OF SAN FRANCISCO COURTHOUSE 19 (2005).

4. According to the United Nations, "trafficking in persons" is:

> [T]he 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.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, art. 3(a), U.N. Doc. A/RES/55/25 (Nov. 15, 2001) [hereinafter Protocol to Prevent Trafficking].

5. *See, e.g.*, Moisés Naím, *Five Wars of Globalization*, 18 AM. U. INT'L L. REV. 1 (2002); Vidyamali Samarasinghe, *Confronting Globalization in Anti-trafficking Strategies in Asia*, 10 BROWN J. OF WORLD AFF. 91 (2003).

Labour Organization, for example, referred to human trafficking as the "underside of globalization."[6] However, human trafficking in general—and sex trafficking in particular—has deep historical roots that reach as far back as the mid-1800s.[7]

This article uncovers the story of one of the earliest documented court cases of sex trafficking in American history, *United States v. Ah Sou.* There are various definitions of sex trafficking.[8] For the purposes of this article, we adopt the definition of sex trafficking found in the Trafficking Victims Protection Act (TVPA) of 2000, which provides that "sex trafficking" is "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."[9] The legal battle in which Ah Sou was engaged is meticulously preserved in the hundreds of pages of court documents held at the National Archives, Pacific Alaska Region, in Seattle. These documents include transcripts of witness testimony, court orders, and legal briefs filed by the parties. This article relies on these court documents, as well as a variety of other previously unexamined archival documents and immigration records drawn from local libraries, churches, and the National Archives. These materials offer a rare and unique view into the world of sex trafficking in the early 1900s.

Through the lens of Ah Sou's legal challenge, this article investigates the development of international human rights norms, the "domestication" of these norms in U.S. law, and the significance of these changes for the protection of trafficking victims in the twenty-first century. In her petition for a writ of certiorari to the U.S. Supreme Court, Ah Sou argued, "to carry the order of the Circuit Court of Appeals into effect would be in violation of the 13th Amendment to the Constitution of the United States[10] in that

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6. U.S. STATE DEP'T, TRAFFICKING IN PERSONS REPORT 5 (2003) [hereinafter 2003 TRAFFICKING IN PERSONS REPORT].

7. For an early history of sex trade in the United States involving Chinese women, see Lucie Cheng Hirata, *Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth-Century America*, 5 SIGNS: J. WOMEN IN CULTURE & SOC'Y 3, 3-29 (1979); Eileen Scully, *Pre-Cold War Traffic in Sexual Labor and Its Foes: Some Contemporary Lessons*, *in* GLOBAL HUMAN SMUGGLING 74, 75-83 (David Kyle & Rey Koslowski eds., 2001).

8. *See* Michael R. Candes, Comment, *The Victims of Trafficking and Violence Protection Act of 2000: Will It Become the Thirteenth Amendment of the Twenty-First Century?*, 32 U. MIAMI INTER-AM. L. REV. 571, 577-79 (2001) (describing the debate over how to define trafficking); Becki Young, Note, *Trafficking of Humans Across United States Borders: How United States Laws Can Be Used to Punish Traffickers and Protect Victims*, 13 GEO. IMMIGR. L.J. 73, 75-77 (1998) (discussing definitional issues).

9. Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106-386, § 103(9), 114 Stat. 1464, 1470 (2000) (consisting of the first section of the three-part Victims of Trafficking and Violence Protection Act, 22 U.S.C. §§ 7101-7110 (2000) (amended 2005)). The acronym TVPA is also used in connection with a separate statute, the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1991). We use it here, however, to refer only to the trafficking statute.

10. The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

she would be delivered into slavery if deported."[11] The Thirteenth Amendment, however, could not prevent her deportation because the U.S. Constitution had no extraterritorial effect in China.[12] The jurisdictional limitation of the Thirteenth Amendment remains in place today, but much has changed since Ah Sou's deportation in 1906. Numerous international instruments now establish protection for individuals fleeing from persecution.[13] Other international conventions and treaties explicitly ban human trafficking and forced labor, as well as violence against and sexual exploitation of women.[14] The United States has adopted many of these international human rights standards and norms.[15]

Despite the proliferation of treaties and protective laws, trafficking remains a persistent and intractable problem. Human trafficking is a thriving and lucrative business that, according to the U.S. Department of State, has "reached staggering dimensions around the globe."[16] According to one recent estimate, approximately 800,000 people are trafficked across international borders every year; about 80% of these victims are female and up to 50% are children.[17] The U.S. Department of State also estimates that the majority of these women and children are trafficked into the commercial sex trade.[18] One scholar estimates that "[t]he numbers of women and children trafficked today for the purpose of prostitution may soon be as high as those of the African slave trade of the 1700's."[19] The United States is one of the primary destination countries for human trafficking, involving as many as 17,500[20] to 50,000[21] victims every year. According to some sources, human trafficking is the third most profitable international criminal enterprise, lagging behind only drug smuggling and the weapons trade.[22]

It is important to note that estimates of the number of trafficking victims vary widely, because it is extremely difficult to develop accurate statistics on the scope and magnitude of a phenomenon that is clandestine and

11. Petition for Writ of Certiorari at 5, Ah Sou v. United States, 200 U.S. 611 (1905) (No. 339). The Supreme Court denied Ah Sou's petition. *Ah Sou*, 200 U.S. at 611.

12. *See* Ross v. McIntyre, 140 U.S. 453, 464 (1891) ("The constitution can have no operation in another country.").

13. *See infra* text accompanying notes 123-128.

14. *See infra* text accompanying notes 129-142.

15. *See infra* Part III.B.

16. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 5 (2002) [hereinafter 2002 TRAFFICKING IN PERSONS REPORT].

17. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 8 (2007) [hereinafter 2007 TRAFFICKING IN PERSONS REPORT]. This figure does not include millions of individuals who are trafficked within their own countries. *Id.* The International Labor Organization estimates that, in total, approximately 12.3 million people are in forced labor and sexual servitude at any given time. *Id.*

18. *Id.*

19. Susan W. Tiefenbrun, *Sex Sells But Drugs Don't Talk: Trafficking of Women Sex Workers and an Economic Solution*, 24 T. JEFFERSON L. REV. 161, 171 (2002).

20. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 23 (2004).

21. 2002 TRAFFICKING IN PERSONS REPORT, *supra* note 16, at 2.

22. *See* Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L. L. 249, 250 (2007) [hereinafter Tiefenbrun II].

illicit in nature.[23] In 2006, the Government Accountability Office (GAO) concluded that U.S. government estimates of global human trafficking are "questionable" and "in doubt because of methodological weaknesses, gaps in data, and numerical discrepancies."[24] Although all estimates must be considered with caution, there is no denying that most estimates signal a vast and rapidly growing problem.[25]

Despite the significant passage of time, Ah Sou's story is virtually indistinguishable from many of the contemporary accounts of sex trafficking.[26] Modern-day victims are typically young women from developing countries.[27] They often suffer extreme psychological and physical violence at the hands of their traffickers.[28] One recent news article described the path from innocence to victimhood:

> The traffickers' harvest is innocence. Before young women and girls are taken to the United States, their captors want to obliterate their sexual inexperience while preserving its appearance. For the Eastern European girls, this "preparation" generally happens in Enseñada, a seaside tourist town in Baja California, a region in Mexico settled by Russian immigrants, or Tijuana, where Nicole, the Russian woman I met in Los Angeles, was taken along with four other girls when she arrived in Mexico. The young women are typically kept in locked-down, gated villas in groups of 16 to 20. The girls are provided with all-American clothing—Levi's and baseball caps. They learn to say, "U.S. citizen." They are also sexually brutalized. Nicole told me that the day she arrived in Tijuana, three of her traveling companions were "tried out" locally. The education lasts for days and sometimes weeks.[29]

These statistics and anecdotal accounts beg the question: What progress has been made during the past century in ending human trafficking? This question is difficult to answer in the abstract; rather than attempting to address it with large brush strokes or from a sociological standpoint, we ask instead: Would today's legal regime provide a legal remedy for Ah Sou? In framing the inquiry this way, we evaluate developments in international human rights law and U.S. domestic law in their historical context, using

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23. *See generally* Frank Laczko & Marco A. Gramegna, *Developing Better Indicators of Human Trafficking*, 10 BROWN J. OF WORLD AFF. 179 (2003) (examining why it is so difficult to produce reliable data on trafficking).

24. U.S. GOV'T ACCOUNTABILITY OFFICE, HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD 2 (2006), *available at* http://www.gao.gov/new.items/d06825.pdf.

25. For a comprehensive summary of varying estimates, see Martti Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 133, 183-215 (2006).

26. *See, e.g.*, DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2006 43-53 (2007) [hereinafter 2006 ATTORNEY GENERAL'S REPORT], *available at* http://www.usdoj.gov/ag/annualreports/tr2006/agreporthumantrafficing2006.pdf (providing case synopses of modern-day sex trafficking); Sara Elizabeth Dill, *Old Crimes in New Times: Human Trafficking and the Modern Justice System*, 21 CRIM. JUST. 12, 18 (2006) (summarizing recent human trafficking prosecution).

27. *See* 2002 TRAFFICKING IN PERSONS REPORT, *supra* note 16, at 1.

28. *See, e.g.*, 2006 ATTORNEY GENERAL'S REPORT, *supra* note 26, at 20.

29. Peter Landesman, *The Girls Next Door*, N.Y. TIMES MAGAZINE, Jan. 25, 2004, at 30, 37.

Ah Sou's case as a yardstick to take stock of these developments. This approach is unique and affords considerable leverage over the question of whether, and to what extent, international human rights norms have evolved in the area of human trafficking, and whether the incorporation of these international norms into U.S. domestic law has yielded measurable results.[30]

This article is organized into four parts. Part I provides a broad historical context for understanding *United States v. Ah Sou*. Ah Sou entered the United States after the enactment of the 1882 Chinese Exclusion Act, which singled out Chinese immigrants for exclusion for over six decades.[31] Apart from the Chinese Exclusion Act, Ah Sou's entry into the United States was independently barred by the Page Law of 1875, legislation that prohibited the bringing of persons into the United States for "immoral purposes."[32] Because Ah Sou's fate was shaped in large part by these immigration laws, an overview of the history and contours of these laws is useful in understanding her story.

Part II traces Ah Sou's life in the United States, from her illegal entry to the legal proceedings that led to her ultimate deportation to China in 1906. Because Ah Sou herself and a large number of witnesses testified at her deportation hearing, the narrative that emerges from the court transcript is surprisingly detailed and textured.

Part III offers a brief overview of the development of international human rights norms relating to the protection of refugees and prohibition against human trafficking. Part III also examines the incorporation of these international norms into U.S. law. The discussion in this section provides a contextual roadmap for exploring the contemporary relevance of Ah Sou's story.

Part IV considers the legal remedies within current U.S. law that might be available for Ah Sou if she were alive today. This analytical exercise sheds new light on the relative strengths and weaknesses of the existing legal regime. The existence of possible legal remedies for Ah Sou is a testament to the government's growing willingness to recognize the special vulnerability of victims of sex trafficking and to remedy human rights violations regardless of the victim's nationality. At the same time, the application of these laws to Ah Sou reveals significant limitations in the existing legal regime.

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30. For a case study that examines the inadequacies and service gaps in the U.S. system to care for child victims of trafficking, see Elzbieta M. Gozdziak & Margaret MacDonnell, *Closing the Gaps: The Need to Improve Identification and Services to Child Victims of Trafficking*, 66 HUM. ORG. 171 (2007). For a comprehensive analysis of human trafficking within a broader framework of labor migration, human rights, women's rights, sexual and reproductive health rights, and globalization, see Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 317 (2007).

31. Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, 22 Stat. 58 (repealed 1943).

32. Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (repealed 1974).

I. Historical Context: The Chinese Exclusion Era

The Chinese first began arriving in the United States in significant numbers in the mid-1800s.[33] These immigrants were drawn to the United States by the promise of jobs and wealth associated with the California Gold Rush (1848-1855) and the construction of the Central Pacific Railroad (1863-1869).[34] At first, the Chinese were greeted with a mixture of enthusiasm and curiosity: "They were few in number and seemed a harmless and exotic addition to the cosmopolitan mass of humanity that was gathering in Northern California . . . ."[35] As the number of Chinese immigrants grew, however, they became the target of mounting racial hatred and physical violence including mob attacks, lynching, and mass expulsion.[36] The hostility toward Chinese immigrants was in part based on white perceptions of the economic threat posed by Chinese immigration. For example, the platform of the "Anti-Chinese Convention" held in San Francisco in 1870 read: "The system of importing Chinese or Asiatic coolies into the Pacific States, or into any portion of the United States, is in every respect injurious and degrading to American labor, forcing it, as it does, into unjust and ruinous competition . . . ."[37]

Equally important, the growing animosity toward Chinese immigrants was a product of xenophobia, prejudice, and virulent racism.[38] The belief in the biological and cultural inferiority of the Chinese was deeply entrenched and widespread.[39] Governor Leland Stanford's Message to the California Legislature in 1862 is illustrative:

> To my mind, it is clear that the settlement among us of an inferior race is to be discouraged by every legitimate means. Asia, with her numberless millions, sends to our shores the dregs of her population. . . . There can be no doubt but that the presence of numbers among us of a degraded and distinct people must exercise a deleterious influence upon the superior race, and to a certain extent repel desirable immigration.[40]

The continued influx of Chinese immigrants into the United States eventually came to be known by such opprobriums as "Yellow Peril," "Yel-

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33. LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 7 (1995).

34. *See, e.g.*, JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS 3-10 (2007); SALYER, *supra* note 33, at 7-8; Emily Ryo, *Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration During the Chinese Exclusion Era*, 31 LAW & SOC. INQUIRY 109, 115-16 (2006).

35. Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 534-35 (1984).

36. *See generally* ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943, 23-39 (2003); PFAELZER, *supra* note 34.

37. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 652 (2005).

38. *See generally* PFAELZER, *supra* note 34, at 252-90.

39. *Id.*

40. J. Thomas Scharf, *The Farce of the Chinese Exclusion Laws*, 166 N. AM. REV. 85, 86 (1898).

low Terror," and "Chinese Invasion."[41] Slogans such as "The Chinese Must Go!" became a common rallying cry throughout the West.[42]

The Chinese immigrants, for their part, did not quietly acquiesce in these mounting racial attacks. Instead, they engaged in community action and legal battles to combat the growing number of discriminatory local and state laws designed to drive them out of the Pacific West.[43] But by the late 1800s, white nativism and anti-Chinese sentiments reached a feverish pitch, culminating in the enactment of the Chinese Exclusion Act of 1882.

The 1882 Act, which inaugurated six decades of Chinese exclusion, is acknowledged as the first race-based immigration legislation in the United States.[44] The Act banned the immigration of Chinese laborers for ten years and prohibited the naturalization of the Chinese, though Chinese laborers who were already present in the United States could remain in the country.[45] Notably, the Act contained a provision exempting teachers, students, merchants, and travelers from exclusion.[46] Children and wives of the exempted class were also allowed to enter the United States.[47] Throughout the next several decades, Congress repeatedly renewed the legislation, making it successively more restrictive and draconian.[48] It was not until 1943 that Congress finally repealed the Chinese Exclusion Act.[49]

The Chinese shaped early American immigration law in another important way. At the time of the 1882 Chinese Exclusion Act, male immigrants comprised 95% of the Chinese population in the United States.[50] The small number of Chinese women who journeyed across the Pacific in the mid-1880s predominantly consisted of slaves, many of whom were forced into prostitution.[51] Whites viewed these Chinese prostitutes with both desire and loathing. Jean Pfaelzer writes:

> Locked in cages or tiny chambers facing busy Jackson or Dupont Street, [Chinese prostitutes] were forced to solicit men who passed by; then their owners or madams would open the pen and draw a curtain while the girl serviced her customer, white or Chinese. Soon the city would move the cribs to back alleys, hidden from the view of downtown customers and merchants.

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41. THE COMING MAN: 19TH CENTURY AMERICAN PERCEPTIONS OF THE CHINESE 123 (Philip P. Choy, Lorraine Dong & Marlon K. Hom eds., 1994) [hereinafter COMING MAN]; LEE, *supra* note 36, at 36.

42. COMING MAN, *supra* note 41, at 85.

43. *See, e.g.*, CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (1994); SALYER, *supra* note 33, at 37-68.

44. Ryo, *supra* note 34, at 115-16; Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882-1924*, 27 LAW & SOC. INQUIRY 271, 277 (2002).

45. Ryo, *supra* note 34, at 118.

46. *Id.*

47. *See* JUDY YUNG, UNBOUND FEET: A SOCIAL HISTORY OF CHINESE WOMEN IN SAN FRANCISCO 23 (1995).

48. Ryo, *supra* note 34, at 118.

49. *Id.*

50. *See* Stevens, *supra* note 44, at 277-78.

51. *See* PFAELZER, *supra* note 34, at 5; Abrams, *supra* note 37, at 642.

> Generally, the top price for sex was seventy-five cents. A "lookee" cost between a dime and a quarter and was pitched to the popular belief that there were anatomical differences between Chinese and Caucasian women, in particular the myth that a Chinese woman's vaginal opening was horizontal rather than vertical.[52]

There was also a widespread perception that Chinese prostitutes posed a unique physical and moral threat to whites.[53] In an interview with the San Francisco Chronicle, United States Senator Cornelius Code declared:

> When I look upon a certain class of Chinese who came to this land—I mean the females—who are the most undesirable of population, who spread disease and moral death upon our white population, I ask myself the question, whether or not there is a limit to this class of immigrants?[54]

In 1875, Congress passed the Page Law, which required that before any person from China, Japan, or "any Oriental country"[55] was admitted to the United States, the consul-general had to determine whether such an immigrant had entered into a contract for "lewd and immoral purposes."[56] The Act also barred the admission of any woman imported "for the purposes of prostitution."[57] Although the Page Law is often framed as a general anti-vice law that was directed at all immigrant women, "[t]he text, legislative history, historical context, and enforcement of the Page Law indicate that one of its animating purposes was to prevent the Chinese practices of polygamy and prostitution from gaining a foothold in the United States."[58]

In theory, the combination of the Chinese Exclusion Act and the Page Law should have ended the sex trafficking of Chinese women into the United States. In practice, however, these laws proved to be ineffective in achieving that purpose. The following sample of headlines published in major newspapers throughout the exclusionary period is illustrative: "The Slave Trade: How It Has Flourished at San Francisco;"[59] "The Chinese Slave Women: Tales of Degradation from the California Mission Records;"[60] "Rescue Six Girl Slaves: San Francisco Officers Chop Through Seven Doors to Get Chinese;"[61] "Chinese Slave Girls Rescued: Souls Salvaged from Substrata of Chinatowns."[62]

The trafficking of Chinese women continued and flourished into the early 1900s.[63] Many destitute families in China sold their daughters to

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52. PFAELZER, *supra* note 34, at 93.
53. Abrams, *supra* note 37, at 663.
54. *Id.*
55. Page Law, ch. 141, § 1, 18 Stat. 477 (repealed 1974).
56. *Id.*
57. *Id.* § 3.
58. Abrams, *supra* note 37, at 643.
59. L.A. TIMES, Dec. 6, 1887, at 4.
60. N.Y. TIMES, Sept. 23, 1900, at 26.
61. N.Y. TIMES, Mar. 14, 1911, at 4.
62. L.A. TIMES, Feb. 26, 1922, at II6.
63. Abrams, *supra* note 37, at 713-14.

members of Chinese tongs (secret criminal gangs), who in turn brought the girls into the United States to force them into prostitution.[64] Some Chinese women were kidnapped or lured into taking the journey across the Pacific with false promises of marriage.[65] Other Chinese women entered the United States "voluntarily," seeking to work as prostitutes in an effort to escape crushing poverty in China.[66]

II. The Story of Ah Sou

A. Life in the United States

Ah Sou (also known as Chow Sheem or Moy Yut Gum) was born in China on November 16, 1884.[67] She lost her parents at an early age and was raised by a foster mother.[68] When Ah Sou was fifteen years old, she was sold to a man named Moy Sam (also known as Moy Bun).[69] Accompanied by Moy Sam's associate—Ah Bun—Ah Sou crossed the Pacific Ocean and entered the United States at Port Townsend, Washington on August 23, 1900 at the age of sixteen.[70] Ah Sou was coached to tell the immigration inspectors at the port of entry that she was the daughter of Moy Sam, a merchant.[71]

Figure 1. Ah Sou (1904) and Moy Sam (1900)[72]

64. *Id.* at 654.
65. *Id.* at 655.
66. *See* YUNG, *supra* note 47, at 26-37; Abrams, *supra* note 37, at 654-55.
67. Petition for Writ of Certiorari, *supra* note 11, at 3.
68. Transcript of Record: Upon Appeal from the United States District Court for the District of Washington, Northern Division at 52, 64, United States v. Ah Sou, 138 F. 775 (9th Cir. 1905) (No. 1110) [hereinafter Transcript of Record].
69. *See* Brief of Appellee at 5, *Ah Sou*, 138 F. 775 (No. 1110).
70. Transcript of Record, *supra* note 68, at 9-10, 63.
71. *Id.* at 52.
72. Images provided by the National Archives and Records Administration, Pacific Alaska Region (Seattle, Washington).

According to Ah Sou's later testimony, she left China believing that she was going to take her place as Moy Sam's daughter in the United States.[73] Upon arrival in the United States, however, she was forced into prostitution, enduring frequent and severe physical abuse: "I was whipped and beaten by [Moy Sam]. Every day I was beaten by him with sticks of wood until I was black and blue."[74] Ah Sou never received any of the earnings generated by her forced prostitution.[75] At a deportation hearing before a U.S. Commissioner,[76] Ah Sou offered the following account of her life in the United States:

Q: What has been your manner of living during the last two years; what sort of life have you led during the last two years?
A: Well, [Moy Sam] went [sic] me to go to prostitution all these two years.
Q: Has [Moy Sam] acted as your master during the last two years?
A: Yes, sir.
Q: And you have regarded yourself as his slave?
A: Yes, sir.[77]

In November of 1903, when Ah Sou discovered that Moy Sam was going to sell her to another owner, she escaped from Moy Sam and sought shelter at The Home for Chinese Women and Girls.[78] The record does not provide detailed information as to how Ah Sou managed to escape. Ah Sou detailed that Moy Sam "whip[ped] me pretty bad all day, all night, he wanted to kill me he wants to cut me to pieces, and I ran up to Mrs. Holt's mission."[79]

Reverend William Holt and his wife, Frances Holt, of the First Presbyterian Church in Portland, Oregon founded the Home for Chinese Women and Girls.[80] Rev. Holt and his wife were long-time American missionaries who had worked in China.[81] "The Home began with one Chinese woman who sought refuge with Rev. and Mrs. Holt. Not long afterwards a second woman sought shelter, then a third. The Home, located at 350 Fourteenth Street, was opened in April 1889."[82] Many of the prominent women of Portland served on the Board of Directors of the Home, lending a certain level of legitimacy and prestige to the institution.[83]

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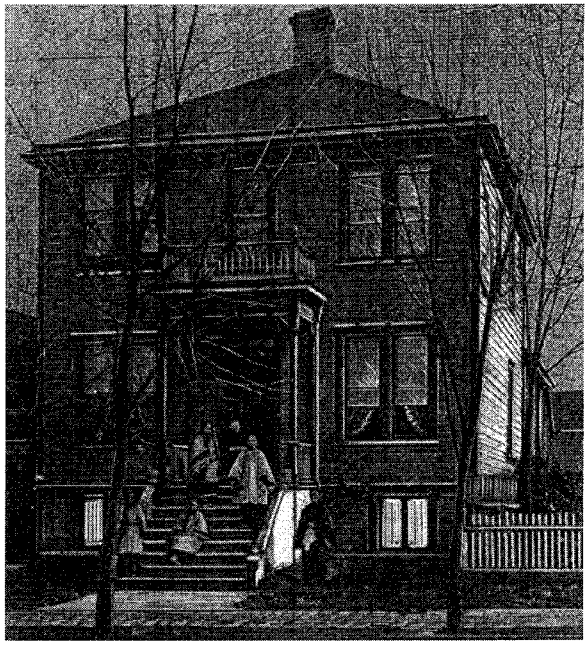
73. Transcript of Record, *supra* note 68, at 65.
74. *Id.* at 176.
75. *Id.* at 68.
76. In 1887, the Secretary of the Treasury was given the power to "take charge of the local affairs of immigration" at ports of entry. 49 CONG. CH. 220, 24 Stat. 414 (1887). To implement immigration policy, the Secretary had power to appoint commissioners or officers in individual states. *Id.*
77. Transcript of Record, *supra* note 68, at 55-56.
78. *Id.* at 72.
79. *Id.* at 71.
80. *Id.* at 47.
81. Katherine Thaxter, *Friend of Chinese Women*, 15 WOMEN & MISSIONS 240 (1938).
82. J. DUDLEY WEAVER, JR., A LEGACY OF FAITH: FIRST PRESBYTERIAN CHURCH, PORTLAND, OREGON 1854-2004 63 (2004).
83. Margaret Ainslie Macmillan, The History of the Women's North Pacific Board of Foreign Missions 47 (March 1941) (unpublished M.A. dissertation, San Francisco Theological Seminary) (on file with authors).

Figure 2. The Home for Chinese Women and Girls (date unknown)[84]



Mrs. Holt, who was in charge of daily operations, described the life at the Home this way:

> The inmates are taught to read and speak English and to read Chinese. Instruction is given in housework, and in needle-work, so that when the woman or girl leaves the Home she will be intelligent and neat, and qualified to take care of a home of her own. Of course there is most careful and thorough Bible instruction, for the great aim is to lead the women and girls to Jesus Christ. They all attend the Chinese services and Sabbath-school at the Mission, going in care of the matron.
>
> For the most part nothing is done or taught which will unfit the inmates for useful lives as Chinese women. They eat Chinese food, wear Chinese clothes, except the shoes, have very plain furniture in their rooms, and are led to look forward to such lives as respectable, intelligent Chinese women may hope to enjoy. The purpose is not to make them over into American women, which might end in dissatisfaction and unhappiness by and by, but we want them to develop into good, useful Chinese women.[85]

Ah Sou stayed at the Home under Mrs. Holt's supervision for a number of weeks and was married there by Rev. Holt to a Chinese man named Lum Kong (also known as "Charley").[86] According to Mrs. Holt, Ah Sou:

> was very lonely in the home, she was the only girl at the time, and she did not like to stay on that account, because it seemed very lonely for her; she

84. Image provided by the First Presbyterian Church Archives (Portland, Oregon).
85. W.S. HOLT, RESCUED LIVES 5-6 (publication date unknown).
86. Transcript of Record, *supra* note 68, at 43-44.

> said the days seemed so long, and it was her own suggestion that she not stay there any longer.[87]

Mrs. Holt and her staff felt differently: "We wished [Ah Sou] to stay, we did everything we could to persuade her to stay, we hoped she would stay with us for a year or more and it was Charley's wish that she stay, but she said he did not want to, she preferred to leave."[88]

Figure 3. Frances Holt (date unknown)[89]

After leaving the Home, Ah Sou traveled to Seattle and went into hiding.[90] In Seattle, Ah Sou encountered Moy Sam, who was then cooperating with law enforcement to have her arrested.[91] She was apprehended on January 1, 1904, by an immigration inspector[92] who filed a complaint with a U.S. Commissioner in Seattle alleging that Ah Sou "was a Chinese person, to wit, a Chinese laborer, unlawfully in the United States, and not registered as required by the act of Congress in such case made and provided."[93] Seven days later, on January 8, 1904, Commissioner James Kiefer ordered Ah Sou deported to China.[94]

87. *Id.* at 43.
88. *Id.*
89. Image provided by the First Presbyterian Church Archives (Portland, Oregon).
90. Transcript of Record, *supra* note 68, at 74.
91. *Id.* at 75-76.
92. *Id.* at 20.
93. Complaint at 2, United States v. Ah Sou, 132 F. 878 (D. Wash. 1904) (No. 2628).
94. Order of Deportation at 4, *Ah Sou*, 132 F. 878 (No. 2628).

Throughout her legal ordeal, two able attorneys, Roger S. Greene and John P. Hartman, represented Ah Sou.[95] At her deportation hearing, a number of witnesses testified, including the immigration inspectors who apprehended and interviewed Ah Sou; a baggageman for the Northern Pacific Railroad who knew Moy Sam and his family; the photographer who helped Moy Sam create a fake family photograph; Mrs. Holt; the employer of Ah Sou's husband; and Ah Sou's husband.[96] The issue at the deportation hearing was whether Ah Sou was married to a Chinese merchant, because marriage to a merchant would entitle her to stay in the United States.[97] At the conclusion of a lengthy hearing, the Commissioner found that Ah Sou was deportable.[98]

B. In the District Court

Ah Sou appealed the Commissioner's deportation order to the United States District Court for the District of Washington.[99] Judge Hanford presided over Ah Sou's appeal.[100] After carefully considering the evidence, Judge Hanford concluded that Ah Sou's marriage was not bona fide:

> The marriage ceremony was performed by a minister of the gospel, and formal compliance with the laws of Oregon with respect to the solemnization of marriages is shown by the uncontradicted evidence of trustworthy witnesses; but the marriage has not been consummated by cohabitation, and it appears to be questionable whether the parties themselves regard it as bona fide, or only a mere pretense creating no binding obligation. The woman was not contented in the home, and she solicited the man to marry her and become her protector. He was reluctant, and, by his testimony, he appears to be uncertain whether he is in fact the woman's husband.[101]

In addition, Judge Hanford found that Ah Sou's husband was not a merchant.[102] Nevertheless, Judge Hanford reversed the deportation order,

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95. Greene served as an associate justice of the Washington Territorial Court between 1870 and 1879. ALBERT NELSON MARQUIS, WHO'S WHO IN AMERICA: A BIOGRAPHICAL DICTIONARY OF NOTABLE LIVING MEN AND WOMEN IN THE UNITED STATES, 1908-1909 764 (1908). He became chief justice of the same court in 1879 and served another eight years until 1887. *Id.* He began his practice of law in Seattle, Washington, in 1887. In 1888, Greene ran as a Prohibition candidate for Congress. *Id.* Hartman began the practice of law in 1882. *See generally* LANCASTER POLLARD, A HISTORY OF THE STATE OF WASHINGTON 323-34 (1937). Although his practice focused on commercial interests, such as the railroads and steamship lines, he did considerable work in enterprises for public improvement and for the public benefit. *Id.* A politically active Republican, he served as a Regent of the University of Washington and was influential in the passage of the Act that created Rainier National Park. *Id.*

96. Transcript of Record, *supra* note 68 *passim*.

97. As discussed earlier, see *supra* text accompanying note 46, the Chinese Exclusion Act exempted teachers, students, merchants and travelers, as well as their wives and children, from exclusion. Wives of Chinese laborers were barred from entry. *See* YUNG, *supra* note 47, at 23.

98. Order of Deportation, *supra* note 94, at 4.

99. Notice of Appeal at 5, *Ah Sou*, 132 F. 878 (No. 2628).

100. *Ah Sou*, 132 F. at 878, *rev'd*, 138 F. 775 (9th Cir. 1905).

101. *Id.* at 879.

102. *Id.*

valiantly appealing to a higher moral authority than the strict letter of the law:

> The case is unique and perplexing. The laws excluding Chinese immigrants and women imported for immoral purposes require the court to cause a person in the situation of the appellant to be deported to China. Compliance with the statute in this case will be, in my estimation, a barbarous proceeding, for it will be equivalent to remanding the appellant to perpetual slavery and degradation. If sent back to her own country, where she was by her own kindred sold to a cruel master, she must abandon hope; and it is shocking to contemplate that the laws of our country require the court to use its process to accomplish such an unholy purpose.[103]

In reversing the deportation order, Judge Hanford emphasized the "effort which [Ah Sou] has made to escape from thraldom and to rise from her condition of degradation."[104] Judge Hanford also noted that the Thirteenth Amendment of the U.S. Constitution expressly prohibits slavery.[105] He then concluded, "because I can see no other way in which to emancipate her from actual slavery, I direct that an order be entered vacating the order for her deportation, and that she be discharged from custody."[106] Judge Hanford's decision is surprising in light of the pervasive racism and hostility toward the Chinese that characterized public opinion during this period. It is therefore illuminating to consider briefly Judge Hanford's background and his judicial philosophy.

President Benjamin Harrison appointed Judge Hanford as the first United States District Judge for the District of Washington in 1890.[107] Judge Hanford's general judicial philosophy was one of pragmatism.[108] In one speech he explained his view of law:

> Law is not an exact science. Precision and uniformity in the interpretation and application of legal principles is impossible. . . . General rules which are just in themselves, become unjust unless modified in their application to the facts of particular cases . . . . Thus common sense becomes a factor in the adjudication of individual rights, and the individuality of each particular judge, whose common sense is appealed to, becomes interwoven into the fabric of jurisprudence as we find it in the vast multitude of adjudged cases.[109]

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103. *Id.*

104. *Id.*

105. *Id.*

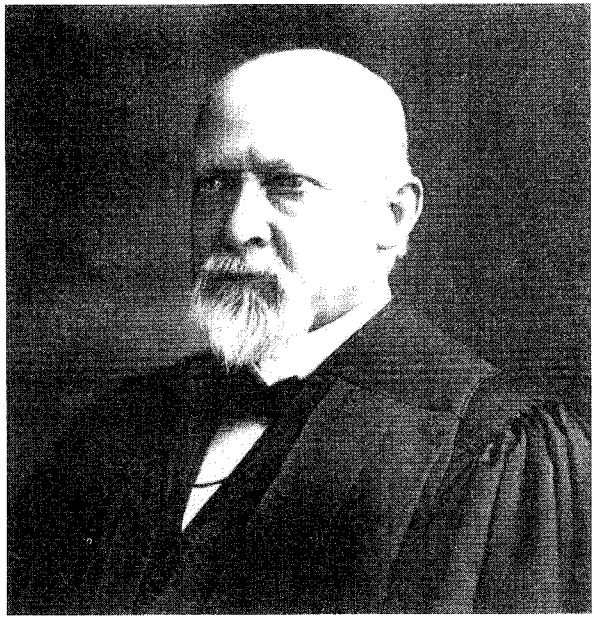
106. *Id.* at 880.

107. U.S. Dist. Ct. for the W. Dist. of Wash., *Resolutions of the Committee of the Bar of the Western District of Washington Upon Judge Hanford's Death*, at 3 (1926).

108. *See generally id.* at 3-5.

109. Cornelius Hanford, Conflicting Decisions of Federal and State Courts: Our National Constitution the Harmonizer, Speech Before the Washington State Bar Association 1-2 (1902) (transcript available at the University of Washington Libraries, Special Collections, Box 1/6, Accession No. 1512).

Figure 4. Judge Cornelius Hanford (date unknown)[110]



In the area of immigration, Judge Hanford expressed certain empathy toward the Chinese. In one of the Chinese exclusion cases over which he presided in 1904, Judge Hanford wrote, "I believe that repeated arrests and vexatious persecutions of Chinese laborers ought not to be tolerated."[111] Not everyone shared his views.[112] In 1912, Judge Hanford resigned from the judiciary, with the threat of impeachment looming over him.[113] The impeachment proceedings were precipitated by a number of decisions that he issued against powerful interests at the time, including city officials and railroad companies, and a ruling against a socialist in an immigration case.[114]

In a certain sense, Judge Hanford's decision was a poignant reflection of his pragmatic judicial philosophy and commitment to race-blind justice. Unfortunately for Ah Sou, her legal ordeal did not end at the district court.

C. In the Ninth Circuit

The government appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. Ah Sou argued that the court did not have subject matter jurisdiction because the "sole question

110. Image provided by the U.S. Courts Library (Seattle, Washington).

111. United States v. Lee Wing, No. 2722 (D. Wash. 1904) (on file with the University of Washington Libraries, Special Collections, Box 2/6, Accession No. 151).

112. *See, e.g.*, John N. Rupp, Hanford (An Almost Impeachment), Speech Before the Monday Club 2 (Jan. 28, 1985) (transcript available at the University of Washington Libraries, Special Collections) (documenting calls for Judge Hanford's impeachment).

113. *Id.* at 4.

114. *See id.* at 15-20.

involved is the application of the thirteenth amendment to the Constitution of the United States, and that therefore the appellate jurisdiction of the Supreme Court is exclusive."[115] At the time of the appeal, the Judiciary Act of 1891 established that the Supreme Court had exclusive jurisdiction over "the construction or application of the Constitution of the United States."[116]

The Ninth Circuit's decision is notable for the brevity of its legal analysis. The court concluded that the case did not involve the construction or application of the Constitution, because "[t]he true ground of the decision, from the language of the opinion, would appear to have been that compliance with the statute would be a barbarous proceeding, equivalent to remanding the appellee to perpetual slavery and degradation."[117] The court noted that the district court "did not, as we understand it, hold that the thirteenth amendment, prohibiting slavery within the United States or in any place subject to their jurisdiction, by its terms prohibited the deportation of the appellee."[118] The court held:

> The case is one which, from its nature, enlists the sympathy of the court, and we regret that the law is so written that it does not permit us, as we view it, to yield to the humane considerations which actuated the court below.
>
> We see no escape from the conclusion that the judgment of the trial court must be reversed, and the appellee remanded to the country whence she came.[119]

Ah Sou appealed the decision to the Supreme Court. On December 18, 1905, the Supreme Court denied the petition for certiorari for lack of jurisdiction.[120] Shortly thereafter, Ah Sou was placed aboard a steamer called "Manchuria," which left San Francisco on March 8, 1906, for the Port of Hong Kong, China.[121] There the records end. Nothing more is known of Ah Sou. We now turn to modern legal remedies implicated by Ah Sou's plight.

III. International and Domestic Legal Framework

A. International Human Rights Law

Two bodies of international human rights law relate most directly to our analysis: the first is the international law on refugees and the second is the international law against human trafficking. In this section, we consider the origins of these international conventions and the history of their

115. United States v. Ah Sou, 138 F. 775, 777 (9th Cir. 1905).
116. Judiciary Act of 1891, ch. 517, § 5, 26 Stat. 826, 827-28 (1891).
117. *Ah Sou*, 138 F. at 777.
118. *Id.* at 777-78.
119. *Id.* at 778.
120. Ah Sou v. United States, 200 U.S. 611, 611 (1905).
121. C.B. Hopkins, United States Marshal for the W. Dist. of Wash., Execution of the Deportation Order Against Ah Sou (Mar. 13, 1906).

incorporation into U.S. law.[122]

The first major international instrument to codify the concept of non-refoulement, the duty not to return an individual to a country in which she fears persecution or torture, is the 1933 Convention Relating to the International Status of Refugees.[123] Only eight European countries ratified the 1933 Convention, several with major reservations.[124] A more comprehensive and systematic scheme for refugee protection emerged in the aftermath of World War II. In 1951, the United Nations promulgated the Convention Relating to the Status of Refugees,[125] which "remains the cornerstone of modern international refugee law."[126] The duties of nation-states under the 1951 Convention applied only to individuals fleeing from "events occurring before 1 January 1951," and state parties to the Convention could restrict their obligations to only European refugees.[127] It was not until 1967 that the UN amended the 1951 Convention to provide protection to refugees from any country without any time limitations.[128]

The trafficking of women and children has been a long-standing concern of the international community, stretching back to the late nineteenth and early twentieth centuries.[129] Much like the international instruments relating to refugee protection, the early international agreements on human trafficking are European in origin.[130] The 1904 International Agreement for the Suppression of the White Slave Traffic,[131] the first major international agreement recognizing human trafficking as an international offense, was prompted by concerns regarding the sale of European women into prostitution.[132] The 1904 Agreement required that state parties collect "all information relative to the procuring of women or girls for immoral

122. For a comparative study of anti-trafficking laws in different countries, see Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357 (2006).

123. Convention Relating to the International Status of Refugees, art. 3, Oct. 28, 1933, 159 L.N.T.S. 3663 (entered into force June 13, 1935).

124. JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 83-88 (2005) (noting that the Convention offered only limited protection against refoulement).

125. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter 1951 Convention].

126. HATHAWAY, *supra* note 124, at 91.

127. 1951 Convention, *supra* note 125, art. 1(B)(1).

128. *See* Protocol Relating to the Status of Refugees, art. 1(1), *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

129. *See* Katrin Corrigan, Note, *Putting the Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to Stop the Flow of Traffic*, 25 FORDHAM INT'L L.J. 151, 163-64 (2001); Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1144 (2003); Lehti & Aromaa, *supra* note 25, at 165-73.

130. Corrigan, *supra* note 129, at 163-64.

131. International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 (entered into force July 18, 1905) [hereinafter 1904 Agreement].

132. Corrigan, *supra* note 129, at 163-64.

purposes abroad."[133]

The early international conventions focused on "prohibitions regarding only the procurement or physical trafficking process and were silent regarding the resulting forced prostitution."[134] Matters such as forced prostitution were apparently considered to be within the exclusive *domestic* jurisdiction of nation states.[135] The 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[136] is the first international instrument to address sex trafficking in gender-neutral terms and to treat forced prostitution as a matter of international law.[137] The promulgation of the 1949 Convention marks the end of what Elizabeth Bruch has referred to as the "first wave" of international attention to the issue of human trafficking.[138]

Human trafficking, particularly trafficking of women, became the focus of renewed international attention in the 1970s with the rise of a global social movement around the issue of women's rights.[139] The culmination of this "second wave" of international attention to human trafficking is the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[140] The 2000 Protocol provides "the most expansive definition of trafficking in persons and recognizes that trafficked persons are not criminals, but victims regardless of consent."[141] Nonetheless, many commentators share the view that "[t]he focus [of the 2000 Protocol] remains on crime control and deterrence of unlawful migration."[142]

B. Domestication of International Human Rights Norms

Although the international community condemns persecution, torture, human trafficking, and slavery,[143] it is widely acknowledged that

133. 1904 Agreement, *supra* note 131, art 1.

134. Corrigan, *supra* note 129, at 165.

135. *See id.*

136. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 317 (IV), U.N. Doc. A/1251 (Dec. 2, 1949) [hereinafter 1949 Convention].

137. *See* Corrigan, *supra* note 129, at 166-67; Hanh Diep, *We Pay-The Economic Manipulation of International and Domestic Laws to Sustain Sex Trafficking*, 2 LOY. U. CHI. INT'L L. REV. 309, 320-21 (2005); *see also* 1949 Convention, *supra* note 136, art. 1.

138. Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L L. 1, 7-11 (2004).

139. *Id.* at 11-12.

140. Protocol to Prevent Trafficking, *supra* note 4.

141. *See* Diep, *supra* note 137, at 321.

142. Fitzpatrick, *supra* note 129, at 1151; *see also* Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 976 (2001) ("While human rights concerns may have provided some impetus (or cover) for collective action, it is the sovereignty/security issues surrounding trafficking and migrant smuggling which are the true driving force behind such efforts.").

143. *See, e.g.*, Corrigan, *supra* note 129, at 161-73 (discussing international treaties that condemn human trafficking); Maya Raghu, Note, *Sex Trafficking of Thai Women and the United States Asylum Law Response*, 12 GEO. IMMIGR. L.J. 145, 163-67 (1997) (same).

international instruments embodying these norms do not contain adequate enforcement measures.[144] That said, the effect of these international human rights norms on U.S. law has been undeniable and significant.[145] To bring the United States into compliance with international refugee standards, Congress enacted the Refugee Act in 1980.[146] In 1998, Congress codified the United Nations Convention Against Torture (CAT),[147] which prohibits the return of an individual to a country where he or she will likely be tortured.[148] More recently, Congress enacted the Trafficking Victims Protection Act (TVPA) to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children."[149] The TVPA explicitly notes that "the international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking," citing a host of relevant international instruments.[150]

Whether the domestication of international human rights norms against slavery and trafficking has created meaningful avenues of relief for trafficking victims in the United States is a more difficult question. In the next section, we address that question by applying existing U.S. law to Ah Sou's case and considering whether and to what extent her fate may have been different had she been alive today.

IV. Ah Sou in the Twenty-first Century

Several forms of contemporary immigration relief might have been available to Ah Sou: asylum, withholding of removal, protection under the CAT, and relief under the TVPA.[151] Increasingly, trafficking victims appear to be applying for asylum, withholding of removal, and protection under the CAT, but published decisions[152] and scholarly analysis[153] of

144. *See generally* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999).

145. Whether and to what extent judges should rely on comparative and international sources in adjudicating individual cases is a hotly debated issue. *See generally* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

146. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

147. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

148. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8,478, 8,478 (Feb. 19, 1999). Congress passed the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) to give effect to CAT. Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as a note to 8 U.S.C. § 1231).

149. TVPA, Pub. L. No. 106-386, § 102(a), 114 Stat. 1464, 1466 (2000).

150. *Id.* § 102(b)(23).

151. For analysis of possible civil remedies, see Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1 (2004).

152. For agency decisions, see Center for Gender and Refugee Studies, Case Law Summaries, http://cgrs.uchastings.edu/law/summaries.php (last visited Oct. 1, 2008). For examples of federal circuit court decisions, see Hongyok v. Gonzales, 492 F.3d 547

these claims remain scarce. More trafficking victims appear to be applying for relief under the TVPA, but, as discussed below, relatively few applications have been granted to date.

The following analysis is not intended to be comprehensive; rather, it outlines the general applicability of various forms of relief and the legal framework and hurdles that Ah Sou might have faced.

A. Asylum and Withholding of Removal

Asylum is a discretionary form of relief that the Attorney General may grant to an individual who qualifies as a "refugee."[154] To be eligible for asylum, an alien must, absent changed or extraordinary circumstances, file an asylum application within one year of arriving in the United States.[155] From a practical standpoint, Ah Sou could not have applied for asylum within one year of arriving in the United States, as she was held captive by Moy Sam during that period. However, Ah Sou's situation would likely constitute an "extraordinary circumstance" that could excuse her late filing under the tolling doctrine.

Under the Immigration and Nationalization Act (INA), a "refugee" is

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[156]

In short, an alien may qualify for asylum in one of two ways. The first way is to show past persecution on account of a protected ground—race,

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(5th Cir. 2007) (affirming the BIA's denial of withholding of removal and protection under the CAT to a trafficking victim from Thailand who escaped forced prostitution); Rreshpja v. Gonzales, 420 F.3d 551 (6th Cir. 2005) (affirming the BIA's denial of asylum, withholding of removal, and protection under the CAT to a woman from Albania who feared being kidnapped and forced into prostitution). There are also a handful of unpublished decisions. *See, e.g.*, Celaj v. Gonzales, 186 F. App'x 44 (2d Cir. 2006) (unpublished) (remanding to the BIA to consider whether the alien's membership in an asserted social group of young Albanian women likely to be trafficked renders the alien eligible for asylum); Nilaj v. Gonzales, 205 F. App'x 902 (2d Cir. 2006) (unpublished) (remanding to the BIA to consider the alien's claim of membership in a social group of young Albanian women likely to be trafficked); Papapano v. Gonzales, 188 Fed. App'x 447 (6th Cir. 2006) (unpublished) (affirming the BIA's rejection of alien's well-founded fear of persecution based on her membership in a social group of women likely to be kidnapped or forced into prostitution).

153. *See, e.g.*, Anna Marie Gallagher, *Triply Exploited: Female Victims of Trafficking Networks—Strategies for Pursuing Protection and Legal Status in Countries of Destination*, 19 GEO. IMMIGR. L.J. 99 (2004); Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN'S L.J. 77 (2002); Raghu, *supra* note 143, at 167-84; Elizabeth Rho-Ng, Comment, *The Conscription of Asian Sex Slaves: Causes and Effects of U.S. Military Sex Colonialism in Thailand and the Call to Expand U.S. Asylum Law*, 7 ASIAN L.J. 103, 122-27 (2000).

154. 8 U.S.C. § 1158(b)(1)(A) (2005).

155. *Id.* § 1158(a)(2)(B).

156. *Id.* § 1101(a)(42)(A).

religion, nationality, membership in a particular social group, or political opinion.[157] If the alien establishes past persecution, then a well-founded fear of future persecution is presumed.[158] That presumption, however, may be rebutted if "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution;" or the applicant could avoid persecution by relocating to a different part of the country.[159] The second way an alien may qualify for asylum is to show a well-founded fear of persecution, again on account of a protected ground.[160]

Were she alive today, Ah Sou might argue that she suffered past persecution as a victim of slavery and human trafficking. As the United Nations High Commissioner for Refugees (UNHCR) has stated:

> There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering—both mental and physical—and which have been used as forms of persecution, whether perpetrated by State or private actors.[161]

Ah Sou could also have argued that she had a well-founded fear of persecution upon removal to China on the basis that she would have faced re-enslavement and the risk of being re-trafficked, as well as possible retaliation for escaping from Moy Sam. Before the Ninth Circuit, she argued, "[t]he record does show . . . that she was the slave of Moy Bun, and that as such slave she was worth several thousand dollars to him, and it is evident from the record that should she be deported he would again claim her as his property."[162] The government, however, argued that "[t]here is no danger that . . . Moy Sam Sing will surrender [his] privilege of the right to live here and of doing business here for the purpose of going to China to control Ah Sou there."[163]

To prevail on her claim of past persecution or a well-founded fear of future persecution, Ah Sou would have needed to overcome a number of other challenges. Because Moy Sam is a private actor, Ah Sou would have had to demonstrate that the Chinese government is unable or unwilling to control individuals such as Moy Sam who engage in slavery, domestic violence, and human trafficking.[164] According the UNHCR, "[w]here serious

157. 8 C.F.R. § 1208.13(b)(1) (2008).
158. *Id.*
159. *Id.* § 1208.13(b)(1)(i)(A)-(B).
160. *Id.* § 1208.13(b)(2).
161. U.N. High Comm'r for Refugees, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, ¶ 9 U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter *UNHCR Gender Guidelines*].
162. Brief of Appellee, *supra* note 69, at 5.
163. Petition for Writ of Certiorari, *supra* note 11, at 5.
164. *See* Gormley v. Ashcroft, 364 F.3d 1172, 1177 (9th Cir. 2004) (noting that the agents of persecution may include non-state actors, but "random, isolated criminal acts" of private actors are not within the meaning of persecution); Avetovo-Elisseva v. INS, 213 F.3d 1192, 1196 (9th Cir. 2000) (explaining that the source of persecution must be the government, a quasi-official group, or persons or groups that the government is unable

discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."[165]

Whether Moy Sam's private conduct would be attributed to the Chinese government for purposes of asylum and withholding of removal depends, in large part, on the nature of country condition evidence that Ah Sou might have been able to marshal in support of her case. Specifically, she would have been required to present such evidence as "information relating to [the] failure to prosecute non-State actors who violate human rights, the lack of laws designed to protect persons . . . , and the ongoing impunity enjoyed by [the human rights violators] as evidenced by their successful and ongoing operations."[166] Fast-forwarding to this century—the age of the Internet—compilation of such evidence by a woman in Au Sou's position continues to present a formidable hurdle.

Another difficult challenge for Ah Sou is what is commonly known as the "nexus requirement"—the requirement that the persecution be on account of one of the five enumerated grounds.[167] Gender discrimination is not a statutorily-enumerated ground for asylum.[168] But immigration judges (IJs), the Board of Immigration Appeals (BIA), and a number of federal appellate courts have recognized gender-based claims[169] on the basis that these claims involve persecution on account of membership in a particular social group. For example, women fleeing domestic violence or those who may be subject to female genital mutilation (FGM) have been granted asylum.[170]

The development of jurisprudence on social group membership has been uneven because "courts have applied the term [social group] reluctantly and inconsistently."[171] For example, in a recent case involving a

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to control); *see also* Deborah Anker, Lauren Gilbert & Nancy Kelly, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709 (1997).

165. U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 65, U.N. Doc. HCR/IP/4/Eng/Rev.1 (1992); *see also UNHCR Gender Guidelines*, *supra* note 161, ¶ 19.

166. Gallagher, *supra* note 153, at 117.

167. *See* 8 U.S.C. § 1101(a)(42)(A) (2006).

168. *UNHCR Gender Guidelines*, *supra* note 161, § D.

169. By "gender-based claims," we mean "the range of different claims in which gender is a relevant consideration in the determination of refugee status." *Id.* ¶ 1.

170. *See* Matter of R-A-, 22 I&N Dec. 906 (BIA 1999) (vacated by Att'y Gen., 2001) (vacating the BIA's decision denying asylum to a victim of domestic violence); In re Kasinga, 21 I&N Dec. 357 (BIA 1996) (en banc) (granting asylum to a gender-defined social group of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice").

171. Lwin v. INS, 144 F.3d 505, 510-11 (7th Cir. 1998) (describing divergent approaches of different circuit courts on what constitutes a "social group"); *see also* Deborah Anker, *Membership in a Particular Social Group: Developments in U.S. Law*, 39TH IMMIGRATION & NATURALIZATION INSTITUTE at 195 (PLI Corporate Law & Practice, Course

woman facing FGM in her country of origin, the Ninth Circuit held that "[a]lthough we have not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law."[172] In contrast, the Second Circuit denied asylum to an El Salvadoran woman who was repeatedly raped by guerrillas and whose life had been threatened, holding that "broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."[173]

The small number of sex trafficking cases that have been decided to date reflect this uncertainty in law—an uncertainty that is made all the more problematic because so many of these decisions are unpublished or not for legal citation. In *Rreshpja v. Gonzales*, the Sixth Circuit held that "young (or those who appear to be young), attractive Albanian women who are forced into prostitution" do not constitute a particular social group within the meaning of the INA.[174] The Second Circuit, in *Nilaj v. Gonzales*, expressed less doubt on this point, noting that an Albanian woman who feared return to her country "because of the likelihood that she would be kidnaped [sic] by groups that engage in illicit trafficking of women" may have "asserted a cognizable social group claim."[175]

Most recently, the Fifth Circuit was presented with a case that is quite similar to Ah Sou's, but the court declined to rule on the question of whether "escaped sex slaves" are a protected social group.[176] In *Hongyok v. Gonzales*, although the petitioner—a victim of sex trafficking from Thailand—did not seek asylum because she was unable to comply with the one-year statute of limitations, she did seek withholding of removal and protection under the CAT after escaping from her traffickers.[177] She claimed that the Thai government would not protect her because the "Thai police have been thoroughly corrupted by sex traffickers."[178] She also presented evidence of the "widespread sex trade in Thailand and southeastern Asia and the Thai government's toleration of and complicity in sex trafficking."[179] Although the IJ granted withholding of removal and relief under the CAT,

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Handbook Series No. 8729, 2006); E. Dana Neacsu, *Gender-Based Persecution as a Basis for Asylum: An Annotated Bibliography, 1993-2002*, 95 LAW LIBR. J. 191 (2003).

172. Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005).

173. Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).

174. 420 F.3d 551, 555 (6th Cir. 2005); *see also* Papapano v. Gonzales, 188 F. App'x 447 (6th Cir. 2007) (unpublished) (applying *Rreshpja* to reject an Albanian woman's claim of a well-founded fear of persecution on account of membership in a particular social group).

175. 205 F. App'x 902, 903-04 (2d Cir. 2006) (unpublished) (remanding to the BIA due to the IJ's failure to consider the petitioner's social group claim); *see also* Celaj v. Gonzales, 186 Fed. App'x 44, 46-47 (2d Cir. 2006) (remanding to the BIA because "the BIA has not addressed the issue of whether young Albanian women in [petitioner's] position (i.e., young Albanian women who fear being sold into prostitution) constitute a particular social group").

176. Hongyok v. Gonzales, 492 F.3d 547 (5th Cir. 2007).

177. *See id.* at 549.

178. *Id.*

179. *Id.*

the BIA reversed, declining to recognize "escaped sex trafficking victims" as members of a particular social group.[180] The Fifth Circuit did not reach the question of social group membership. Instead, it affirmed the BIA's decision on the basis that substantial evidence supported the BIA's conclusion that the petitioner failed to prove that it was more likely than not that she would be subjected to persecution in Thailand.[181]

In short, Ah Sou today would have a possible claim for asylum and withholding of removal on the basis that she suffered past persecution or had a well-founded fear of persecution. But to prevail, Ah Sou would face a number of difficult legal hurdles.

B. Convention Against Torture

Article 3 of the Convention Against Torture prohibits nation-states from deporting a person "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[182] The United States signed the Convention in 1987,[183] but it was not until 1998 that Congress enacted the implementing legislation.[184] To establish eligibility for protection under the CAT, the applicant must establish that it is more likely than not that she will be tortured if sent to the proposed country of removal.[185] Torture, "an extreme form of cruel and inhuman treatment,"[186] is defined as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind.[187]

The torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[188] "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."[189] Importantly, acquiescence does not require actual knowledge or willful acceptance on the part of government

180. *Id.*
181. *Id.* at 550-51.
182. CAT, *supra* note 147, art. 3.
183. 136 CONG. REC. S17,486-01, 17,486 (1990).
184. This legislation came in the form of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA). Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as a note to 8 U.S.C. § 1231).
185. *See* 8 C.F.R. § 1208.16(c)(2) (2008).
186. *Id.* § 1208.18(a)(2).
187. *Id.* § 1208.18(a)(1).
188. *Id.*
189. *Id.* § 1208.18(a)(7).

officials.[190] For example, in *Zheng v. Ashcroft*, the Ninth Circuit remanded the CAT claim of a Chinese applicant who feared torture, not by government officials, but by private actors who had smuggled him out of China and against whom he had testified in the United States.[191]

On the one hand, the CAT's reach is broader than asylum or withholding of removal because the petitioner need not show that she would be tortured "on account of" one of the protected grounds.[192] Therefore, inability to state a cognizable asylum claim does not necessarily preclude relief under the CAT.[193] On the other hand, qualification for CAT protection is more difficult because the CAT requires the applicant to show that it is "more likely than not" that she will be tortured and not simply that she will be persecuted upon removal.[194] Once the alien satisfies the burden of proof with regard to future torture, withholding of removal under the CAT is mandatory.[195]

To be sure, Ah Sou would have been able to argue that she feared torture upon return to China. Slavery and sex trafficking threaten the life and freedom of its victims and are quintessential examples of the kind of conduct prohibited by the CAT.[196] According to the UNHCR,

> [t]he forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment.[197]

Country condition reports on China would have played a critical role in the determination of whether it would be "more likely than not" that Ah Sou would face re-enslavement, and whether public officials in China would "turn a blind eye"[198] to her fate.[199] In *Zadrima v. Gonzales*,[200] the Second Circuit underscored the importance of country conditions in a sex slave case:

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190. *See* Zheng v. Ashcroft, 332 F.3d 1186, 1196 (9th Cir. 2003).

191. *See id.* at 1197.

192. *See* Kamalthas v. INS, 251 F.3d 1279, 1280 (9th Cir. 2001).

193. *See id.*

194. *See id.* at 1283 (explaining that "the Convention's reach is both broader and narrower than that of a claim for asylum or withholding of deportation").

195. *See* 8 C.F.R. § 1208.16(d)(1) (2008) (stating that "an application for withholding of deportation or removal to a country of proposed removal *shall be granted* if the applicant's eligibility for withholding is established" (emphasis added)).

196. *See id.* § 1208.18(a).

197. *UNHCR Gender Guidelines*, *supra* note 161, ¶ 18.

198. Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 354-55 (5th Cir. 2002) (stating that "'[w]illful blindness'" suffices to prove 'acquiescence' and concluding that the evidence did not show that Honduran public officials "would turn a blind eye to torture").

199. Kamalthas v. INS, 251 F.3d 1279, 1280 (9th Cir. 2001) (stating that "country conditions alone can play a decisive role in granting relief under the Convention.").

200. 187 F. App'x 58 (2d Cir. 2006) (unpublished).

> Here, despite the Country Profile and other documents attesting to the abduction of young women in Albania, the IJ did not analyze, to any extent, [petitioner's] likelihood of torture upon return, and specifically (1) whether abduction, forcing a girl into a trafficking ring, and selling her into sexual slavery may constitute torture; and (2) whether it is more likely than not that [petitioner] would be subject to this harm.[201]

The Second Circuit emphasized that

> [t]he Country Profile for Albania from 2001, which was submitted to the IJ, explains that human trafficking in Albania is prevalent, especially for girls between fourteen and seventeen, and that these girls are commonly taken to Italy, or other countries, and sold into prostitution. According to the Profile, "Albanian . . . women trafficked by Albanian organized crime networks are abused, tortured, and raped. Traffickers also may threaten their family members."[202]

The court remanded the petition to the BIA.[203]

According to a recent State Department report on trafficking, China "is a source, transit, and destination country for men and women trafficked for the purposes of sexual exploitation and forced labor."[204] China is ranked as a "Tier 2 Watch List" country in the State Department's report, which means "China [has] made improvements in some areas, such as by sustaining efforts to enforce its laws against trafficking," but trafficking remains a serious problem.[205] Significantly, a minimum of 10,000 to 20,000 victims—the majority of whom are women and children—are trafficked internally each year in China.[206]

In sum, Ah Sou's eligibility for protection under the CAT is an open question. Although she would not need to satisfy the "nexus requirement," which often presents a major obstacle in applications for asylum and withholding of removal, she would have faced other significant challenges in seeking protection under the CAT—particularly establishing that her sex slave status would result in her torture or continued enslavement on return to China.

C. Trafficking Victims Protection Act

President William J. Clinton signed the Trafficking Victims Protection Act, the first and only anti-trafficking legislation in the United States, into law in 2000.[207] President George W. Bush reauthorized the Act in 2003[208] and 2006.[209] The Act addresses human trafficking through a three-pro-

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201. *Id.* at 60.
202. *Id.*
203. *See id.*
204. 2007 TRAFFICKING IN PERSONS REPORT, *supra* note 17, at 80.
205. *Id.*
206. *Id.*
207. *See* TVPA, Pub. L. No. 106-386, 114 Stat. 1464 (2000).
208. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003)
209. *See* Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006).

nged strategy: prosecution of traffickers, protection of victims, and prevention of trafficking in source countries.[210] Ah Sou's case falls squarely within the goal of protecting the victims of sex trafficking.

The TVPA established two forms of immigration relief for trafficking victims: "continued presence" and T non-immigrant status (also known as "T-visa" status).[211] A trafficking victim with continued presence or a T-visa can be certified by the Department of Health and Human Services to receive certain benefits and social services to the same extent as refugees.[212] As of May of 2006, 1000 human trafficking victims have been certified to receive federal benefits.[213]

1. Continued Presence

Continued presence is temporary status that law enforcement officers may seek on behalf of trafficking victims who are potential witnesses in the prosecution of traffickers.[214] If granted by U.S. Immigration and Customs Enforcement, this status permits an alien to be legally present in the United States during the pendency of criminal investigation or prosecution.[215] Although continued presence is initially authorized for one year and is renewable if the investigation is ongoing, "[t]he status may be revoked at any time should officials deem the victim uncooperative."[216] Enforcement officers have sought relatively few requests for continued presence.[217] In 2006, for example, the Bureau of Justice Assistance's Human Trafficking Taskforce identified 955 potential human trafficking victims, but only 103 continued-presence requests were made during the same year.[218]

Although Ah Sou's record does not indicate that law enforcement was interested in investigating or prosecuting Moy Sam, the situation might be different today. The Bush administration has expressed a commitment to

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210. 2006 ATTORNEY GENERAL'S REPORT, *supra* note 26, at 1.

211. It may be argued that "continued presence" does not constitute "relief" in the sense that it is primarily a law enforcement tool and it "does not convey any immigration status." 28 C.F.R. § 1100.35(b)(1) (2001). Nonetheless, we treat continued presence as one form of relief (however limited and temporary the relief) because the beneficiaries are eligible for certain benefits and social services under 22 U.S.C. § 7105(b)(1)(A), as well as protection from "intimidation, threats of reprisals, and reprisals from traffickers and their associates," under 28 C.F.R. § 1100.35(d).

212. 22 U.S.C. § 7105(b)(1)(A) (2000).

213. Press Release, U.S. Dep't of Health & Human Servs., HHS Announces 1000th Victim of Human Trafficking Certified (May 22, 2006), http://www.acf.hhs.gov/news/press/2006/1000_trafficking_victims_certified.htm.

214. *See* 22 U.S.C. § 7105(c)(3) (2006); *see also* 28 C.F.R. § 1100.35 (2001).

215. 2006 ATTORNEY GENERAL'S REPORT, *supra* note 26, at 11.

216. Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 388 (2005); *see also* 2006 ATTORNEY GENERAL'S REPORT, *supra* note 26, at 11.

217. *See generally* 2006 ATTORNEY GENERAL'S REPORT, *supra* note 26, at 11.

218. *Id.* According to the Attorney General's Report, a number of factors may explain the gap between the number of potential victims and the requests for continued presence. In general, the number of requests depends on the government's decision to pursue investigation and the willingness of potential witnesses to cooperate with the government. *Id.*

reducing sex trafficking as part of its efforts to abolish prostitution.[219] Combating trafficking has been designated as one of the highest priorities of the Department of Justice since 2001.[220] In 2006, Attorney General Gonzales condemned human trafficking as "a violation of the human body, mind and spirit."[221] He further declared, "[f]or this vile practice to be taking place in a country that the world looks to as a beacon of freedom is a terrible irony and an utter tragedy."[222] Although the small number of trafficking cases under investigation relative to the large number of trafficked victims in the United States continues to draw criticism,[223] the number of trafficking investigations and prosecutions has increased drastically since the passage of the TVPA.[224]

If law enforcement was interested in investigating Moy Sam, Ah Sou might have been eligible for continued presence, as she was arguably a victim of "a severe form of trafficking," and was certainly a potential witness to such trafficking.[225]

a. Victim of "A Severe Form of Trafficking"

Under the TVPA, "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" constitutes a "severe form of trafficking."[226] Ah Sou may satisfy this requirement

> either by submitting an LEA [Law Enforcement Agency] endorsement, by demonstrating that the [Immigration and Naturalization] Service previously has arranged for the alien's continued presence under 28 C.F.R. § 1100.35, or by submitting sufficient credible secondary evidence, describing the nature and scope of any force, fraud, or coercion used against the victim.[227]

The first and most significant issue facing Ah Sou is the government's suggestion that Ah Sou was not forced into prostitution, but that she was a willing participant.[228] The government emphasized that Ah Sou "know-

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219. *See* Chang & Kim, *supra* note 30, at 321.

220. *See* Tiefenbrun II, *supra* note 22, at 256-60.

221. Press Release, Dep't of Justice, Attorney General Gonzales Announces Enhanced Programs to Combat Human Trafficking (Oct. 3, 2006), http://www.ojp.usdoj.gov/newsroom/pressreleases/2006/06-671.htm.

222. *Id.*

223. *See, e.g.*, Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 347-49 (2007); Sadruddin et al., *supra* note 216, at 391-94.

224. *See* 2006 ATTORNEY GENERAL'S REPORT, *supra* note 26, at 12-17 (summarizing statistics on the number of cases filed, defendants charged, and convictions obtained under the TVPA); Tiefenbrun II, *supra* note 22, at 257-60 (documenting the increase in investigations, prosecutions, and convictions since 2000).

225. *See* 22 U.S.C. § 7105(c)(3) (2006); *see also* 28 C.F.R. § 1100.35(a) (2001).

226. 22 U.S.C. § 7102(8) (2003); *see also* 28 C.F.R. § 1100.25 (2001).

227. 8 C.F.R. § 214.11(f) (2007). For discussion of this regulatory language, see Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 176-77 (2007).

228. Petition for Writ of Certiorari, *supra* note 11, at 7 ("[I]t is hard for any intelligent person to believe that Ah Sou was much averse to living the life she did.").

ingly play[ed] her part in the fraud" of illegally entering the United States.[229] The government also argued that Ah Sou's "only purpose in fleeing to the mission was to await an opportunity to escape from Moy [Sam] in order that she might ply her vocation for the benefit of another."[230]

Ah Sou, on the other hand, claimed, "it was never her wish to enter upon a life of shame, and she did not until in sheer desperation, to save her life, she saw no other course open to her."[231] Ah Sou declared that "had she known that she was expected to enter upon a life of shame she would never have come [to the United States], but she innocently thought that she was to take the place of a daughter in [Moy Sam's] family."[232]

Under these circumstances, and given that Ah Sou was a minor when she was first brought into the United States, she has a compelling argument that she was "induced by . . . fraud"[233] to enter the United States and to subsequently engage in "a commercial sex act."[234] However, her testimony alone may not constitute sufficient secondary evidence of victim status.

> The secondary evidence must include an original statement by the applicant indicating that he or she is a victim of a severe form of trafficking in persons; credible evidence of victimization and cooperation, describing what the alien has done to report the crime to an LEA; and a statement indicating whether similar records for the time and place of the crime are available.[235]

b. "A Potential Witness to Such Trafficking"

Ah Sou would easily qualify as "a potential witness to . . . trafficking"[236] because she possessed critical information concerning Moy Sam and how he operated his business. While Ah Sou appears to have been forthcoming and reasonably articulate in her testimony before the U.S. Commissioner, the record suggests that she may have been more reticent when she was first apprehended. The government argued,

> [I]t would seem that one who has been compelled to lead the life of a prostitute, 'for which life she showed the most intense aversion,' and who had been repeatedly beaten and abused, would be willing to furnish the officers with information which would result in the certain punishment of those who had so abused her, rather than sit in sullen silence and refuse to give any information whatever, and by her silence permit the criminals to go unpunished.[237]

Ah Sou vigorously contested the government's assertion that she refused to provide information to law enforcement officers, countering that "[t]here is nothing in the record to show this, and in fact the record

229. *Id.* at 5.
230. *Id.* at 7-8.
231. Brief of Appellee, *supra* note 69, at 5.
232. *Id.* at 7.
233. 22 U.S.C. § 7102(8).
234. *Id.*
235. 8 C.F.R. § 214.11(f)(3).
236. 22 U.S.C. § 7105(c)(3).
237. Brief Opposing Petition for Certiorari at 8, Ah Sou v. United States, 200 U.S. 611 (1905) (No. 339).

strongly disproves this assertion."[238] She further noted, "[b]ut if it were true it could easily be accounted for from the fact that [Ah Sou] lived in constant fear of these Chinamen, and feared that her life might be taken if she informed against them."[239] Ah Sou's explanation is entirely consistent with contemporary research findings that show that trafficking victims suffer from severe trauma that renders them physically and psychologically incapable of providing cooperation, especially if they fear retaliation from their traffickers.[240] In addition, "victims who are without housing, income, or medical care are likely to prioritize securing basic life necessities above cooperation with law enforcement and may lack the time and energy to pursue both goals simultaneously."[241]

Ah Sou's predicament highlights the transitory nature of relief provided by the "continued presence" provision. Not only would she be subject to the priorities of law enforcement even if she had been granted continued presence, but it is also only short-term relief that would have merely delayed her eventual removal to China.

2. *T-Visa Status*

The second form of immigration relief available to trafficking victims under the TVPA is a T-visa, for which victims may directly petition the U.S. Citizenship and Immigration Services.[242] T-visa holders are granted work authorization and may remain in the United States for up to four years;[243] after three years, T-visa holders may apply for legal permanent residence, subject to a number of statutory requirements.[244] The total number of aliens granted T-visas cannot exceed 5000 in any given fiscal year.[245] In fiscal year 2006, out of 346 trafficking victims who applied for a T-visa, only 182 were successful.[246]

To be eligible, the applicant must satisfy four criteria: the applicant must (1) be a victim of "severe form of trafficking;" (2) be physically present in the United States or at a port-of-entry "on account of such trafficking;" (3) have complied with "any reasonable request for assistance in the investigation or prosecution of acts of such trafficking" or be less than 18

238. Brief of Appellant Upon Motion to Dismiss or Affirm at 4, Ah Sou v. United States, 138 F. 775 (9th Cir. 1905) (No. 339).

239. *Id.* at 4-5.

240. *See* Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3026 (2006); Sadruddin et al., *supra* note 216, at 398-406; Srikantiah, *supra* note 227, at 199-201.

241. Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574, 2582 (2006).

242. Sadruddin et al., *supra* note 216, at 388.

243. 8 U.S.C. § 1101(i)(2) (2006); *see also* 2006 ATTORNEY GENERAL'S REPORT, *supra* note 26, at 12.

244. 8 U.S.C. § 1255(l) (2006); *see also* 2006 ATTORNEY GENERAL'S REPORT, *supra* note 26, at 12.

245. 8 C.F.R. § 214.11(m).

246. *See* 2006 ATTORNEY GENERAL'S REPORT, *supra* note 26, at 12.

years of age;[247] and (4) face "extreme hardship involving unusual and severe harm upon removal."[248] Because the first and third elements substantially overlap with the requirements for continued presence, we focus on the second and fourth elements in this section.[249]

a. "On Account of Such Trafficking"

Ah Sou would first need to show that she was physically present in the United States "on account of such trafficking."[250] Trafficking victims such as Ah Sou who escape from their captors face a higher burden of proof than those who are "rescued" by law enforcement agents.

> If the alien has escaped the traffickers before law enforcement became involved in the matter, he or she must show that he or she did not have a clear chance to leave the United States in the interim. The [U.S. Citizenship and Immigration] Service will consider whether an applicant had a clear chance to leave in light of the individual applicant's circumstances. Information relevant to this determination may include, but is not limited to, circumstances attributable to the trafficking in persons situation, such as trauma, injury, lack of resources, or travel documents that have been seized by the traffickers.[251]

While many scholars have criticized this implicit preference for "rescued" victims as inappropriate and paternalistic,[252] this requirement remains in effect today. Thus, Ah Sou would be put to the test to prove that she did not have a "clear chance"[253] to return to China after her escape from Moy Sam. Ah Sou's record contains substantial evidence of physical and psychological abuse[254] which would have prevented her travel to China. The record also reflects that she lacked the financial means to return to China, as she was financially exploited by Moy Sam and left without any economic resources of her own.[255] She was also without any valid travel documents because she entered the United States under false pre-

247. Prior to 2003, the TVPA required children fifteen years and older to assist with the prosecution of their traffickers in order qualify for the T-visa; the 2003 amendment eliminated this requirement so that cooperation with law enforcement is not mandated for children under the age of eighteen. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(b)(1)(A), 117 Stat. 2875, 2878 (2003).

248. 8 U.S.C. § 1101(a)(15)(T); 8 C.F.R. § 214.11(b).

249. For regulation pertaining to evidence demonstrating that the T-visa applicant is a victim of a "severe form of trafficking," see 8 C.F.R. § 214.11(f). For regulation pertaining to compliance with reasonable requests from law enforcement agency for purposes of T-visa application, see 8 C.F.R. § 214.11(h). With respect to both of these elements, a "law enforcement agency endorsement" (also known as an LEA endorsement) constitutes "primary evidence." *See* 8 C.F.R. § 214.11(f)(2), (h)(1). For a critique of the LEA endorsement requirement, see Srikantiah, *supra* note at 227, 176-84.

250. 8 U.S.C. § 1101(a)(15)(T)(i)(II).

251. 8 C.F.R. § 214.11(g)(2).

252. *See, e.g.*, Haynes, *supra* note 223, at 352-58; Srikantiah, *supra* note 227, at 197-99.

253. 8 C.F.R. § 214.11(g)(2).

254. *See* United States v. Ah Sou, 132 F. 878, 879 (D. Wash. 1904); Transcript of Record, *supra* note 68, at 55-58, 71.

255. *See* Transcript of Record, *supra* note 68, at 68-71, 73.

tenses as Moy Sam's daughter.[256] Her efforts to escape slavery by seeking sanctuary at the First Presbyterian Church and later marrying Lum Kong[257] would work against her under the TVPA. The irony, of course, is that because she escaped her captor, she would face yet another hurdle in proving her status as a sex slave.

b. "Extreme Hardship"

"Extreme hardship involving unusual and severe harm upon removal"[258] is a very high standard—higher than "extreme hardship" that aliens are required to show in suspension of deportation proceedings,[259] and higher than the "well-founded fear of persecution" that is required of asylum applicants.[260] Current or future economic detriment to the victim, or disruption of the victim's social or economic opportunities, may not be considered.[261] Hardship to persons other than the trafficking victim is also deemed irrelevant.[262] However, the applicant is "encouraged to describe and document"[263] such factors as the age and personal circumstances of the applicant; the need for medical or psychological attention, which is not reasonably available in the country of origin; the nature and extent of the physical and psychological impact of trafficking; the applicant's need for access to the U.S. courts and the criminal justice system; the likelihood of the applicant being penalized in the country of origin; and the likelihood of re-victimization or the threat to safety of the applicant in the country of origin.[264]

The extreme hardship requirement for the T-visa has been criticized as unduly restrictive, falling short of the goal of protecting bona fide traffick-

256. *See* United States v. Ah Sou, 138 F. 775, 776 (9th Cir. 1905).

257. *See Ah Sou*, 132 F. at 879.

258. 8 U.S.C. § 1101(a)(15)(T)(i)(IV).

259. *See* 8 C.F.R. § 214.11(i)(1) ("Extreme hardship involving unusual and severe harm is a higher standard than that of extreme hardship as described in § 240.58 of this chapter."). Section 240.58 was redesignated as § 1240.58 in 2003. *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FED. REG. 9,824, 9,840 (Feb. 28, 2003). Suspension of deportation is a discretionary form of relief previously available to aliens in deportation proceedings who can demonstrate continuous legal presence in the United States for a period of at least seven continuous years, good moral character, and "extreme hardship" to themselves or a qualifying family member. *See* 8 U.S.C. § 1254(a)(1)-(2) (repealed 1996). In 1996, Congress replaced suspension of deportation with a new form of relief called "cancellation of removal." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 240A, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1229b (2000)).

260. Jennifer M. Wetmore, *The New T Visa: Is the Higher Extreme Hardship Standard Too High for Bona Fide Trafficking Victims?* 9 NEW ENG. J. INT'L & COMP. L. 159, 168 (2002) (noting that the House version of the bill that became the TVPA included a "well-founded fear of retribution" standard, which was ultimately rejected because of fears by some members of Congress that TVPA might open up a floodgate of fraudulent claims).

261. 8 C.F.R. § 214.11(i)(1).

262. *Id.* § 214.11(i)(2).

263. *Id.*

264. *Id.* § 214.11(i)(1).

ing victims and inconsistent with international human rights norms.[265] One commentator noted:

> It seems difficult to believe that applicants subjected to a severe form of human trafficking, who are scared and confused, would be able to describe or document such things as their psychological state or the existence of laws in their home country that might persecute them upon their removal from the U.S.[266]

In Ah Sou's case, the most compelling evidence in support of extreme hardship is the possibility that she would be enslaved again by Moy Sam upon removal to China, and that she would suffer anew attendant physical and psychological abuse and violence. The record indicates that Ah Sou lived in constant fear of Moy Sam and feared retaliation if she spoke out against him.[267] Her young age upon arrival, the psychological impact of trafficking, the need for continuing psychological care, and her need to resort to U.S. courts weigh in her favor. While Ah Sou would have benefited from the testimony of Mrs. Holt of the Chinese Women's Home of the Presbyterian Church, it is not clear that Ah Sou would have been able to make the required showing with sufficient certainty.

Conclusion

More than a century after Ah Sou was deported to China, the United States continues to struggle with the problem of human trafficking and the task of providing adequate protection to victims of human trafficking. While the expansion of international human rights norms and the incorporation of these norms into U.S. law signal substantial progress in the institutional capacity to respond to problems of human trafficking, our examination of the forms of immigration relief available to Ah Sou demonstrates that these changes are far from comprehensive. Despite Ah Sou's compelling story and remarkably well documented case (particularly considering that it has been revived after 100 years), relief remains illusory even for her.

These limitations in the current legal framework are hardly surprising in light of the enduring tension between the sovereign prerogative to control and restrict immigration, on the one hand, and the humanitarian impulse to accommodate the needs of vulnerable and involuntary migrants, on the other. Although the analysis of Ah Sou's case has been hypothetical in nature, the inquiry is far from purely academic in its import. To what extent and in which direction U.S. immigration law

265. *See, e.g.*, Hartsough, *supra* note 153, at 102; Suzanne H. Jackson, *To Honor and Obey: Trafficking in "Mail-Order Brides,"* 70 GEO. WASH. L. REV. 475, 553-54 (2002); Rosy Kandathil, *Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Day Slavery*, 12 MICH. J. GENDER & L. 87, 114 (2005); Wetmore, *supra* note 260, at 176.

266. Michael C. Payne, *The Half-Fought Battle: A Call for Comprehensive State Anti-Human Trafficking Legislation and A Discussion of How States Should Construct Such Legislation*, 16 KAN. J. L. & PUB. POL'Y 48, 55 (2006).

267. Brief of Appellant Upon Motion to Dismiss or Affirm, *supra* note 238, at 4-5.

strikes the balance between these two competing principles will be a critical indicator of what the future may hold for trafficking victims like Ah Sou.