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Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States

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INTRODUCTION

I have been asked to reflect on the significance of the range of new visions of global public order now circulating in the United States, and to consider, in particular, what has happened to the liberal consensus of twenty years ago. There are, of course, many directions that a response might take. One could question whether there really was a liberal consensus twenty years ago and, if there was a seeming consensus, what underlying concerns and tensions it attempted to mediate. One could focus on political science, economics, history, critical theory, postcolonial theory, or feminist theory and discuss how one or all of those has played a role in various challenges to liberal legal internationalism inside the United States. One could attempt to understand liberal legal internationalism in relationship to U.S. foreign relations and question the extent to which it emerged and coalesced around a particular view of the United States' role in the global order. One might consider what, if any, causal relationship exists between the dissolution of the apparent consensus and the rise of what many consider to be a new American exceptionalism. And one might even consider whether liberal legal internationalism has unwittingly participated in constructing a new American exceptionalism.

I will not explore all of these questions here. Yet I will attempt to touch upon many of them through the consideration of a couple of recent examples of the Bush administration's deployment of international legal rhetoric and process to protect women's rights, and by examining the various critiques they have and have not engendered. In particular, I will look at the Bush administration's intervention in Afghanistan and its support of international efforts to end sex trafficking.

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I have chosen these case studies to understand contemporary views of international law within the United States for a variety of reasons. Since September 11, it seems that almost every international legal scholar in the United States has felt the need to write something about the war on terrorism, often specifically challenging or defending U.S. responses to September 11. As a result, it is more difficult today than it has been for some time to separate visions of public order circulating *within* the United States from visions of public order *about* the United States. Moreover, with the rise of a real right within the discipline of international law in the United States over the past decade and its manifestation in at least some of the Bush administration's interpretations of international law, proponents and even designers of parts of the war against Iraq and the war on terrorism have effectively participated in and even altered the terms of much of the debate within the international legal academy. While liberal internationalists often contend that the Bush administration opposes international law, I would suggest instead that the administration is in many instances pursuing a vision of international law that does not accord with the liberal internationalist version that has dominated the past few decades. That is, the administration is often promoting a classical view of international law that is based on sovereign consent, at least on the sovereign consent of the United States.

The case studies suggest, however, that the Bush administration policies also contain a liberal internationalist streak. With regard to Afghanistan, the administration has appealed to liberal internationalist and feminist rhetoric about respecting human rights. In the context of trafficking, it has appealed to a liberal internationalist process that favors international cooperation. Thus, by offering examples where the United States claims to be protecting international human rights and even does so through a rhetorical, and in one instance procedural, commitment to international cooperation, these case studies question the characterization of U.S. foreign policy as an example of American exceptionalism.¹ In addition, they show how the assertion of acting in the name of international human rights, particularly women's rights, serves to silence much of the opposition that the substantive positions themselves might otherwise invoke.

I. THE BUSH ADMINISTRATION'S PROMOTION OF WOMEN'S HUMAN RIGHTS

These are extraordinary times, historic times. We've seen the fall of brutal tyrants. We're seeing the rise of democracy in the Middle East. We're

1. Some have argued that U.S. attempts to export human rights and democracy represent the use of American exceptionalism to promote a double standard of human rights: one applying to the rest of the world and another to itself. See, e.g., Harold Hongju Koh, *Forward: On American Exceptionalism*, 55 STAN. L. REV. 1479 (2002–2003); Michael Ignatieff, American Exceptionalism and Human Rights, 2005 Amnesty Lecture at Trinity College, Dublin (Jan. 13, 2005), available at <http://www.amnesty.ie/user/content/view/full/3488>.

seeing women take their rightful place in societies that were once incredibly oppressive and closed. We're seeing the power and appeal of liberty in every single culture. And we're proud once again—this nation is proud—to advance the cause of human rights and human freedom.

—President George W. Bush, March 12, 2004,
The White House²

Global respect for women is a Bush Administration foreign policy priority. The United States is at the forefront of advancing women's causes around the world, helping them become full participants in their societies through various initiatives and programs that help increase women's political participation and economic opportunities and support for women and girls' access to education and health care.

—State Department Office of Senior Coordinator for
International Women's Issues³

Many liberals are likely to disregard the above two quotations, considering them to be "mere rhetoric," or even lies. In the wake of a nearly unilateral war against Iraq, the uncovering of torture in Abu Ghraib and at the U.S. military base on Guantanamo, and State Department and Justice Department memoranda justifying both the war and torture, it is easy to conclude that the United States does not respect international human rights or international law—at least in their international cooperation forms—or care to advance their causes.

In the shadow of the Bush administration's refusal last October to join with 250 global leaders, including those of 85 states (including every European state) to sign a statement reaffirming the 1994 Cairo plan of action because of the statement's reference to fundamental human rights including sexual and reproductive rights,⁴ it might be easy to conclude, as some have in similar cases, that the Bush administration is engaged in a "war against women."⁵

With these case studies, I hope to question the ease with which we can draw either conclusion, or assume that the President and his administration are lying when they claim to uphold international law and women's human rights. I will point to some of the ways, beyond the two quotations above,

2. First Lady Laura Bush and President George W. Bush, Remarks by the First Lady and the President on Efforts to Globally Promote Women's Human Rights (Mar. 12, 2004), available at <http://www.whitehouse.gov/news/releases/2004/03/20040312-5.html> (last visited Mar. 12, 2004).

3. U.S. Department of State, Office for International Women's Issues homepage, at <http://www.state.gov/g/wi/> (last visited Apr. 10, 2005).

4. See Madelyn Spirnak, Explanation of Position by Madelyn Spirnak, Deputy U.S. Representative to the United Nations Economic and Social Council, on the Resolution entitled "Follow-up of the Programme of Action of the International Conference on Population and Development, Cairo, 1994," in the Commission on Population and Development, USUN Press Release No. 76 (04) (May 6, 2004), available at http://www.un.int/usa/04_076.htm (last visited Apr. 25, 2005).

5. See, e.g., Editorial, *The War Against Women*, N.Y. TIMES, Jan. 12, 2003, § 4, at D14, available at <http://www.nytimes.com/2003/01/12/opinion/12SUN1.html?ex=1112673600&en=9660648957a90039&ei=5070>; Françoise Girard, *White House is Waging War Against Women*, WOMEN'S ENEWS (last visited Apr. 25, 2005), at <http://www.womensenews.org/article.cfm/dyn/aid/1141>.

that the Bush administration expresses a commitment to international law and to women's human rights, and I will encourage us to take the rhetoric at face value. I want us to consider the rhetoric seriously because when we ask whether the administration is for or against international law and whether it is for or against women, liberal internationalists and feminists of all types miss an opportunity to engage with the substantive positions pursued by the administration. International law can be used and violated in the service of some women's interests and vice versa. Rather than asking "are we for or against using international law to protect women's rights?", we might consider which rights of which women we want to protect, and in what ways international law should be interpreted to protect them.

The administration's approach to Afghan women under the Taliban after September 11 and its approach to trafficking both raise difficult issues over which liberal internationalists and feminists disagree. To understand how the administration's views have nevertheless largely gone unchallenged, I will set forth the administration's positions, consider the liberal internationalist response, or lack thereof, and then layer over that some potential feminist reactions. I contend that in fact feminists are divided over issues that implicate how Afghan women should be represented and in what ways they are in need of protection. They also differ over what they consider to be the harm constituted by trafficking, and particularly over whether and how to distinguish prostitution from trafficking.

A. Afghanistan

The recovery of Afghanistan must entail a restoration of the rights of Afghan women. . . . The rights of women in Afghanistan will not be negotiable.

—U.S. Secretary of State Colin Powell, November 19, 2001⁶

Only the terrorists and the Taliban threaten to pull out women's fingernails for wearing nail polish. The plight of women and children in Afghanistan is a matter of deliberate human cruelty, carried out by those who seek to intimidate and control . . . because of our recent military gains in much of Afghanistan, women are no longer imprisoned in their homes. They can listen to music and teach their daughters without fear of punishment.

—First Lady Laura Bush, November 17, 2001⁷

As of this month, [Afghanistan] has a new constitution, guaranteeing free elections and full participation by women. Businesses are opening,

6. Secretary of State Colin L. Powell, Remarks at the Eisenhower Executive Office Building (Nov. 19, 2001), available at <http://www.state.gov/secretary/former/powell/remarks/2001/6229.htm> (last visited Apr. 25, 2005).

7. First Lady Laura Bush, Radio Address to the Nation (Nov. 17, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011117.html>.

health care centers are being established, and the boys and girls of Afghanistan are back in school.

—President George W. Bush, State of the Union,
January 20, 2004⁸

When the United States invaded Afghanistan in 2001 to oust the Taliban from leadership, it did so without explicit Security Council approval,⁹ and articulated two primary reasons for intervention. The first was as a matter of self-defense, to hunt down Osama bin Laden for the attacks on the World Trade Center and the Pentagon. The second was to protect the women of Afghanistan.¹⁰

In contrast to their nearly unanimous condemnation of the invasion of Iraq, liberal internationalists were somewhat divided over whether the United States could legally invade Afghanistan without explicit Security Council authorization. While international lawyers outside the United States tended to be critical of the U.S. position, some U.S. liberals were surprisingly sympathetic to U.S. actions. Tom Franck, usually a critic of the administration, for example, wrote a piece in the *American Journal of International Law* defending the United States against a group of German international lawyers who had been critical of the invasion.¹¹ Only a few U.S. scholars were willing to argue that the invasion was not justified as self-defense.¹²

Even if the basis of the United States intervention in Afghanistan did not evoke much criticism, the occupation and ongoing intervention has not totally escaped scrutiny by liberal internationalists. Yet such criticism tends to point to the Bush administration's failure to commit seriously to its nation-building project. As Harold Koh puts it, "the problem in Afghanistan has not been what the United States had done, but what it has not yet done. The United States won the Afghan war, without making the necessary commitments to secure the peace."¹³ Thus, the question becomes not whether the

8. President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

9. There is a debate over whether Security Council Resolution 1368, which was passed on September 12, 2001 and "[r]ecogniz[ed] the inherent right of individual or collective self-defence in accordance with the Charter," provided such authorization. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). See, e.g., *infra* notes 11, 12, 43.

10. See, e.g., Interview by Noah Adams of National Public Radio with Colin Powell, U.S. Secretary of State, Washington, D.C. (Sept. 27, 2001), available at <http://www.state.gov/secretary/former/powell/remarks/2001/5091.htm> (last visited Apr. 25, 2005) (stating that "[the Taliban leadership] has impoverished the country; it has suppressed fundamental human rights in a most vicious way, especially the rights of women").

11. Thomas M. Franck, *Editorial Comments: Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001). See also Statement of Abraham D. Sofaer to the National Commission on Terrorist Attacks upon the United States (Mar. 31, 2003), at http://www.9-11commission.gov/hearings/hearing1/witness_sofaer.htm (last visited Apr. 25, 2005) (stating that Resolution 1368 implicitly authorized the use of force by the United States).

12. See, e.g., Jordan J. Paust, *Use of Armed Force Against Terrorism in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533 (2002).

13. Koh, *supra* note 1, at 1490.

United States has pursued a liberal internationalist agenda, but whether it has pursued it strongly enough.

Regardless of the position they took or continue to take on the invasion of Afghanistan, liberal internationalists in the United States rarely relied upon arguments about women's rights in their defense or critique of the Bush administration's actions. It would have been difficult, at least within the traditional understanding of humanitarian intervention, to justify the invasion of another country to protect women's rights, especially in the absence of explicit Security Council approval.

Yet, to the extent that the administration justified and the public understood the invasion as a means to protect women from the Taliban, one might have expected that it would have been a dream for many feminists. Legally or not, "the troops" were actually being sent in to protect women. Women's rights groups, both inside and outside Afghanistan, had long been trying to call attention to the plight women had suffered in Afghanistan, but especially since the Taliban had seized control. At last, it would seem they were being heard. Moreover, radical feminists had long critiqued international law for its structural failure to attend to women's rights, arguing that international law had failed to hold states accountable for private and public violence against women, either as a doctrinal or practical matter. Enforcement mechanisms were seen as weak or non-existent. The invasion of a country to protect women's rights would seem to be a way to enforce the doctrine that did exist.

It turned out that Western feminists did not overwhelmingly applaud the administration's actions. Nor did they strongly criticize them. Instead, Western feminists were mostly silent with regard to the intervention in Afghanistan.¹⁴ Most had opposed the Bush administration in general, but suddenly found themselves in the position of having to decide between supporting the war and opposing the rights of Afghan women. There was little room to second-guess the dichotomy.

And feminists have largely remained silent. Indeed, as recently as 2004, the Global Scorecard for Women gave the Bush administration an A for rhetoric but a D for action with regard to women in Afghanistan, explaining:

With pledges of support for the constitutional rights of women, expansion of international peace troops and more reconstruction aid, the Administration's rhetoric is strong. But extremist interpretations of Islam continue to threaten women's rights, few new peace troops have been deployed, and little additional money has reached Afghanistan.¹⁵

14. For a critique of the left's failure to "grasp the discourse about women from the right" in this context, see Ranjana Khanna, *Taking a stand for Afghanistan: Women and the Left*, 28 SIGNS 464 (2002).

15. Center for Health and Gender Equity, Feminist Majority, and Women's Environment and Development Organization, *Global Women's Issues Scorecard on the Bush Administration*, available at <http://www.wglobalscorecard.org/Mar04Afghanistan.htm> (last visited Mar. 17, 2005).

Others have commented on how fundamentalism has retained its power since the invasion. The concern, then, is much like that expressed by Harold Koh from the liberal internationalist perspective. It is not that the administration intervened, but that it did not intervene enough in the end to wipe out fundamentalism.

Had feminists engaged with the question of whether international law should support an invasion to protect women's rights, they almost certainly would have differed in their responses. Liberal, or doctrinal, feminists might, for example, have been aligned with those skeptical liberal internationalists, mostly from outside the United States. Attentive to violations of women's human rights under the Taliban, these feminists might nevertheless have argued that military action against Afghanistan should only be taken collectively under the U.N. Charter. Perhaps international law needed changing, but changes in the law—not unilateral force—should be the answer. Cultural feminists might have questioned whether violence should be used to end violence, or whether attempts at peaceful resolution might have been more in line with feminist values.

In the decade preceding September 11, Third World feminists, including many in the United States, had been engaged in a critique, both of international law and of Western feminist critiques of international law, largely challenging First World feminist understanding and use of culture to call for changes in women's lives in the third world.¹⁶ For these critics, First World feminists often essentialized culture and defined Third World women by that essentialized culture. In doing so, First World feminists were seen to deny Third World women's agency within or in opposition to their "culture."

Ratna Kapur provides an example of this critique applied specifically to approaches to women's rights in Afghanistan. First, she points to the ways in which Western feminists have described women's plight under the Taliban:

The West has almost obsessively focused on the veil as a symbol of the Taliban's discriminatory treatment of women. To "Westerners" the *burqa* is a "kind of body bag for the living." This practice is being evaluated against the rhetoric of (Western, Christian) civilization, respect for women as defined by first wives Laura Bush and Cherie Blair, and feminist claims to "rescue" Muslim women from their "barbaric" culture.¹⁷

She then argues that such descriptions essentialize and freeze Islamic culture:

16. For an elaboration of this literature, as well as a description of what I mean by Third World feminism (as distinct from feminism in the third world), see Karen Engle, *International Human Rights and Feminisms: When Discourses Keep Meeting*, in FEMINIST PERSPECTIVES ON INTERNATIONAL LAW (Dorris Buss & Ambreena Manji eds., forthcoming 2005).

17. Ratna Kapur, *Un-Veiling Women's Rights in the "War on Terrorism,"* 9 DUKE J. GENDER L. & POL'Y 211, 216 (2002).

[T]his stagnant understanding of culture as well as the criteria being developed to distinguish the “good” Muslim from the “bad” Muslim does not acknowledge the dissents, pluralisms or contests over the meaning of culture and religions. It does not . . . reflect the complexity of culture within Islam and the Islamic world.¹⁸

While this critique of the essentialization of culture is often made in a variety of contexts, it has not been commonly voiced around the issue of Afghanistan. To the extent that feminists have been critical of the U.S. position on Afghanistan, they have generally assumed that fundamentalist culture is the central problem to be addressed, and that the United States simply has not done enough to help women in this regard.

B. Trafficking

My Administration also has advanced the fight against human trafficking and the abuse and exploitation of women and children, particularly of young girls in the sex trade.

—President George W. Bush, Dec. 10, 2004
(Human Rights Day)¹⁹

Worldwide, violence against children continued to be a problem and trafficking in persons claimed many women and children as victims, forced to engage in sex acts or to labor under conditions comparable to slavery.

—U.S. State Department Country Reports, 2003.
Released Feb. 2004²⁰

In FY 2003, the U.S. devoted nearly \$93.5 million to combat trafficking in persons worldwide. At the 2003 UN General Assembly, President Bush committed an additional \$50 million to accelerate efforts to rescue women and children from labor and commercial sex exploitation.

—State Department Office of Senior Coordinator for International Women’s Issues, Oct. 5, 2004²¹

The United States has signed two U.N. Protocols on trafficking: the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children²² and the U.N. Protocol to the Convention on the

18. *Id.*

19. Press Release, President George W. Bush, Human Rights Day, Bill of Rights Day, and Human Rights Week, 2004 (Dec. 10, 2004), available at <http://www.whitehouse.gov/news/releases/2004/12/20041210-17.html> (last visited Apr. 20, 2005).

20. *Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices 2003* (Feb. 25, 2004), available at <http://www.state.gov/g/drl/rls/hr rpt/2003/29637.htm> (last visited Apr. 20, 2005).

21. Office of the Senior Coordinator for International Women’s Issues, *Fact Sheet: U.S. International Women’s Issues Initiatives* (Jan. 19, 2005), at <http://www.state.gov/g/wi/rls/40996.htm> (last visited Apr. 25, 2005).

22. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime. Annex II, G.A. Res. 55/25, U.N. Doc. A/55/383 (Dec. 12, 2000).

Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.²³ In addition, the United States has ratified International Labor Organization Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.²⁴ The administration has encouraged additional signatures to these instruments and has, in statements made to the Committee on the Advancement of Women, "welcome[d] new partnerships in combating the scourge of trafficking."²⁵ In addition, the Bush Administration has supported municipal legislation to combat trafficking, signing the Victims of Trafficking and Violence Protection Act of 2000.²⁶ That legislation contains measures designed to prevent trafficking, prosecute traffickers, and protect victims, and establishes a Cabinet-level federal inter-agency task force to monitor and combat trafficking.²⁷ In accordance with that legislation, the U.S. government has begun rating other countries' records on human trafficking and, in principle, can impose economic sanctions on any country that does not take steps to end the practice.²⁸

For a liberal internationalist, this type of response to a global problem would seem ideal. International cooperation is being used to develop protocols, and would seem to be the accepted means by which to end trafficking. Further, the state is committing itself to the enforcement of international law through municipal legislation.

For many feminists, this response to trafficking would also appear to be ideal. Liberal and radical feminists, at least, might be pleased to see international law being used to respond to a longtime concern—the exploitation of women's sexuality.

In fact, though, liberals and feminists have long been divided over issues of trafficking, particularly on whether prostitution should be included in an anti-trafficking sweep. Radical feminists like Kathleen Barry and Catharine MacKinnon have long questioned the distinction between forced trafficking and prostitution,²⁹ arguing in part that, like forced trafficking, prostitution does not represent a choice, but constitutes economic and physical coercion.

23. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Pornography, and Child Prostitution, G.A. Res. 54/263, Doc. A/54/49 (May 25, 2000).

24. CONVENTION CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR, June 17, 1999, ILO Convention No. 182, available at <http://www.ilo.org/public/english/standards/icode/ratification/convention/text.htm> (last visited Apr. 20, 2005).

25. Press Release, U.S. Mission to the United Nations, Statement by Nancy Cain Marcus, United States Public Delegate to the United Nations on the Advancement of Women and Implementation of the Outcome of the Fourth World Conference on Women and the Twenty-third Special Session of the General Assembly, in the Third Committee, General Assembly (Oct. 22, 2001), available at http://www.un.int/usa/01_145.htm (last visited Apr. 20, 2005).

26. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000), available at <http://www.state.gov/documents/organization/10492.pdf> (last visited Apr. 25, 2005).

27. *Id.* at §§ 105–07, 112.

28. *Id.* at § 110.

29. See, e.g., KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1979); Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER L. 13–31 (1993).

Others who resist the distinction sometimes argue that prostitution creates the black market that facilitates trafficking.

With regard to prostitution more generally, however, other feminists have argued that women should have the right to commodify their bodies, and have challenged the distinctions critics often assume between prostitution and many other forms of work that women do. Indeed, some prostitute advocacy groups argue that prostitution provides women a unique form of agency.³⁰ Many liberals and most libertarians are generally inclined to agree that women should be granted some amount of autonomy to use their bodies for purposes of prostitution. With regard to the specific relationship between prostitution and trafficking, some feminists—generally from outside the United States—have argued that anti-trafficking measures, if unwittingly, harm women because they are used to prevent the migration of women for purposes of labor, as well as to punish sex workers.³¹

In its anti-trafficking campaign, the Bush administration has taken an explicit anti-prostitution position, effectively joining with radical feminists and the religious right.³² Beyond using anti-trafficking efforts to attempt to end prostitution, the State Department recently announced that “no U.S. grant funds should be awarded to foreign non-governmental organizations that support legal state-regulated prostitution.”³³ Thus, the \$50 million it has earmarked for anti-trafficking efforts this year to enforce its anti-prostitution position will only be awarded to nongovernmental organizations that actively oppose prostitution.³⁴ The administration justified this move by arguing that “[p]rostitution and related activities—including pimping and patronizing or maintaining brothels—fuel the growth of modern-day slavery by providing a façade behind which traffickers for sexual exploitation operate” and that “prostitution is the oldest form of oppression.”³⁵

To the extent that feminists have criticized the administration, they have not done so by defending the rights of prostitutes or by raising substantive concerns about the effects of aiming enforcement efforts against them. Rather, they have generally responded from a pragmatic perspective, arguing that

30. For these arguments, as well as an excellent description of the debate between sex workers and their critics, see Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1052–59 (1992).

31. See, e.g., Marieke van Doorninck & Marjan Wijers, Only Rights Can Stop Wrongs: A Critical Assessment of Anti-Trafficking Strategies (paper presented at EU/IOM STOP European Conference on Preventing and Combating Trafficking in Human Beings—A Global Challenge for the 21st Century) (Sept. 18–20, 2002), available at <http://www.walnet.org/csis/papers/wijers-rights.html> (last visited Apr. 25, 2005).

32. For a discussion of the influence that evangelical Christians have had on the Bush administration’s anti-trafficking positions, see Elisabeth Bumiller, *Evangelicals Sway White House On Human Rights Issues Abroad*, N.Y. TIMES, Oct. 26, 2003, at A11.

33. U.S. BUREAU OF PUBLIC AFFAIRS, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING 2 (2004), available at <http://www.state.gov/t/pa/ei/rls/38790.htm> (last visited Apr. 25, 2005).

34. Jennifer Friedlin, *Debate Roars Over Anti-Trafficking Funds*, Feminist.com, at <http://www.feminist.com/news/vaw14.html> (Apr. 17, 2004) (last visited Apr. 25, 2005).

35. U.S. Bureau of Public Affairs, *supra* note 33.

directing government funding only to groups that oppose prostitution will hurt organizations that provide services to prostitutes but have not taken an anti-prostitution position.³⁶ These critics further warn that by turning the war on trafficking into a battle against prostitution, the government's anti-trafficking efforts will prove ineffective.³⁷ Thus, much as feminists and liberal internationalists found fault with the invasion of Afghanistan for its lack of success, not its aim, here the claim is that Bush administration's attempts to end trafficking will be ineffective because they will prevent assistance to groups that might otherwise be helpful in reducing trafficking.

Executive director of Equality Now Taina Bien-Aime has been perhaps a bit more critical than most feminists in the United States with regard to the Bush administration's trafficking policy, saying she is concerned that it will keep money from non-governmental organizations that help women who turn to prostitution out of desperation in much the same way that the administration has used what is known as the global gag rule to keep money from any non-governmental organization (NGO) that discusses abortion. "If people are trying to unionize women in prostitution, is that pro-prostitution?" Bien-Aime asked. "We don't want a situation like the global gag rule where people are punished because they address prostitution."³⁸ Ultimately, though, even this level of critique has been muted. The day after a story containing the above quotation was published, for example, a clarification was posted: "The quote above from Taina Bien-Aime, executive director of Equality Now, did not make clear that Equality Now opposes the legalization and unionization of prostitution in any form, all of which, the organization says, fuels the demand for trafficking of women and girls."³⁹

Thus, despite the fact that liberals and a variety of feminists have argued against anti-prostitution efforts and even some anti-trafficking efforts in other contexts, the criticisms have rarely been articulated in the context of the Bush administration's anti-trafficking policies. The administration's seeming commitment to women and international law on this issue, I would contend, has largely led to self-censorship on the part of would-be critics. In fairness, though, I should note that there is another practical reason for the lack of criticism. If funds to oppose trafficking will only go to organizations that oppose prostitution, even nongovernmental organizations in the United States have been compromised. As one commentator has explained: "U.S.-based organizations that currently receive either antitrafficking or HIV-related funding and might want to resist or challenge the expanded interpre-

36. *See id.*

37. *See id. See also* Holly Burkhalter, Editorial, *Better Health, Better Lives for Sex Workers*, WASH. POST, Dec. 8, 2003, at A25, available at <http://www.phrusa.org/campaigns/aids/news120803.html> (asserting that the anti-prostitution requirement could also "end up defunding some of the most successful HIV/AIDS prevention services and empowerment strategies for women in the sex industry") (last visited Apr. 25, 2005).

38. Jennifer Friedlin, *supra* note 34.

39. *Id.*

tation of the law on both constitutional and programmatic grounds—including major universities as well as private health and development groups—will run the risk of being labeled as ‘pro-prostitution.’”⁴⁰

II. CONCLUSION: THE END OF THE LIBERAL CONSENSUS?

Since 1990, much of the work of international legal scholarship in the United States has tended toward either left or right critiques.⁴¹ Identity politics and reassessments of Third World sovereignty have dominated the left. Renewed arguments about sovereign autonomy—at least with regard to the United States and the exceptional nature of its constitutional democracy—have comprised most of the critiques of the right.⁴²

In this telling, the center in the discipline is constantly under attack in a way it has not been in decades—from within the discipline itself. International lawyers are no longer able to attend the annual meeting of the American Society of International Law (ASIL) with the assurance that they will be surrounded by other believers of the faith, even as they unite together to fight the actions of U.S. administrations or people outside of the field who reject international law’s legitimacy. If liberal internationalism continues to dominate the ASIL, the argument would be that it does so by a combination of design and self-selection. Many international legal thinkers, on the left at least, feel that the ASIL considers them as nothing more than tokens.⁴³

In another telling, though, international legal vocabulary continues to dominate both the academy and international legal practice, even in the United States. The center, left, and right all at some level default to it when making their claims. Those who assert Third World sovereignty, for example, also argue for respect for universal human rights, if primarily of the economic and social variety, and those who argue that the United States needs to use its sovereignty to protect the Constitution also argue for international cooperation to protect universal human rights—even women’s rights.

My intervention here has in part been to show ways in which international legal liberalism is, in form and discourse, still very much alive. Indeed, the rhetoric is so alive that it has functioned to prevent substantive critiques by international legal liberals themselves, whether of the feminist or non-femi-

40. Susan A. Cohen, *Ominous Convergence: Sex Trafficking, Prostitution and International Family Planning*, GUTTMACHER REP. PUB. POL’Y, Feb. 2005, at 12–14, available at <http://www.agi-usa.org/pubs/tgr/08/1/gr080112.html> (last visited Apr. 25, 2005).

41. For a general description and analysis of the rise of the liberal consensus in the 1960s and the beginning of its demise, see David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT’L L. & POL. 335 (2000).

42. For a description of positions ranging from “sovereignty for its own sake” to “parliamentary world government,” see Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1260–66 (2005) (reviewing Anne-Marie Slaughter, *A New World Order* (2004)).

43. The 1999 Annual Meeting during Tom Franck’s tenure as president of the Society provided a notable counterexample. See *Proceedings of the Ninety-Third Annual Meeting of the American Society of International Law*, 93 AM. SOC’Y INT’L L. PROC. (1999).

nist type. Both case studies offer instances of where the Bush administration has invoked—not ignored—international law, although I would maintain that even in other, more overtly contested areas, the administration has consistently interpreted rather than disregarded international law.⁴⁴ Still, it seems likely that its positions on women's human rights have been less controversial than torture or war, in part because the administration has deployed both feminist and liberal internationalist arguments to shore up its policies. I contend that the lack of controversy engendered by the policies is part of the problem. Liberal internationalist discourse and even liberal and radical feminist discourse have been, it seems, effectively captured by the right.

I hope I have made clear that I believe that both positions of the administration are problematic. The invasion of Afghanistan is problematic, even from a liberal internationalist position. I suspect, however, that many liberal internationalists were willing to grant the Executive a significant amount of leeway in responding to September 11, at least in part because of the way that gender was deployed in the discourse—through images of liberating uneducated, corporally punished, burqa-clad women. But both Afghanistan and trafficking also raise issues for feminists. The extent to which the intervention in Afghanistan was justified as a move to save Afghan women from the Taliban, for example, raises questions about the representations of culture with regard to Afghanistan in general and Afghan women in particular, the extent to which those representations should be and are already contested, and the extent to which “saving” women has functioned to deflect attention from the ongoing economic and political harm caused to the region by the war. The restrictions on trafficking raise questions about the representations of women with regard to trafficking, whether women should be able to sell their sexuality both here and abroad, and the extent to which anti-trafficking efforts function to restrict migration and avert attention from the socioeconomic pressures that make women and children vulnerable to trafficking.

If liberal internationalists and feminists are suppressing their substantive disagreements for the purposes of promoting international law or women (or both), it is almost certain to backfire. The suppression of that disagreement takes an administration that most of us do not trust for other reasons, and defers to it both to make international law and to define women's human rights. Paradoxically, such procedural deference highlights the extent to which international legal liberals and feminists might ultimately be participating in the demise of the dominance of their own substantive views about global order.

44. Even the international law arguments made to support treatment of Iraqi prisoners and near-unilateral invasion of a country without specific, final Security Council authorization were in fact steeped in international legal tradition. With regard to the Iraq invasion, the arguments about Security Council resolutions were conceivably within a liberal internationalist frame. Ibrahim Gassama has explored these arguments in some depth, expressing concern about the extent to which they deploy the rhetoric of liberal internationalism. Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT'L L. REV. 1 (2004).

