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# Trafficking in Human Beings: Partial Compliance Theory, Enforcement Failure, and Obligations to Victims

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## **Chapter 6**

### **Trafficking in Human Beings**

#### **Partial Compliance Theory, Enforcement Failure, and Obligations to Victims**

**Leslie P. Francis and John G. Francis**

Trafficking—the coerced exploitation of people—is a major global concern. Primary forms of trafficking include sex trafficking, labor trafficking, trafficking in organs, trafficking in reproduction, and trafficking in child soldiers. This paper explores whether “host” countries—destinations for trafficking—have special obligations to provide trafficked persons with support needed to escape trafficking and to deal with the damage it has caused. This support includes asylum, healthcare, food, and shelter, at least for an initial period of time.

Our argument begins by demonstrating that anti-trafficking laws are seriously under-enforced. Anti-trafficking laws are difficult to enforce for a number of reasons. Host states or their residents may benefit from trafficking (for example, receive cheap labor or a much-needed organ for transplant) and face incentives that make enforcement difficult. Much trafficking activity takes place across borders, so detection or enforcement may be difficult if laws against trafficking are enforced primarily within national borders or if there are failures of needed international cooperation. The jurisdiction of one major international institution prosecuting international crimes, the International Criminal Court, does not extend to trafficking offenses (unless they are crimes of war, genocide, or crimes against humanity) (Rome Statute 1998).

Trafficking thus presents an example of “partial compliance” theory in the classic Rawlsian sense of failure to adhere to just laws. Trafficking is also a problem of non-ideal theory more generally: global poverty generates a ready supply of persons available for trafficking. We contend that the partial compliance aspects of trafficking yield a persuasive argument for special obligations to trafficked persons. It is more difficult to argue, however, that host countries have special obligations to trafficked persons that they do not have to the world’s poor more generally. Unfortunately, we conclude, confusion about whether obligations to trafficked persons rest loosely in non-ideal theory may lie behind some of the reluctance of host countries to provide these people with needed forms of support rather than regarding them as complicit in the criminal acts that brought them within the host country’s jurisdiction.

Section 1 provides an overview of the problem of trafficking. Section 2 describes and explains the extent of enforcement failures. Section 3 considers grounds for special obligations to victims of trafficking. Finally, section 4 returns to the problem of enforcement and suggests corrective strategies that emphasize the roles played by beneficiaries of trafficked services as well as by traffickers themselves.

## **Introduction**

Several facts about trafficking are clear. Trafficking is widespread, international, and lucrative. It involves labor, sex, body parts, gametes, pregnancies, and soldiering, among principal ways in which human bodies can be exploited for economic gain. Trafficked persons may be physically injured, disabled for life, tortured, left to die, or killed. Traffickers are punished infrequently, if at all. Calls for stepped-up enforcement of anti-trafficking laws are more frequent, however. Many societies are deeply conflicted about whether to understand trafficked persons as victims

or as themselves complicit in crime—as subjects of coercion or as willing participants in the enterprise of migration in search of better economic futures.

Ethically, what to say about trafficking would seem similarly simple. Coerced exploitation is a serious and widespread violation of human rights that should be condemned unreservedly. Victims receive far less compensation than they ethically should. Efforts to prevent, deter, and punish those who traffic are woefully inadequate—manifest failures of political and legal justice. Why, then, have anti-trafficking efforts generated apparent ethical disagreement? Our view in this paper is that it is inadequate to see trafficking simply as a problem of global injustice or human exploitation; obligations to trafficked persons are best seen in light of the serious failures of domestic or international law enforcement.

The contemporary literature of injustice distinguishes between “partial compliance theory” in the classical Rawlsian sense and what has more loosely been termed *non-ideal* theory (Sreenivasan 2007; Stemplowska 2008; Simmons 2010). The former consists of failures to adhere to recognized requirements of justice: widespread disobedience, inadequate enforcement, official corruption, and the like. The latter has been linked to the wide variety of ways in which our world today fails to measure up to ideal justice, including the mal-distribution of resources and concomitant global poverty. The claim we develop here is that it matters whether the prevalence of human trafficking is viewed as a serious enforcement failure that fails to protect the vulnerable or whether it is viewed to some extent as a reasonable response to intolerable circumstances. On the partial compliance understanding, we argue, trafficked persons are owed support because of the failures of legal systems to do what they should be doing to enforce the law. Viewing trafficking as just another problem of poverty, however, fails to explain why trafficking’s victims are owed more than the world’s poor generally are and in addition risks

constructing them as problematic violators of immigration laws. We begin with a brief overview of the scope of trafficking, followed by discussion of the significance of under-enforcement of anti-trafficking laws.

## 1. Trafficking

Trafficking in persons<sup>1</sup> is, by definition, coerced exploitation. Thus the definition from the United Nations Convention on Transnational Organized Crime: the “recruitment, transportation, transfer, harboring 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” (United Nations Office on Drugs and Crime 2004).<sup>2</sup> Under this definition, exploitation is specified to include the use of persons for labor, sex, slavery, pregnancy, or organ removal. There are three elements to this definition: recruitment, coercion, and exploitation.

Despite its prohibition under international criminal law and the domestic laws of the large majority of states, trafficking is widespread. Although actual data are the subject of considerable controversy, the United Nations Office on Drugs and Crime (UNODC) estimates conservatively that at any given time about two and a half million persons are being trafficked (UNODC 2013). Other estimates range as high as 4 million people trafficked annually (International Rescue Committee 2013) and nearly 21 million persons who have been trafficked (International Labour Organization 2012, 13). Nearly 80 percent of these are trafficked for labor. The majority of the remainder are sex workers, primarily women and girls. The highest levels of trafficking are to be found regionally in Asia and the Pacific (Belser 2005). Estimates are that trafficking is highly

lucrative, generating over \$30 billion in profits annually (UNODC 2012). Sex worker trafficking is estimated to account for nearly 40 percent of the profits drawn from trafficking (Belser 2005). Trafficking occurs both intra- and inter-nationally; the United Nations has observed that trafficked persons from 127 countries have been found in 137 host countries (UN News Centre 2008). Migrant smuggling, closely associated with trafficking and often abusive, is even more widespread and has reportedly become increasingly linked with trafficking as border controls have intensified.

Internationally, the UN Convention against Transnational Organized Crime and accompanying protocols were adopted in 2000. The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, entered into force in 2003 and now has 147 states parties, including the United States. According to UNODC, 80 percent of states report having domestic laws against trafficking. These laws vary widely in structure and enforcement and do not in all cases meet the requirements of the Protocol (UNODC 2012, 8). The Protocol requires criminalization of trafficking but makes support for victims voluntary, an approach that has drawn criticism (Leevan 2008).

In addition to the United Nations, regional organizations have also established anti-trafficking legal regimes. The Council of Europe Convention on Action against Trafficking in Human Beings was established in 2005 to combat trafficking, guarantee gender equality, protect the human rights of victims, and promote cooperation (Council of Europe 2005). The Convention strikes a balance between the free movement of persons and the need for border controls to detect and prevent trafficking (Askola 2007). Unlike the UN Protocol, the Convention sets substantive standards for assistance to victims, including safety and protection, standards of living sufficient for subsistence, emergency medical treatment, assistance in asserting rights, and

access to education for children (Art. 12). Lawful residents are to be provided with any needed medical care or other forms of public assistance. Victims who are not lawful residents are to be given a thirty-day reflection period, without threat of expulsion, to consider how to escape the grasp of traffickers and whether to cooperate in prosecution (Art. 13). Parties to the Convention must criminalize trafficking (Art. 19). To foreshadow recommendations made in a later section of this chapter, we also note that Parties to the Convention are committed to “consider” criminalization of the use of services known to involve persons who are victims of trafficking (Art. 19).

Certain trafficking patterns are well established (Kara 2009). Nepal and India are sources for trafficking within and beyond South Asia. Thailand and Cambodia are sources for Japan and the Middle East. Impoverished areas of Eastern Europe provide a ready supply of victims to all of Europe, especially through EU member states such as Romania or Bulgaria. Cyprus is a destination point for trafficking especially from Russia, Ukraine, and other countries in Eastern Europe (*Rantsev v. Cyprus and Russia* 2010; UN Refugee Agency 2011). North Africa is a transit point for trafficking from West Africa to the EU (UNODC 2011). Trafficking from Latin America to North America is extensive, as is trafficking from South Asia to the Middle East (UNODC 2009). Israel and South Africa have been fulcrums for organ trafficking (Smith, Krasnolutska, and Glovin 2011).

The United States is not immune from trafficking. The latest reported statistics indicate federally supported investigation of approximately twenty-five hundred suspected trafficking incidents between 2008 and 2010. By far the majority (82 percent) of these investigated cases were sex trafficking, divided almost equally between adult and child victims. However, not

surprisingly in light of U.S. controversy over immigration, federal agencies were more likely to take the lead in investigating allegations of labor trafficking (Banks and Kyckelhahn 2011).

## **2. Under-Enforcement: Trafficking as Partial Compliance**

Despite efforts by the UNODC, the European Union, the United States, and others, trafficking has proved stubbornly intractable to enforcement efforts. We highlight here several critical features of trafficking as an enforcement problem.

*First, the elements of trafficking* are recruitment, coercion, and exploitation (Anti Trafficking Monitoring Group 2010, 20). Thus understood, trafficking is typically a three-party relationship (Zimmerman, Hossain, and Watts 2011). There is the victim: the person coerced into sex, labor, pregnancy, or organ-procurement surgery. There is the recipient: the person enjoying the fruits of exploitation—a sexual experience, cheap labor, a child, or a desperately needed life-saving organ. And there is the recruiter: the person gaining economically—in many cases substantially—from brokering connections between the victim and the recipient.

This three-party structure of trafficking plays an important role in explaining why enforcing anti-trafficking laws is so difficult. Recipients may be easier to deter, apprehend, and try within jurisdictions with effective law enforcement regimes. But recipients may also be subjects judged to be sympathetic by these states. In some cases of trafficking, especially organ trafficking and reproductive trafficking, recipients may even appear to be victims themselves: people desperate for a child or for life-saving medical treatment. Although trafficked persons may be within the physical jurisdiction of the enforcing state, they may not be its citizens or have any connection with it other than being transported by a trafficker. Indeed, it is not unusual for trafficked persons to be perceived as illegal immigrants by the host state, however unjustifiable this perception may



be. Trafficked persons may reasonably fear retaliation if they come forward and may put little trust in a host state with visible ties to recipients. Arguably, recruiters are the primary wrongdoers—and certainly the profiteers—in many trafficking situations. But recruiters are the most likely parties to elude punishment, in part because of the international structure of so many trafficking transactions.

*Second, the interests of domestic jurisdictions: recipients and victims.* One strategy for reducing the frequency of trafficking is reducing the demand for trafficked services (Lee and Persson 2012). In enforcing anti-trafficking laws, their domestic jurisdictions may be in the best position to take action against recipients. These recipients may be citizens or lawful permanent residents of the domestic jurisdiction, while recruiters function as middlemen outside of the physical territory of the enforcing jurisdiction and victims lie in the shadows. In at least some cases, however—particularly trafficking in organs and reproductive trafficking—the recipient’s home state may be reluctant to prosecute citizens seen as desperate (Francis and Francis 2010). In Israel, for example, the lack of a domestic supply of organs has contributed to demand for trafficked organs. The explanation is the belief among some orthodox Jews that organ donation violates Jewish law and a reluctance to recognize brain death. The Israeli government has sought to counter with a law that gives priority for the receipt of organs to those who have agreed to donate or who have family members who have been donors (Ofry 2012).

Even when recipients do not themselves appear as sympathetic victims, as with those seeking sex trafficking services, enforcement may be uneven at best. The U.S. history of domestic law enforcement against trafficking is an example (Sheldon-Sherman 2012). There are even greater discrepancies when U.S. residents travel abroad for trafficked services. The formal U.S. position is strongly condemnatory, imposing up to thirty years’ imprisonment against

persons who go abroad for underage sex or persons who arrange such activities for economic gain (Child Sexual Abuse Protection Act 2012).<sup>3</sup> But when U.S. residents go abroad for sex services, popular destination jurisdictions such as Thailand or Cambodia have limited interests in arresting tourists who are contributing (in some sense) to their domestic economies. United States prosecutions are infrequent, although the United States has stepped up enforcement on site in countries such as Cambodia, with some highly publicized arrests (Henshaw 2011).

Cooperative efforts have been improved, too; for example, in 2012 the United States and Myanmar announced a joint initiative to combat trafficking in persons (US Department of State 2012b). In 2009, President Barack Obama appointed Luis CdeBaca as special ambassador to combat trafficking and as director of the U.S. Department of State's Office to Monitor and Combat Trafficking in Persons (US Department of State 2009). Ambassador CdeBaca has been active in urging cooperative enforcement efforts against trafficking (CdeBaca 2012). The most recent report on trafficking issued by the U.S. State Department emphasizes enforcement and victim support (US Department of State 2012b). Yet as of this writing, websites hosted in the United States continue to advertise sex tourism abroad.<sup>4</sup> Estimates are that Americans represent about a quarter of all sex tourists abroad but prosecutions are a minuscule handful of the actual frequency of the offense (Hall 2011). The United States does restrict passports of those convicted of sex tourism during the period of any sentence; one commentator has proposed that the United States no longer issue passports to persons convicted of sex offenses against children (Hall 2011, 171). Explanations for these enforcement difficulties include the inability to obtain victim testimony or other evidence and uneven enforcement in host countries—but may extend as well to a reluctance to engage in law enforcement activities overseas or to punish U.S. citizens for their activities abroad, however heinous.

Domestically in the United States, actual freeing of sex worker slaves can be characterized as only modestly successful. State and federal agents free about two thousand women each year (a figure that may include other non–sex slaves) but this figure should be assessed against the official estimates that seventeen thousand to eighteen thousand sex slaves are moved into the United States each year (Monasky 2011).<sup>5</sup> Convictions of traffickers and their collaborators such as pimps or brothel owners are few in number, perhaps only two hundred a year according to federal reporting. Although prosecutions against trafficking victims are extremely rare, nonetheless it is troubling to note that under federal law the penalties for knowing recruiters and knowing *victims* are the same (18 U.S.C. § 2423 [2012]).

In addition, enforcement interests of domestic jurisdictions may not fully parallel international interests in preventing trafficking. In the United States, for example, the most aggressive federal anti-trafficking enforcement activities are directed against labor trafficking of undocumented workers—a far smaller percentage of the trafficking market (11 percent according to federal reports) than sex trafficking (Kara 2009, 40; Banks and Kyckelhahn 2011). Victims in labor trafficking cases were more likely to be adults (over half age twenty-five or older), male, Hispanic (63 percent), and undocumented. It is not difficult to see this enforcement strategy as shaped by overall U.S. politics about illegal immigration.

In an effort to augment U.S. anti-trafficking enforcement, the Obama administration has appointed an Interagency Task Force to Monitor and Combat Trafficking in Persons. In their 2012 progress report, the U.S. Department of Justice (DOJ) reported bringing 41 prosecutions, charging 117 defendants, and securing 65 convictions. Highlighted case reports involved both forced labor and sex trafficking. The report also indicated DOJ victim assistance consisting largely of funding organizations providing services to victims in urban areas such as San

Francisco, Chicago, Dallas/Fort Worth, and Las Vegas (Office of Justice Programs 2012). Department of Labor victim assistance reported offering Job Corps training to victims of “severe trafficking” (but no statistics on how many victims were offered or actually received such training). The Department of Labor also reported insisting that victims of labor trafficking receive reimbursement for full wages and providing assistance in calculating wages owed (but again provided no numbers) (US Department of State 2012c). It is fair to say that the predominant strategy reported by federal agencies is education and training. States, too, have stepped up anti-trafficking enforcement; for example, between mid-2010 and mid-2012, California’s regional task forces initiated more than twenty-five hundred investigations, identified nearly thirteen thousand victims of human trafficking, and arrested nearly eighteen hundred individuals (California Department of Justice 2012).

Recent federal and California reports also indicate a change in tone in U.S. policy toward victim protection. These reports construct victims as modern-day slaves, calling for their emancipation on the 150th anniversary of the Emancipation Proclamation (California Department of Justice 2012; US Department of State 2012b). But it remains to be seen whether these efforts will generate momentary enthusiasm or prove sustainable. In the fall of 2012, the Obama administration announced a series of initiatives to combat trafficking at home and abroad (White House 2012). The initiatives largely address commercial activities, encouraging businesses to collaborate against trafficking and insisting on anti-trafficking clauses in government contracts. They also include contests such as the USAID Counter-Trafficking in Persons Campus Challenge, a technology challenge with a \$5,000 prize. The winner was a student team at Virginia Tech for AboliShop, an app that lets people search their Amazon.com shopping carts to determine a product’s rating in the Not For Sale database of information about

labor abuses in supply chains (USAID 2013). The initiatives also include a community competition for awards for programs for survivors of trafficking. The awards total \$6 million and are funded by a public private partnership including the federal government, Humanity United, and the Goldman Sachs 10,000 Women for Innovation Awards to Stop Human Trafficking (Partnership for Freedom 2013). These awards are to emphasize sustainable housing and shelter for trafficking survivors, comprehensive care and case management for minors, and law enforcement engagement with survivors (note the neutral term *survivors*). The structure of the grants will include community conversation awards to encourage dialogue and challenge grants for scalable initiatives; winners will be paired with academic researchers for program assessment and development of evidence-based scale-up initiatives.

*Third, ethical and epistemological ambivalence* continue to contribute to enforcement failure. Ethically, some argue that forms of commercialization of human bodies that may appear as trafficking also have more benign manifestations; epistemologically, the concern is that it may be difficult to distinguish the benign from the malign. Debates about trafficking are highly politicized and the ideological nature of the literature contributes to difficulties in understanding evidence about trafficking rates, participants in trafficking (victims, traffickers, and consumers of services), degrees and types of coercion, and relationships between legalized sex work and the presence of illicit trafficking, among other issues. For example, Weitzer (2011) is highly critical of feminists' understanding of the evidence, arguing that trafficking is far less prevalent than claimed and that many supposedly trafficked persons are voluntary participants in the trade.

Several countries that have legalized prostitution, such as the Netherlands and Germany, have engaged in vigorous debates about whether legal prostitution is a voluntarily chosen occupation for some, about whether legalization has bettered the circumstances for prostitutes,

and about whether legalization has been coupled with enhanced enforcement of laws against sex trafficking. If “abolitionist” feminists such as Dempsey (2010) are right, the answer is that legalized prostitution masks continued flourishing of trafficking in its shadow.

The Dutch debate illustrates the potential interplay between legalization of prostitution considered to be ethically permissible and prostitution that is exploitive. In the Netherlands, abolition of the ban on brothels in 2000 was coupled with stiffened penalties for illegal prostitution involving sex workers who are underage, coerced, or without legal residency. Some Dutch contend that lifting the brothel ban helped to reduce the numbers of illegal sex workers. Others disagree. A 2006 report by the Dutch Ministry of Justice concluded that although enforcement has improved, stringency varies at the local level. Licensed brothels perceive that they are subject to more frequent examination than before formal abolition of the ban and that illegal establishments are, ironically, treated less harshly (Daalder 2007). Based on interviews, the report also concludes that an identifiable percent (at least 8 percent) of prostitutes are working involuntarily but that the extent of involuntary prostitution is very difficult to ascertain. Kara (2009, 110) speculates that the rate may be as high as 80 percent, based on reports from an anti-trafficking NGO. Because the involuntary relationship is most likely to occur between the prostitute and the pimp, even licensed brothel owners may be unaware of the extent of coercion. The report concludes that legalization of brothels has not brought improved labor conditions for prostitutes. On the more hopeful side, there have been apparent decreases in the numbers of underage or undocumented workers—although the pattern appears to be that undocumented workers have been replaced by legal sex workers from East European countries where trafficking is rife. Brothels also have increasingly lost licenses if they appear to be connected to other illegal businesses.

The effects of epistemological ambivalence—a word we use deliberately, to signify that official uncertainty may be unjustified—are apparent in the initial British experience in enforcing the Council of Europe Convention against Trafficking. The Convention entered into force in Britain in 2009; a study of the first year’s enforcement experience suggested that the exercise of discretion by enforcing officials had resulted in significant risks of discrimination among classes of victims, contrary to the non-discrimination provision of the Convention. The percentage of positive determinations that the person was a victim of trafficking was “startling[ly]” higher for UK nationals than for EU-nationals, and even higher than for non-EU-nationals (Anti Trafficking Monitoring Group 2010, 33). To some enforcement officials, coercive structures such as debt bondage, threats employing modern information technology, and participation in illegal activities (growing cannabis, petty crime) were judged to be “voluntary” in the absence of evidence of outright force (Anti Trafficking Monitoring Group 2010, 33). For example, one British referral worker expressed the view that “Sometimes domestic workers are brought here on false pretences, but they are not illegal. No domestic worker is a trafficked victim, because they are legal. . . . Until they come here they don’t run away. They run away here because they want to live a Western life, it is more attractive, more freedom” (Anti Trafficking Monitoring Group 2010, 35).

In the United States, to take another example, a reasonable belief that the victim was eighteen is a defense to the federal crime of illicit sexual activity with a minor (18 U.S.C. § 2423(g) (2012)). A long-standing criticism of U.S. rape law is the frequency with which prosecutions founder on problematic judgments that the victim was consenting (Ristroph 2011). Commentators critical of prosecutions for sex trafficking argue that many recipients may genuinely believe that they are paying for an evening out with a nice person who has decided

freely to become an escort and who is receiving a fair wage. The concern that it is difficult to distinguish among genuineness and disingenuousness in this belief may lead to discretionary enforcement by prosecutors and may encourage some courts to convict irregularly if at all even when prosecutions are brought.

***Fourth, international criminal law is underdeveloped*** with respect to cross-border crimes such as trafficking. Although some trafficking occurs within countries, much is cross border. Traffickers may be mobile and escape the jurisdiction of particular enforcing states. The increasing role of the Internet in recruiting persons for trafficking exacerbates this problem (California Department of Justice 2012, 4). In addition, international criminal law may not cover trafficking that occurs in societies plagued by civil war and failures of the rule of law (Warpinski 2013). We have argued elsewhere that a role for international criminal law should be prosecution of crimes that do not readily lend themselves to intra-national enforcement (Francis and Francis 2009). Trafficking is a particularly good example of a crime that, while often escaping intra-national enforcement, also remains under-addressed by inter-national criminal law.

The Rome Statute of the International Criminal Court (ICC) (Rome Statute 1998) defines three crimes as being within the current jurisdiction of the ICC: genocide, crimes against humanity, and war crimes (Art. 5). Only those instances of human trafficking that are committed with the intent to destroy “in whole or in part, a national, ethnical [*sic*], racial or religious group, as such” come within the crime of genocide (Art. 6); some trafficking in the former Yugoslavia possibly qualifies as genocide. Crimes of war might also include some instances of trafficking, such as the conscription of child soldiers under the age of fifteen (Art. 8 (e)(vii)) or the commission of sexual slavery (Art. 8(e)(vi)), but only within the context of armed conflict. The most likely crime within the jurisdiction of the ICC to apply to trafficking is crimes against



humanity, which includes “enslavement,” sexual slavery and enforced prostitution, and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” The difficulty with regarding the majority of instances of trafficking as crimes against humanity, however, is that such acts must also be committed as part of a widespread, well-documented attack against a civilian population (Art. 7) and it is unlikely that many forms of trafficking will be part of such known widespread attacks.

Efforts to amend the Rome Statute to include trafficking—primarily drug trafficking—have failed. Trinidad and Tobago, concerned that anti-trafficking laws are severely under-enforced (*Barbados Gazette* 2010), has raised this possibility before the conference of state parties but to date there has been no interest in expanding ICC jurisdiction. Commentators have noted the irony that drug trafficking receives more international attention—and more stringent enforcement efforts—than trafficking in persons (Kara 2009, 209).

In summary, the three-party structure of trafficking—victim, recipient, and recruiter—creates significant difficulties for enforcing anti-trafficking laws. Victims are regarded sympathetically by their domestic legal regimes. Recipients may be viewed with ambivalence by enforcing jurisdictions. Recruiters work internationally but international criminal law infrequently applies to them. The result is stunning partial compliance at many levels: trafficking continues to flourish without effective deterrence on especially the inter-national but also the intra-national level.

### **3. Establishing Obligations to Victims**

Although some trafficking victims are themselves citizens of wealthier nations, the vast majority of victims come from circumstances of severe to desperate poverty. Victims are generated by

circumstances that are non-ideal in this sense. They thus present general questions of what is owed victims of desperate poverty, as well as questions of what is owed victims who have been recruited in these circumstances for the benefit of recipients who may be far better off. In this section, we focus on the latter set of arguments, whether special obligations are owed trafficking victims based on non-ideal circumstances benefiting recipients or based on the partial compliance of under-enforcement. Our discussion grants background assumptions that it is in general imperative to reduce and remediate violations of human rights and that those responsible for these violations have compensatory obligations to their victims. Our focus instead is on whether trafficking victims have special claims to remediation that do not extend generally to all victims of such injustice.

In this regard, we note that victim compensation funds and victim assistance play prominent roles in current anti-trafficking strategies. The United Nations has established a global trust fund for victims of trafficking to provide victim services. Although the Fund is at present supported primarily by voluntary contributions from states parties, it envisions a wider charitable base. At present, its ambitions are impressively modest, especially in proportion to the economic gains from trafficking: it has a goal of disbursing \$500,000 per year in total to organizations for work with victims (UNODC 2012, 29–30). In the United States, as described above, funding for victim assistance programs is becoming a centerpiece of anti-trafficking strategy. Longer-term legal support for victims identified within the United States—especially the T visa that gives three years of residency and public benefits for victims of “severe” trafficking—is contingent on cooperation with criminal investigations, a problem for victims who fear retaliation against themselves or their families (Kara 2009, 195).

*Trafficking Victims and Non-Ideal Theory.* Pogge (2008) and others have argued that beneficiaries of global injustice have special obligations to victims. Trafficking may be thought to present a general version of this argument, that the circumstances of poverty giving rise to a ready supply of victims are part of a global commercial regime benefiting nations that have concomitant obligations to these victims. In this regard, commentators have noted the extent to which International Monetary Fund policy, backed by the United States, contributed to the abrupt impoverishment of countries in Eastern Europe from which many trafficking victims originate (Kara 2009, 25–28). Trafficking also presents a more particular version of the argument from benefit that recipients of trafficked services are largely, although by no means only, residents of better-off countries that have concomitant obligations to victims who serve their residents.

On the more general version of this argument from global injustice, it is unclear why special obligations to trafficking victims would be greater than obligations to victims who have not been trafficked but whose circumstances are similarly dire. Consider treatment for HIV: would a sex trafficking victim who has become HIV-positive have a stronger claim to scarce resources than a rural victim who contracted HIV from her husband who had sought work in urban industries and sexual services on the side? Each is arguably a victim of unjust international economic structures, if either one is; arguments for prioritization of trafficking victims would require more.

More particular versions of the argument from global injustice may present a stronger case for prioritizing compensation for trafficking victims. Consider whether countries hosting the recipients benefiting from trafficking services have obligations to victims providing those services. It may also be relevant whether any of the parties are citizens or lawful permanent residents of the host country, or whether they are located within the borders of the host country.

The clearest connections to the host country exist when the recipient, trafficker, and victim are citizens of the host state and are present within its borders.

One method for establishing obligations in this clearest case would be to regard trafficking victims as a special case of obligations to compensate victims of crimes. Assuming there are such obligations (Walgrave 2011)—and there surely are issues about whether crime victims have claims to compensation or to assistance that outstrip obligations to their other unfortunate peers—more would be needed to explain why trafficking victims have special claims to compensation that other crime victims (for example, victims of rape) do not. Crime victim compensation arguments that rely on direct responsibilities of perpetrators to victims would support requiring traffickers or recipients engaged in criminal activities to compensate their victims, as they would require rapists to compensate their victims. One difference would appear to lie in the practical possibility of obtaining resources for compensation from perpetrators: recruiters make profits and recipients of trafficking services may in some cases be better off than the general run of rapists. United States anti-trafficking laws require those convicted of trafficking to pay restitution of the value of the victim's services (18 U.S.C. § 1593(b) (2012)), although often no funds will be available as U.S. law also makes property used or obtained in trafficking subject to seizure (18 U.S.C. § 1594 (2012)).

Other crime victim compensation programs decouple victims' rights from perpetrators' abilities to pay, as when a fund for all victims is created from fines levied on perpetrators, tax revenues, or charitable contributions (Megret 2011). Many domestic legal regimes as well as the ICC have such funds. These funds are often quite limited, however, and the question would be whether trafficking victims have priority claims on them that other crime victims—for example, rape victims—do not. One argument might be that trafficking victims have been treated

particularly horribly; but “ordinary” rape victims are also coerced, tortured, shamed, and violated, some even many times, and it seems implausible to link the priority of trafficking victims’ claims to compensation fund resources on their duration of captivity. Another argument for priority is that trafficking is a human rights violation in a way that “ordinary” rape or other similar crimes are not. The violation, however, cannot be the exploitation of rape—for that would fail to distinguish the trafficking victim from victims of other serious sexual offenses. Other possible distinguishing factors lie in the roles of trafficker/recruiter or beneficiary/recipient or in complicity on the part of the host state.

Consider the roles of recruiter or recipient, either of whom violates the law of the home state. If states owe compensation to victims of crimes committed by their citizens or lawful permanent residents, then they would owe compensation in such cases to trafficking victims. However, a parallel argument would support compensation for other crime victims. Instead, a more plausible argument supporting states’ responsibilities for trafficking victim compensation would be that the host state in some way plays a role in the ability of traffickers to operate, or recipients to benefit, that it does not in the case of ordinary crimes. One candidate for this role is complicity of the host state in arrangements generating the poverty that incubates trafficking, but as argued above, this argument does not single out trafficking victims from other victims of international injustice.

*Trafficking Victims and Partial Compliance.* A more promising line of argument is that recipient host states are making inadequate efforts to enforce anti-trafficking legislation. As described above, host states may be sympathetic to resident beneficiaries, ambivalent about wrongs such as prostitution that may cover for trafficking, and problematically unsure about judgments of victimization. Coupled with the observation that these states have made

international commitments to enforce anti-trafficking laws, this line of argument would defend support for trafficking victims as a special obligation distinct from obligations to other crime victims (except victims where similar types of enforcement failures are apparent). A law and economics argument may provide further support for this reasoning, if the imposition of compensation obligations provides incentives for states to tighten enforcement efforts (Megret 2011, 160). On this view, special obligations to trafficking victims are rooted in the partial compliance of states to anti-trafficking enforcement requirements. To the extent that victims of other crimes are met with similar enforcement failures, they too would have special claims to compensation.

To this point, we have argued that plausible arguments for prioritizing support for trafficking victims can be grounded in the current level of partial compliance with anti-trafficking enforcement. We now turn to two types of objections to this view: the first, that it proves too much (or too little) and the second that it is internally inconsistent because increasing victim support may undermine enforcement efforts and thus prove harmful in the long run to victims overall.

Ours is an argument from enforcement failure to special obligations for victim support. It is thus not limited to trafficking, but would yield similar conclusions for similar circumstances of enforcement failure: for example, if rape laws are significantly under-enforced, if worker protection laws are ignored, or if policing is inadequate in communities identifiable by poverty, race, or ethnicity. Our response is to welcome this observation, point out that partial compliance theory is underdeveloped with respect to the obligations of generally well-functioning states to victims of what might be characterized as localized failures, and urge further work on questions raised by such arguments for victim support. Conversely, our argument would lose force were

anti-trafficking enforcement to become reasonably adequate at inter- and intra-national levels. Were this to happen, on our view obligations to trafficking victims would need to be analyzed either in terms of obligations to crime victims generally or in terms of obligations to victims of global poverty.

## **4. Victim Support and Enforcement**

In this final section, we turn to the concern that our argument is practically inconsistent because increased support for victims may undermine enforcement efforts. We argue that although some aspects of current enforcement policy reflect this concern, understanding how it is misguided can help in developing more effective enforcement strategies.

Some aspects of current enforcement policy seem based on assumptions that victim support may increase rather than decrease the economic incentives that operate in trafficking relationships, such as the profits to be obtained, the demand for trafficked services, or the possible benefits for trafficked persons. One illustration is the limitation of victim support to persons who cooperate in criminal investigations. The U.S. ties T visas and other support to victim cooperation with investigation and prosecution, apparently on the theory that providing support to victims generally removes at least one possibly useful incentive to gain needed information to identify and prosecute traffickers or recipients. This strategy may backfire, however, if it generates mistrust driving victims further underground.

Another objection to victim support is the argument that it creates further incentives for people to enter into the trafficking relationship. This argument constructs trafficked persons as willing economic actors seeking better lives in host countries. The availability of support may lend credence to the stories told by recruiters to potential victims or may make the risks of

potential trafficking seem less dire. In this regard, the distinction between transport and exploitation may be important; trafficking victims may participate voluntarily in smuggling or other transit arrangements that leave them vulnerable to exploitation when they arrive at their destinations. Knowledge of the availability of victim support—for example, of the ongoing availability of healthcare for victims of organ trafficking—may also salve the consciences of some recipients and contribute to state sympathy toward them.

Stepped-up enforcement efforts are surely one key to reducing trafficking and its human costs. As Kara (2009) and others have argued, enforcement efforts that raise the costs of trafficking weaken the hold of recruiters on their victims. They also raise the costs of purchasing trafficked services and thus may reduce demand (Lee and Persson 2012). These enforcement strategies are directed against recruiters and beneficiaries; empirical questions for our argument are whether treating victims as also criminal actors or providing them with support weaken the efficacy of enforcement efforts against recruiters or beneficiaries.

Two aspects of the dismal failure of contemporary anti-trafficking enforcement are the ability of recruiters to function transnationally without incurring prosecution from domestic legal regimes, and the almost complete absence of attention to recipients of trafficked services as subjects of enforcement. The pressing need to address global injustices that incubate trafficking lies in the background of any ultimately successful enforcement strategy; our discussion assumes but does not address this need directly.

For at least the near future, it seems unlikely that international criminal law regimes will be augmented to deal with trafficking. There may be some chance that with support international investigation efforts may increase. Kara (2009, 210) suggests a model for an international investigation force. Other commentators have argued that the United States should take a



stronger role in reporting and imposing sanctions on countries that fail to enforce anti-trafficking laws (Hendrix 2010). However, there are steps that domestic legal regimes can take that may significantly impede the ability of traffickers to function. One is that although traffickers themselves may function in the shadow of any domestic jurisdiction, their resources do not. Jurisdictions with well-functioning legal systems such as the United States and the European Union could enhance anti-trafficking investigations and efforts to freeze assets within their borders identified as potentially connected to trafficking. These better-off jurisdictions could also provide increased support for law enforcement efforts in domestic regimes with histories of poorly functioning and corrupt legal systems.

Without direct access to traffickers, domestic legal regimes can also attack the profitability of trafficking. Kara's (2009, ch. 8) economic analysis suggests the elasticity of demand for sex trafficking services, the form of trafficking with apparently the highest profit margins. Reduced profits decrease the incentive to traffic. Two avenues to reduce profits are both practically promising and ethically desirable for domestic jurisdictions.

One avenue consists in making it more difficult for traffickers to keep victims in bondage. Stepped up investigations would help, especially of businesses such as massage parlors where legitimate activities may mask illegitimate ones. Such enforcement activities are especially important for jurisdictions that defend the legal permissibility of voluntary prostitution, if they are to maintain credibly that it is possible to permit the sale of sex when it is voluntary without also allowing exploited sex to flourish. The report from the Netherlands that enforcement efforts since the lifting of the brothel ban may have focused on easy targets—licensed brothels—rather than more ambiguous businesses such as escort services is a troubling example of what may be the mal-focus of enforcement efforts even where police corruption is limited (Lee and Persson

2012). Even where prostitution is illegal, skewed or incomplete enforcement efforts may make circumstances for prostitutes even worse, if they are driven underground but without adequate protection. This problem is raised by the Swedish controversy over the Skarhed Report (Swedish Government 2010) evaluating the 1998 ban on prostitution in Sweden.

The availability of support for victims is also critical to increasing the costs of bondage. Victim fear and mistrust, as well as misunderstandings and cultural differences, reduce the likelihood of escape from bondage even when victims are not bound physically, maimed, or locked up. To encourage victim trust, services and support must be credible and culturally sage. Enforcement approaches that treat trafficking victims primarily as illegal immigrants—as politically driven U.S. enforcement has been prone to do—may jeopardize trust. Mattar (2011, 1271–73) details how threats of deportation are a common strategy used by traffickers to keep victims in bondage and points out that U.S. courts are divided about the circumstances in which threats of deportation meet the standard for involuntary servitude under the Trafficking Victims Protection Act. A particularly problematic aspect of U.S. law is that it extends support only to victims of “severe” trafficking, leaving many victims in prolonged uncertainty about whether they will be deported as illegal immigrants (Chacon 2006, 3025). What we are suggesting here might be viewed as a public health model for victim support, including hiring public health workers who can be aggressive in understanding the sex trade and other forms of bondage in their jurisdictions.

Accounts of trafficking suggest that the greatest factors intimidating victims are fears for the safety of those they love, beliefs in obligations to repay debt, the likelihood of shame at home, and mistrust of authorities. These function as vicious spirals, with even the slightest suggestion of adverse consequences used by local exploiters to present believable stories to their victims.

Even with culturally appropriate public health efforts, it may be especially difficult to break through realistic fears about what might happen to families and friends back home.

Another avenue for reducing the profits of trafficking is enhancing enforcement efforts against recipients of trafficked services. It is here that the moral failings of many domestic jurisdictions are most apparent. In the United States, for example, sex tourism, organ purchase, hiring undocumented workers, and purchased sex are criminal activities. Yet very little enforcement is directed toward those who receive and enjoy the benefits of these services. Indeed, as we have detailed above, in some cases the penalties for recipients and for knowing victims are the same—surely unjustified given the underlying inequalities that spawn victimhood.

Here, we suggest only a few ways to step up enforcement against recipients. There could be changes in the definition of offenses, with enhanced penalties when the offender had reason to believe that the victim had been trafficked. Whether in labor trafficking (where the employer had reason to believe that workers were bond slaves) or sex trafficking (where the purchaser of commercial sex had reason to believe that the sex worker was underage or abused) these may be the cases in which domestic jurisdictions' sympathies for recipients are weakest. There could be novel reporting requirements akin to the tax requirement for reporting gambling winnings or other illegally obtained profits as income. Travelers returning from jurisdictions such as Thailand or Cambodia where child sex tourism is extensive could be required to list on their re-entry forms any expenditure paid for sex abroad, just as they now list purchases over \$10,000. Some will lie on the form—but the presence of U.S. investigators abroad might soon uncover those who could be criminally charged for failing to fill in the form honestly. There could be fines or forfeitures directed to anti-trafficking enforcement or victim support (Leevan 2008).

The scale of noncompliance with anti-trafficking laws or enforcement requirements is vast. In this chapter, we have argued that these failures create an argument for special obligations of support for trafficking victims. We have also suggested enforcement strategies against recruiters and beneficiaries of trafficking that do not require regarding victims as criminally complicit. Victim support may complement rather than undermine these enforcement strategies.

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## Notes

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- <sup>1</sup> Some international anti-trafficking efforts refer to “human beings” and others to “persons” (Allain 2012).
- <sup>2</sup> The United States became a state party to the protocol in 2005, with reservations concerning federalism and the role of the states. Also, the United States does not consider itself bound to submit disputes between states parties under the protocol to arbitration or to referral to the International Court of Justice.
- <sup>3</sup> Reportedly, forty-four countries have similar laws, although enforcement of them is uneven and in some cases not proactive. Countries such as South Korea, Japan, and Russia do not have such laws (Bramham 2012).
- <sup>4</sup> Websites such as GF Tours offer “pleasure” tours of countries such as Cambodia or the Philippines. This particular website states unobtrusively that the company will not itself arrange for illegal activities, reminds readers that prostitution is illegal in the United States (except in some counties in Nevada), and expresses support for the legalization of prostitution. It does not mention the federal statute criminalizing underage sex tourism. The website also contains a story about support for impoverished children in an orphanage near a “hot” beach (<http://www.pleasuretours.com/>). Brazil has recently asked that such websites be taken down, with some success (Associated Press 2012).
- <sup>5</sup> Accurate estimates are difficult to obtain, because of the hidden nature of trafficking. Critics of the officially published statistics argue that actual numbers may be much higher, perhaps up to fifty thousand annually.