Widening Our Lens: Incorporating Essential Perspectives in the Fight against Human Trafficking

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INTRODUCTION

In 2000, the international community formally launched the modern movement to combat human trafficking with the United Nations’ adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Trafficking Protocol). As the first major international treaty on human trafficking

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CONCLUSION

* Associate Professor of Law, Georgia State University College of Law. I would like to thank Nirej Sekhon for his review of a draft of this Essay and Stephen Lee for his insights on multiple goals theory. Thank you also to Jennifer Whitton for her excellent research assistance.


2. I refer to human trafficking as a modern form of slavery because, although parallels between the two exist, trafficking does not map precisely onto the nineteenth century slave trade. For example, during the nineteenth century, states openly sanctioned slavery, whereas today, law prohibits human trafficking. See Karen E. Bravo, Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade, 25 B.U. Int’l L.J. 207, 270–71 (2007). For victims of human trafficking, however, the experience equates to enslavement. For a comparison, see id. at 265–93. See also Council of Europe Convention on Action Against Trafficking in Human Beings art. 4(a), opened for signature May 16, 2005, C.E.T.S.
in half a century, the Trafficking Protocol represented a significant step forward.\(^3\) One hundred forty-seven countries are now party to the treaty.\(^4\) Since the Trafficking Protocol’s adoption, governments around the world have sought to implement its mandate.\(^5\) As more than a decade has passed, this Symposium presents an important opportunity to assess progress made and to identify gaps and shortcomings in the global response to human trafficking. While recognizing that it is difficult to collect accurate data on human trafficking,\(^6\) a review of efforts to date reveals that although government and civil society have taken important steps, their efforts appear to have had very limited impact overall in terms of reducing the incidence of human trafficking.\(^7\)

One initial reaction to such shortcomings might be to lay blame on weaknesses in international law’s enforcement mechanisms.\(^8\) After all, many

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\(^6\) See infra notes 63, 83, and accompanying text.

\(^7\) In fact, there appears to be general agreement that human trafficking is increasing despite these efforts to reduce it. See Nancie Caraway, Human Rights and Existing Contradictions in Asia-Pacific Human Trafficking Politics and Discourse, 14 Tul. J. INT’L & COMP. L. 295, 295 (2006) (reporting an “almost fifty percent” increase in the incidence of trafficking from 1995 to 2000); Kalen Fredette, Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation, 17 CARDOZO J. INT’L & COMP. L. 101, 102 (2009) (“[H]uman trafficking is one of the most prosperous and fastest-growing[] criminal enterprises.” (footnote omitted)); Luz Estella Nagle, Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude, 26 WIS. INT’L L.J. 131, 131 (2008) (“Globalization and regional integration have contributed to human trafficking becoming the fastest growing and the third most widespread criminal enterprise in the world after drugs and weapons trafficking.”). Data collection is a challenge and there is little or no baseline data. Therefore, statistics on human trafficking are, at best, estimates.

\(^8\) See, e.g., Pemmaraju Sreenivasa Rao, Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation?, 25 MICH. J.
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states that ratify human rights treaties are well short of compliance.⁹ Some scholars might suggest that implementation is the stage at which international law has failed in the trafficking arena as well,¹⁰ and certainly there are shortcomings in this regard.¹¹ I submit, however, that a central failing in international law's response to human trafficking has occurred at the design stage. The Trafficking Protocol grew out of a criminal law framework rooted primarily in concern for combating transnational organized crime syndicates¹² rather than an independent assessment of what is needed to prevent human trafficking. As a result, the international community not only developed a narrow response focused primarily on criminal law measures, but its anchoring of antitrafficking law in criminal law concepts subsequently served to marginalize other vital perspectives.¹³ This failure to draw upon a broad range of perspectives to address the root causes of human trafficking underlies many of the shortcomings in the international community’s response to the issue. It also likely means that even if compliance with international human trafficking law continues to improve, human trafficking is unlikely to decline significantly. As a result, we need to rethink our approach to the problem and redesign international law’s response.

Part I of this Essay provides a brief overview of modern international human trafficking law, the foundation of which is the Trafficking Protocol. Part II then discusses the limitations inherent in current law. These

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⁹ See generally HUMAN RIGHTS WATCH, WORLD REPORT 2010 (2010) (reviewing more than ninety countries that have ratified various human rights treaties and identifying human rights abuses in each).


¹¹ See infra Part II.

¹² See infra notes 49–50, 53, and accompanying text.

¹³ Bruch, supra note 10, at 21 (“Moreover, the law enforcement framework has typically ignored or marginalized human rights and labor concerns. Although mentioned in the 2000 Protocol, human rights issues are given minimal considerations.” (footnote omitted)). On the phenomenon of anchoring, see generally infra note 51.
limitations are revealed by examining the problem in terms of supply (vulnerable populations) and demand (consumers), and reviewing the impact of the law’s criminal law orientation. Criminal law and law enforcement are necessary but not sufficient. To achieve meaningful progress, other sectors of society need to play a more significant role. Finally, in Part III, this Essay explores places and perspectives the international community might look to in seeking to re-engineer international human trafficking law so that it is better equipped to prevent this gross violation of human dignity.

I. INTERNATIONAL HUMAN TRAFFICKING LAW’S DESIGN

In the 1990s, the international community recognized the need to address human trafficking. This mobilization resulted in the adoption of the Trafficking Protocol in 2000. The Trafficking Protocol opens with the following declaration:

[E]ffective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights . . .

With this opening statement, the Trafficking Protocol established a three-pronged approach to human trafficking that mandates states: (1) punish perpetrators of these crimes, (2) protect and assist victims, and (3) implement prevention measures. All three components are essential


15. Trafficking Protocol, supra note 1, pmbl.

16. The major international conventions aimed at combating human trafficking and related abuses have adopted this three-pronged approach. See, e.g., id. arts. 5–6, 9 (mandating criminalization of trafficking, assistance to victims, and prevention measures); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography arts 3, 8–9, opened for signature May 25, 2000, T.I.A.S. No. 13095, 2171 U.N.T.S. 227 (mandating criminal liability for acts of trafficking, prostitution, and pornography involving children and directing states parties to adopt appropriate victim assistance and prevention measures); see also Office to Monitor & Combat Trafficking in Pers., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 25–32 (9th ed. 2009) [hereinafter TIP REPORT 2009], available at http://www.state.gov/documents/organization/123357.pdf. Secretary of State Clinton has suggested that there is need for a fourth P—partnership.
and have been rightly acknowledged under international law. But the devil is in the details. In international human trafficking law, the three prongs are not equal; stronger obligations are imposed on states parties with respect to the criminal law provisions as compared to the victim assistance and prevention provisions.17 The result of this dichotomous approach and its limited focus on prevention is a framework that, even if implemented fully, is unlikely to make a significant difference in terms of reducing the incidence of human trafficking and related exploitation.

II. SHORTCOMINGS IN THE CURRENT FRAMEWORK

In this Part, I review the weaknesses in international human trafficking law. Rather than examine the law’s approach with respect to each of the prosecution, protection, and prevention prongs, I explore international human trafficking law’s effect on supply issues, including measures related to vulnerable populations, and demand issues, including the extent to which demand is addressed. I then briefly discuss the prevailing approach to human trafficking and how international law has shaped and produced a particular response to the problem.

A. Supply: Vulnerable Populations

Human trafficking—like torts, criminal law, or any other area of law—is ultimately about people. Human trafficking persists today in large part because certain individuals are vulnerable to exploitation and governments and civil society have not done enough to prevent such exploitation from occurring. Although vulnerability is a part of the human condition,18 certain individuals and communities are at heightened risk of exploitation.19
If governments and civil society are to make progress in combating human trafficking, they must confront the root causes of this vulnerability. This Section highlights several key shortcomings in the approach of international human trafficking law to the seemingly endless supply of vulnerable persons.

First, international human trafficking law does not address root causes and systemic issues sufficiently. The issues of poverty, development, and equality collectively merit only a single sentence in the Trafficking Protocol, with no detail on steps to be taken or specific requirements on states parties vis-à-vis these issues. In contrast, the criminal law–related provisions receive much greater attention, with detailed language on acts that must be criminalized, law enforcement training, law enforcement information exchange, and border measures.

Next, international human trafficking law fails to address why vulnerable persons migrate. The reality of human trafficking is that many victims initially start out with a desire to migrate and end up exploited in the process. “[I]f human beings need jobs and those jobs are unavailable in their domestic markets, they will attempt to access transborder markets where jobs are available.” As Janie Chuang emphasizes in the context of trafficked women, international human trafficking law ignores “the complex structural, social, and economic aspects of women’s migration, including the possibility that ‘trafficked women’ may be . . . migrant women attempting to meet their own needs or responding to labor demands in the West.” Similar claims can be made regarding international human trafficking law’s response to the experiences of men and children. In short, international human trafficking law

\footnotesize{\textit{Individual factors} include unemployment, limited education and skills, poverty, lack of parental care and a history of physical and sexual abuse. \textit{Societal factors} include discrimination based on gender or ethnicity, weak legal frameworks, poor border and migration controls, and corruption. These factors do not necessarily cause trafficking in humans, but together they make children and women more vulnerable to it.}

\footnotesize{Id.}

20. See Trafficking Protocol, supra note 1, art. 9(4) (“States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.”).

21. See id. arts. 5(1), 10(1)–(2), 11(1).


trafficking law has yet to fully account for the socio-economic realities on the ground.\(^{25}\)

In addition, the current legal framework for human trafficking risks denying the agency and voice of women and girls, as well as that of other trafficking survivors.\(^{26}\) Indeed, the Trafficking Protocol identifies only one context in which the "views and concerns" of victims should be considered—"at appropriate stages of criminal proceedings."\(^{27}\) Furthermore, the Trafficking Protocol requires that states only "consider implementing measures to provide for the physical, psychological and social recovery of victims."\(^{28}\) If law and policy are to give voice to survivors, then states must recognize the value of input from survivors at every stage in the process of combating human trafficking and must be required to ensure their physical, psychological, and social recovery and reintegration.\(^{29}\)

Finally, international human trafficking law fails to adequately account for the fact that men and boys are victims as well. In 1998, when the United Nations formally agreed to draft the Trafficking Protocol, it adopted a resolution on human trafficking in the same General Assembly session.\(^{30}\) In that resolution's preamble, the United Nations "acknowledged that the problem of trafficking also includes the victimizing of young boys"\(^{31}\) but then never mentioned boys in the operative provisions of the resolution, focusing solely on women and girls. Research supports the notion that women and girls are at heightened risk and constitute the great majority of victims of human trafficking.\(^{32}\) However, boys and men are at risk too.\(^{33}\) For instance,

25. See Bravo, supra note 23, at 552–53 (arguing the need for an economics- and trade-based assessment of the problem).

26. See Ratna Kapur, Migrant Women and the Legal Politics of Anti-Trafficking Interventions, in TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS, supra note 22, at 111, 114 (noting the Trafficking Protocol "fails to address the fact that women move in part in search of more lucrative economic opportunities to support their families back home, and more specifically, if they are mothers, to provide educational support and opportunities for their children").

27. Trafficking Protocol, supra note 1, art. 6(2)(b).

28. Id. art. 6(3) (emphasis added).

29. States parties to the Convention on the Rights of the Child are required to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse... Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child." Convention on the Rights of the Child art. 39, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].


31. Id. pmbl.

32. OFFICE TO MONITOR & COMPACT TRAFFICKING IN PERS., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 8 (7th ed. 2007), available at http://www.state.gov/documents/organization/82902.pdf (reporting that based on research completed in 2006, "[a]pproximately 80 percent of transnational victims are women and girls").

33. See TIP REPORT 2009, supra note 16, at 91 (reporting that in 2008, the government of Burkina Faso identified 691 child trafficking victims in various sectors, 438 of whom
the U.S. Federal Bureau of Investigation estimates that “over 50 percent of all child pornography seized in the United States depicts boys.” In addition, in some jurisdictions, such as Sri Lanka, the majority of prostituted children are boys. Beyond sex trafficking, men and boys are victims of labor trafficking as well. Yet today, few trafficking laws or initiatives address the needs of men and boys. The Trafficking Protocol, with its emphasis on women and children in its title, only remedies part of this over-

(63.3%) were boys); id. at 102 (describing a UNICEF study that found sixty-two percent of child domestic workers in Chad were male); id. at 148 (stating that the majority of child trafficking victims in Guinea-Bissau are boys, trafficked into forced begging); see also Susan Carroll, Officials Say Men Are Being Targeted More as Cases of Forced Labor Increase: Rise in Male Trafficking Victims Seen, HOUS. CHRON., July 6, 2009, at A1, available at http://www.chron.com/CDA/archives/archive.mpl?id=2009_4762175 (reporting U.S. government figures that about forty-five percent of the 286 certified adult human trafficking victims in fiscal year 2008 were male).


37. Chuang, supra note 24, at 1711 (“The prevailing orthodoxy of trafficked persons as women and children not only causes law enforcement officials and service providers to overlook male victims of trafficking but also leads trafficked men not to recognize themselves as victims.”); see, e.g., Anne Gallagher & Elaine Pearson, The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking, 32 HUM. RTS. Q. 73, 95-96 (2010) (noting that until recently, “the laws of Thailand did not recognize the possibility that men could be trafficked,” and that under the pre-2008 laws in Cambodia, “adult male victims of trafficking have been ineligible” for protection because prosecutions were only brought for victims of sex trafficking, but not for other types of trafficking (footnote omitted)); see also Rebecca Surtees, Trafficking of Men—A Trend Less Considered: The Case of Belarus and Ukraine 12-13 (Int’l Org. for Migration, Migration Research Series No. 36, 2008), available at http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/main/site/published_docs/serial_publications/MRS-36.pdf (noting that little consideration is given to the incidence of trafficking of men); Todres, supra note 16, at 13-14 (“The prevailing conception of human trafficking that women and girls are the victims obscures a more complex reality. While women and girls are disproportionately represented among victims, research findings reveal that in certain locales or with certain activities, boys are also at risk.” (footnote omitted)).
sight. The experiences of men and boys must be fully recognized and addressed.

In significant ways, international human trafficking law fails to account for the experience of vulnerable populations and victims. To achieve success in reducing the incidence of human trafficking, the law needs to better account for the root causes of vulnerability and the experiences of victims and survivors.

B. Demand: The Drivers of Human Trafficking

International human trafficking law is also weak with respect to demand-related issues. To say traffickers constitute a significant part of the problem is obvious. Ultimately, as with the drug trade, traffickers are feeding a demand driven by consumers. In the human trafficking context, the demand is driven by both the desire for commercial sex and the desire for cheap goods and services.

First, international human trafficking initiatives do not adequately address what underlies demand for the sexual services at the heart of sex trafficking. In the United States, for example, there is frequently an “othered” conception of the problem. When sex trafficking occurs in Thailand, Brazil, or another foreign locale, many in the United States point to “those cultures” as the culprit; yet when the same abuses happen in the United States, they are written off as not a problem of culture but rather a problem caused by a few deviants or bad actors. In doing so, these critiques of

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38. See Bravo, supra note 2, at 234 (“The Trafficking Protocol is indicative of this focus: in its very title, it refers to its special interest in the protection of women and children, despite the realization that men, too, are also vulnerable to this type of exploitation.”).

39. See Chuang, supra note 24, at 1704 (discussing the demand for prostitution that underlies human trafficking); see also, e.g., Robert E. Freeman-Longo, Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 305 (1997) (“Most sexual abuse is illegal, but there are aspects of our culture, lifestyle, and sexual interests and behaviors that are abusive of sexuality, and yet they are legal.”).

40. See Chuang, supra note 24, at 1727 (“[D]emand for trafficked persons is not simply about satiating sexual appetites or taking advantage of cheap migrant labor but deeply entwined with the trafficked person’s identity as a migrant ‘other.’ ”); Jayashri Srikantiah, Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law, 87 B.U. L. REV. 157, 201-04 (2007) (discussing the stereotype of foreign women in the conception of the iconic human trafficking victim); Todres, supra note 17, at 623, 630 (othering leads individuals in the Global North “to overlook the extent of [trafficking] in their own country” and instead see it as a harmful practice occurring largely in the Global South).

41. Todres, supra note 17, at 628–29 (“[I]n Western efforts to combat trafficking, the white American man engaging in sex tourism is seen as a deviant, while sale of children into trafficking networks in developing countries is written off as ‘common practice in their culture.’ ”); see Chuang, supra note 24, at 1698, 1702–03; Leti Volpp, Feminism Versus Multiculturalism, 101 COLUM. L. REV. 1181, 1186–87 (2001). In her article, Volpp states:

Part of the reason many believe the cultures of the Third World or immigrant communities are so much more sexist than Western ones is that incidents of sexual
“other cultures” fail to account for the pervasive nature of gender-based discrimina-
tion, sexualization of young girls in the media, and other factors that drive demand in the United States as well as elsewhere. Second, efforts to combat human trafficking to date have largely overlooked the demand for cheap food, clothes, and other goods and services that are a major part of the problem. States’ "emphasis on cheapness and efficiency, and on increasing returns and cheaper inputs may have led, at the extremes, to the commoditization of humans, in their capacities as providers of labor, as trade objects or goods." At the end of the day, how confident is each of us that no one was exploited in the supply chain to deliver the food we eat or the clothes we wear?

Finally, one other issue has had an impact on demand-side aspects of the problem—the events of September 11, 2001. Since the terrorist attacks on September 11, 2001, numerous countries have increased border security measures. Although national security concerns are important, tightening border security has had unintended consequences. Reducing legally-sanctioned means of cross border movement has created potential markets

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Id. 42. See Volpp, supra note 41, at 1186–87.

43. See, Freeman-Longo, supra note 39, at 305 ("Americans place a high premium on sexuality. We glamorize a variety of sexual behavior through books, special newscasts, movies and stories.").


As far as international and domestic anti-trafficking laws are concerned, the focus is on facilitating prosecution of traffickers. While this is not a bad thing in and of itself, this emphasis obscures the question of how and why demand for children to sexually exploit is so pervasive and broadly based.


45. See Nagle, supra note 7, at 150–51.

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for traffickers to exploit. As Bravo explains: "[B]orders are now heavily policed and enforced, and unsanctioned crossing is essentially verboten... [and as a result,] individuals become more vulnerable to the predations of exploitative middlemen such as traffickers in human beings."

The law's focus on border measures neglects the underlying demand for goods and services provided by exploited persons. To make meaningful progress combating human trafficking, demand issues require significant attention.

C. The Prevailing Response: Criminal Law Model

Numerous scholars and practitioners have identified the fact that international human trafficking law is fundamentally a criminal law framework. Indeed the very fact that the Trafficking Protocol, which has come to serve as the framework for modern efforts to combat human trafficking, is a protocol to the U.N. Convention on Transnational Organized Crime is evidence of that criminal law focus. The Trafficking Protocol, with its emphasis on criminal justice components of the problem and its stronger obligations in its criminal law provisions, creates an "anchoring effect," making it more likely that subsequent efforts will be framed by a criminal law approach.


48. Bravo, supra note 23, at 550. In addition, heightened emphasis on security has resulted in "[v]ictim assistance [being] subjugated to the first-order priority of immigration enforcement." Jennifer M. Chacón, Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement, 158 U. Pa. L. Rev. 1609, 1626 (2010). However, as Chacón notes, "one can accept the need to treat trafficking as a serious crime and still design a system that strikes a different balance between prosecution and victim protection." Id.

49. See, e.g., Bravo, supra note 23, at 556 ("[T]he law enforcement framework is predominant both internationally and in the U.S. domestic system."); Bruch, supra note 10, at 16 ("All of the international documents addressing human trafficking in detail have essentially embodied a law enforcement perspective."); Chuang, supra note 14, at 138 ("[G]overnments have tended to view trafficking as a 'law and order' problem requiring an aggressive criminal justice response."); see also Hussein Sadruddin et al., Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses, 16 STAN. L. & POL'Y REV. 379, 394 (2005) ("The TVPA is designed primarily as a prosecutorial tool . . ."); cf. Chacón, supra note 48, at 1621 ("[I]t is not clear that antitrafficking legislation aimed primarily at victim protection would have garnered congressional support.").


51. See, e.g., Adam D. Galinsky, Should You Make the First Offer?, NEGOTIATION (Program on Negotiation at Harvard Law Sch., Cambridge, M.A.), July 2004, at 3 ("In situations of great ambiguity and uncertainty, first offers have a strong anchoring effect—they exert a strong pull throughout the rest of the negotiation."); see also Robert S. Adler, Flawed Thinking: Addressing Decision Biases in Negotiation, 20 OHIO ST. J. ON DISP. RESOL. 683, 712
Research on anchoring from the field of negotiation demonstrates that an initial step (such as a first offer in negotiations), whatever it may be, significantly influences and shapes the subsequent course of action and final outcomes (for example, the remainder of the negotiation and settlement amount agreed to by the parties). This research helps us understand how, in a similar manner, the initial framing of human trafficking as a criminal law issue has limited the range of options considered when seeking to develop antitrafficking laws and programs.

Not only is the literature on anchoring helpful in understanding the impact of international human trafficking law’s criminal law focus, but multiple goals theory also furthers this understanding. Multiple goals theory helps illustrate how agencies with multiple goals, some of which often conflict, will respond. It “predicts that agencies faced with conflicting tasks will systematically overperform on the tasks that are easier to measure and have higher incentives, and underperform on the tasks that are harder to measure and have lower incentives.” In the context of human trafficking, there has been a more recent push to have law enforcement adopt a victim-centered approach. Admirable progress has been made in a number of jurisdictions, but as multiple goals theory explains, over time law enforcement and prosecutors will continue to prioritize arrests, prosecutions, and convictions over survivors’ recovery-related considerations given their own departmental expertise and the incentives and pressures they face.

(2005) (noting that initial offers are used to anchor negotiations, “thus subtly limiting the range of bargaining”).

52. See Adler, supra note 51, at 711–12; Galinsky, supra note 51, at 3.

53. See Bruch, supra note 10, at 15 (“[T]he law enforcement approach has been the dominant framework at the international level.”); Chuang, supra note 14, at 150 (“In practice, the priorities set forth in the [Trafficking] Protocol are mirrored in counter-trafficking law and policy initiatives undertaken across the globe. ... [M]ost countries’ counter-trafficking efforts focus on effectuating a strong criminal justice response to the problem.”).

54. See Eric Biber, Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies, 33 HARV. ENVTL. L. REV. 1, 9 (2009) (“Economists and political scientists have developed an extensive literature examining the problems of principal-agent interactions, with specific applications for governmental and non-profit organizations. That literature provides us with some important insights into the nature and logic of how agencies tasked with multiple goals are likely to function.”).

55. Id.

56. See id. at 11 (“[T]asks that are more easily measured are more likely to be performed at a higher level by an agent as compared to tasks that are harder to measure . . . .”). Thus, it is easier to measure the number of arrests, prosecutions, and convictions than the emotional well-being of victims. See also Leigh Goodmark, Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases, 37 FLA. ST. U. L. REV. 1, 5–6 (2009) (highlighting how mandatory arrests and no-drop prosecution rules in domestic violence cases often conflict with the goals of women who are victims); Tamara F. Lawson, A Shift Toward Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law, 33 S. ILL. U. L.J. 181, 188–89 (2009) (noting prosecutorial decisions “attempt to accomplish multiple goals, such as: punishing the individual criminal actor, vindicating the injury of the victim, and alerting the public in an effort to deter future crime” and that they “have historically ne-
other words, multiple goals theory demonstrates that it is insufficient simply to ask law enforcement to pursue other goals when their departmental incentives have not changed. Rather, other agencies must be involved with, and direct programs aimed at, preventing exploitation of vulnerable individuals and assisting survivors.

In addition, as mentioned in Part I, international human trafficking law and initiatives fail to get at the root causes of the problem. U.S. Secretary of State Hillary Clinton has noted that “[a] majority of the world’s countries now have criminal legislation prohibiting all forms of trafficking in persons..... Yet much remains to be done, particularly in identifying and addressing the root causes of trafficking.....” As Jennifer Chacón explains, the Trafficking Protocol’s criminal law framework tends to focus on select “bad actors” at the expense of the underlying complex global, social, economic, and political forces contributing to human trafficking. “The ‘bad actors’ that are scrutinized tend to be other noncitizens involved in supplying certain markets with trafficked persons rather than the population that consumes the goods and services that these trafficking victims provide.”

Focusing only on criminal prosecutions ensures that the international community will be stuck in an endless cycle of seeking to prosecute perpetrators and aid victims after the harm has occurred.

Finally, international human trafficking law’s criminal law approach falls short of achieving even criminal law’s core goals of holding perpetrators accountable for their crimes and deterring others from committing crimes. Globally, in 2009, there were 4166 successful human trafficking
prosecutions. Though this record number of convictions reflects progress, it still represents a fraction of the number of human trafficking victims, which has been estimated at over two million per year. Others have suggested that the number of trafficked and enslaved persons is significantly higher. As we have learned from the drug trade and criminal law initiatives to combat drug trafficking, criminal law alone is not sufficient to tackle these complex problems. Underlying supply and demand issues must be addressed. Today, numerous law enforcement officers and prosecutors are working long hours to combat human trafficking via criminal enforcement. However, unless the international community broadens its approach to hu-

Id. (footnote omitted).


63. See INT’L LABOUR ORG. [ILO], ILO ACTION AGAINST TRAFFICKING IN HUMAN BEINGS 1 (2008) (“According to ILO estimates there are at least 2.4 million trafficked persons at any given point in time.”). Obtaining accurate data on the number of victims is challenging at best, and current figures are estimates. For more on data-related issues, see, for example, The Vienna Forum to Fight Human Trafficking, Vienna, Austria, Feb. 13–15, 2008, UN.GIFT, background paper, 024 Workshop: Quantifying Human Trafficking, Its Impact and the Responses to It 2, 3 (2008), http://www.unodc.org/documents/human-trafficking/2008/BP024QuantifyingHumanTrafficking.pdf. The background paper from the forum states:

The difficulties connected with researching human trafficking are related to the nature of the subject itself . . . . At present, statistical data on trafficking in persons frequently do not meet the basic standards for statistical accounting: at the global and regional levels, detailed data are simply not available and even when data are presented, they are frequently partial, incomplete and unreliable.

Id. Underreporting is a significant issue. Id. at 6–7, 14 (discussing reasons for underreporting, including victims’ vulnerability and fear that traffickers will seek retribution if they report them).


65. See, e.g., David D. Cole, Formalism, Realism, and the War on Drugs, 35 SUFFOLK U. L. REV. 241, 252 (2001) (“By all accounts, the war on drugs has been a failure. Although nearly half a million people are locked up for drug crimes, drugs are cheaper, purer, and more easily available than ever before . . . . Further, the criminalization of drugs . . . create[s] the incentive and opportunity for substantial organized criminal activity.”); Kal Raustiala, Law, Liberalization & International Narcotics Trafficking, 32 N.Y.U. J. INT’L L. & POL. 89, 113 (2002) (“If effectiveness is defined as ‘problem solving,’ clearly the legal response to illicit drugs has not been effective. The drug problem has not abated, and, in the view of many experts, it is getting worse.”).
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man trafficking by developing a comprehensive, multisectoral response, there is little hope of preventing human trafficking.

III. TOWARD A MORE EFFECTIVE RESPONSE TO HUMAN TRAFFICKING

Despite tireless efforts by many law enforcement personnel and social service workers, we are not significantly closer to stemming the tide of human trafficking and exploitation than we were a decade ago. A quote from Albert Einstein offers an important way forward:

The formulation of a problem is often more essential than its solution, which may be merely a matter of mathematical or experimental skill. To raise new questions, new possibilities, to regard old problems from a new angle, requires creative imagination and marks real advance . . . .

The essential lesson from Einstein is one that must be heard by policy makers and antitrafficking advocates: In light of the fact that human trafficking persists even after a decade of tireless efforts to combat it, we must be willing to reexamine the problem from different perspectives.

Three perspectives in particular can help in rethinking and reengineering the current approach to human trafficking: (1) a human rights approach; (2) a public health approach; and (3) an international development approach. Each of these fields brings expertise necessary to achieve meaningful progress on the issue.

A. A Human Rights Perspective

To begin, a rights-based approach offers several important benefits. A human rights framework acknowledges the inherent human dignity in each individual. Human trafficking persists, in part, when societies tolerate denials of the dignity and humanity of vulnerable individuals.


Indifference is not a response. Indifference is not a beginning; it is an end. And, therefore, indifference is always the friend of the enemy, for it benefits the aggressor—never his victim, whose pain is magnified when he or she feels forgotten. The political prisoner in his cell, the hungry children, the homeless
rights law is designed to address vulnerability. More specifically, marginalized individuals and populations are often at heightened risk of various forms of exploitation, including human trafficking. Poor children whose births are not registered or who lack access to health care and education are at heightened vulnerability. Children whose births are not registered do not exist in government records, exposing them to a broad range of potential harm. In addition, unregistered children often encounter obstacles in accessing health care services. Children without regular access to health care have a higher incidence of unmet health needs, and children with unmet health needs are more likely to miss school, fall be-

_id_. This idea is also encapsulated in the following well-known adage, often attributed to Edmund Burke (though that has been contested): "All that is necessary for the triumph of evil is that good men do nothing."


> [C]hildren who are denied a fundamental right and who, in legal terms, do not exist ... [and] are likely to join the millions facing discrimination and the lack of access to basic services such as health and education. And, with no proof of age and identity, they may lack the most basic protection against abuse and exploitation. An unregistered child will be a more attractive “commodity” to a child trafficker and does not have even the minimal protection that a birth certificate provides against early marriage, child labour, recruitment in the armed forces or detention and prosecution as an adult.

_id_.

73. UNICEF, *supra* note 71, at 5.

74. See Michael D. Kogan et al., *Underinsurance Among Children in the United States*, 363 NEW ENG. J. MED. 841, 845 (2010), available at http://www.nejm.org/doi/full/10.1056/NEJMsa0909994#articleTop ("Underinsured children were significantly more likely to be without a medical home, to have delayed or forgone care, and to have difficulty obtaining needed specialist care."); Paul W. Newacheck et al., *Health Insurance and Access to Primary Care for Children*, 338 NEW ENG. J. MED. 513, 514-16 (1998) (demonstrating that children with no health insurance are consistently less likely to receive adequate medical care).
hind their classmates, and drop out of school. Adolescents who do not finish school enter the workforce at a younger age with fewer skills, leaving them at greater risk of an array of exploitative practices, including trafficking. Similarly, discrimination creates barriers to individuals’ full realization of their rights, pushing primarily minorities, women, and children to the margins and increasing their risk of exploitation.

Human rights law has a response at every stage in this process. The right to birth registration, health and education rights, labor...
rights, the right to live free from discrimination, and other rights all have the capacity, if fully realized, to reduce the vulnerability of individuals who might otherwise end up at risk of trafficking. In short, a human rights framework can help address the root causes of human trafficking, including denial of economic and social rights, discrimination, and poverty.

B. A Public Health Perspective

Public health methodologies bring important and needed expertise and perspectives to the issue. Public health’s emphasis on evidence-based research as the foundation for any policy or program initiative has much to offer antitrafficking advocates. To date, there is a dearth of reliable research and data on human trafficking, and many laws and programs are adopted with little advance research. Further, monitoring and evaluation of these programs and laws is lacking. As a result, we have little sense of whether we are doing something or doing something effective.

Public health’s focus on prevention also adds value. From a public health perspective, it would make little sense if, instead of vaccinating a population, a government simply waited for a major disease outbreak and

(recognizing the right to the highest attainable standard of health); id. art. 28 (recognizing the right to education); International Covenant on Economic, Social and Cultural Rights art. 12, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR] (recognizing the right to the highest attainable standard of physical and mental health); id. art. 13 (recognizing the right to education).

80. See, e.g., CRC, supra note 29, art. 32; ICESCR, supra note 79, arts. 6–8.

81. See, e.g., CRC, supra note 29, art. 2; ICCPR, supra note 78, art. 2(1); ICESCR, supra note 79, art. 2(2).

82. In a prior article, I have explored the potential utility of public health methodologies. See Todres, supra note 61.


84. See Goździał & Bump, supra note 83, at 9 (recognizing that “the dominant antitrafficking discourse is not evidence-based” and encouraging the development of such research).


86. James A. Mercy et al., PUBLIC HEALTH POLICY FOR PREVENTING VIOLENCE, HEALTH AFFAIRS, Winter 1993, at 7, 11 (noting public health’s key “contributions include placing prevention at the forefront of our efforts” to prevent violence).
then sought to hold the responsible parties accountable for the lives lost or harmed. Similarly it would be poor strategy if, in the bioterrorism context, the government skipped prevention and preparedness and instead told the public not to worry because, following any bioterrorist attack, it would seek to hold the perpetrators responsible, and that would serve to deter future attacks. Success, from a public health perspective, results from fully immunizing or vaccinating a population to prevent illnesses from occurring, or from having a well-coordinated response to a bioterrorism attack that minimizes its impact on the community. That mindset and focus on preventing harm from occurring is greatly needed in the human trafficking context, where there have been few meaningful efforts aimed at prevention.87 Public health’s prevention focus can help policy makers and antitrafficking organizations understand and address the “complex interplay between individual, relationship, community, and societal factors”88 that leaves certain individuals at risk of being trafficked.

As noted in Part II, international human trafficking law and programs must do a better job addressing underlying supply and demand issues. Public health’s experience with addressing societal attitudes that lead to risky, unhealthy behaviors offers valuable insights, as public health campaigns have been successful in fostering healthier behaviors.89 Public health has a wealth of experience in fostering changes at the individual, institutional, and community levels to achieve healthier outcomes in target populations.90 Public health campaigns have been successful across a range of issues,

87. Todres, supra note 61, at 457–58 (explaining that governments’ efforts to date have largely overlooked prevention and instead focus on measures—such as law enforcement and survivor assistance—that address the issue only after the harm has occurred); see also TIP REPORT 2010, supra note 5, at 14 (2010) (“While prevention is an important goal, neither the Palermo Protocol nor the TVPA as amended give much guidance in setting forth prevention activities beyond the obvious: public awareness campaigns, addressing root causes, and conducting law enforcement-related or border security activities.”).


89. Joan B. Wolf, Is Breast Really Best? Risk and Total Motherhood in the National Breastfeeding Awareness Campaign, 32 J. HEALTH POL’LY & L. 595, 624 (2007) (“Public health campaigns are about advocacy and about changing behavior . . . .”). See also Marsha Garrison, Reviving Marriage: Could We? Should We?, 10 J.L. & FAM. STUD. 279, 323 (2008) (“Public health campaigns that seek to alter behavior have been markedly less successful than those that focus on the environment in which disease flourishes, and campaigns that target simple behaviors have been more successful than those that target complex behaviors.”); David Hemenway, The Public Health Approach to Reducing Firearm Injury and Violence, 17 STAN. L. & POL’Y REV. 635, 645 (2006) (“Public health interventions began to emphasize the need to change the environment rather than just changing individual behavior.”).

including youth smoking, nutrition, and seat belt use. In recent years, public health has also tackled violence issues, and that experience might prove particularly valuable in addressing societal attitudes and behaviors that underlie human trafficking. These insights could be applied to help address demand-related issues by countering attitudes and behaviors that promote tolerance of exploitation of others for sex or cheap labor. They also could be utilized to further confront supply-related issues, including by improving identification of risk factors associated with vulnerability to trafficking.

Finally, public health emphasizes the importance of identifying essential partners, engaging affected communities, and fostering community coordination and preparedness. Public health's approach to violence aims to involve a broad range of sectors of society, including "education, labor, public housing, media, business, medicine, and criminal justice." A similar effort is needed to combat human trafficking, the response to which too often is left largely to law enforcement and social services. Engaging partners in all sectors of society helps enhance prospects for early intervention and, ultimately, prevention. Public health campaigns also recognize the importance of partnering with target populations. Finally, public health puts

91. See, e.g., Matthew C. Farrelly et al., Evidence of a Dose-Response Relationship Between "truth" Antismoking Ads and Youth Smoking Prevalence, 95 AM. J. PUB. HEALTH 425, 428–29 (2005) (finding antismoking ads aimed at youth successful in reducing youth smoking); David R. Holtgrave et al., Cost–Utility Analysis of the National truth® Campaign to Prevent Youth Smoking, 36 AM. J. PREVENTIVE MED. 385, 385 (2009) (finding that the "truth" campaign not only reduced youth smoking but did so economically).


93. See, e.g., Vinod Vasudevan et al., Effectiveness of Media and Enforcement Campaigns in Increasing Seat Belt Usage Rates in a State with a Secondary Seat Belt Law, 10 TRAFFIC INJ. PREVENTION 330, 337–38 (2009) (attributing a significant increase in seat belt usage among drivers and passengers to the combination of a media campaign and law enforcement).

94. Mercy et al., supra note 86, at 13. See generally Hemenway, supra note 89, at 643–44 ("[T]he most promising approach to reduce firearm injury is to emphasize prevention [and] focus on the community," which "can be contrasted to the often reactive, individual focus of . . . traditional criminal justice.").

95. Todres, supra note 61, at 476–78.

96. Mercy et al., supra note 86, at 16.

97. Todres, supra note 61, at 493–95 (discussing the importance of engaging numerous sectors of society in addition to law enforcement and social services, including health care, education, media, the tourism industry, airline industry, shipping industry, transportation sector, textiles industry, and others).

98. WHO et al., CONTRIBUTING TO ONE WORLD, ONE HEALTH: A STRATEGIC FRAMEWORK FOR REDUCING RISKS OF INFECTIOUS DISEASES AT THE ANIMAL-HUMAN-ECOSYSTEMS INTERFACE 32 (2008), available at http://www.oie.int/downld/avian%20influenza/owoh/OWOH_14Oct08.pdf (recognizing the importance of "a bottom-up approach, which recognizes the needs of those most directly concerned and which emphasizes
an emphasis on preparedness and coordination among stakeholders. To date, gaps in coordination have been a persistent problem in antitrafficking responses. Overall, public health methodologies offer both new perspectives on how to approach the issue of human trafficking and a wealth of experience in addressing issues underlying human trafficking.

C. A Development Perspective

International development has important insights and skill sets to offer. Three development themes in particular are relevant: poverty alleviation, sustainability, and community partnerships. First, development law and programming are aimed primarily at alleviating poverty. Reducing poverty is one of the central components of the U.N. Millennium Development Goals. As poverty plays a significant role in vulnerability to all forms of exploitation, including human trafficking, socio-economic development aimed at reducing poverty can help address one of the key risk factors related to human trafficking.

Second, international development emphasizes the central importance of sustainability of programs. Although sustainability is often viewed as community involvement [that] ensure[s] the participation of women” in any strategy for reducing the risk of infectious diseases).


100. U.N. Secretary-General, Improving the Coordination of Efforts Against Trafficking in Persons: Background Paper of the Secretary-General, at 12 (2009), http://www.un.org/ga/president/63/letters/SGbackgroundpaper.pdf (noting that poor coordination of human trafficking responses is a “recurrent theme”). There have been significant challenges with coordination among entities working within the United States on these issues. See, e.g., CAL. ALLIANCE TO COMBAT TRAFFICKING & SLAVERY TASK FORCE, HUMAN TRAFFICKING IN CALIFORNIA: FINAL REPORT OF THE CALIFORNIA ALLIANCE TO COMBAT TRAFFICKING AND SLAVERY TASK FORCE 8 (2007), available at http://ag.ca.gov/publications/Human_Trafficking_Final_Report.pdf (“The delivery of and access to victim services are not always well coordinated throughout [California].”).

101. Peter Oakley & Ian Clegg, Promoting Participatory Development as a Strategy of Poverty Alleviation in Sub-Saharan Africa: A Review of Some Current Practice, 14 J. SOCIAL DEV. AFR. 31, 32 (1999) (“Strategies to tackle poverty in Africa have been a feature of international development programmes since the wave of independence and emergence of post-colonial states in the 1960s.”).


103. See supra note 19.

relating to natural resources issues, 105 ensuring that programs continue to thrive and meet their goals over time is relevant to all areas of socio-economic development. For example, health care interventions and programs must be designed so that they become self-sustaining over time, rather than requiring ongoing donor resources. In short, sustainable development means a "strong commitment to social equity, with a view that access to livelihood, good health, resources and economic and political decision making are connected." 106 Focusing on sustainable programming is essential in the human trafficking context. As noted above, law enforcement and victim assistance both deal with the harm after it has occurred. Continuing to emphasize only these post-harm aspects of the issue dooms antitrafficking efforts to an endless cycle of pursuing perpetrators and trying to assist survivors. It is essential, therefore, to ensure that resources invested in antitrafficking initiatives result in sustainable progress toward preventing harm in the first place.

Third, community partnerships are essential to the successful design and implementation of antitrafficking law. To date, much of the law and policy developments of the past decade occurred with little or no input from survivors or representatives of at-risk communities. At times, survivors are called upon to provide testimony, but their role is often viewed as helping mobilize support for an initiative rather than providing expertise. International human trafficking law reinforces this limited role for survivors—as noted above, the Trafficking Protocol contemplates survivors having input only in the context of criminal proceedings against traffickers. Survivors must be a part of the design, implementation, and evaluation of laws, programs, and policies aimed at combating human trafficking. Vulnerable communities also must be represented at every stage. Engaging target communities will help foster greater community support for antitrafficking

105. See e.g., Bill Hopwood et al., Sustainable Development: Mapping Different Approaches, 13 SUST. DEV. 38, 39 (2005).

106. Id. at 46; see also DEBORAH EADE, CAPACITY-BUILDING: AN APPROACH TO PEOPLE-CENTRED DEVELOPMENT 5 (1997). Eade writes:

To be sustainable, the processes of change must promote equity between, and for all, women and men; and enhance their ability to gain a decent living, both now and in the future. Sustainability is more than a matter of financial self-reliance: it depends on people’s social and economic capacity to withstand and surmount pressures on their lives, and ways of life.

Id. (citation omitted).
initiatives.107 Their involvement also helps ensure that programs and policies are culturally appropriate.108 Partnering with members of local communities enables programs to benefit fully from existing local capacity.109 It also facilitates consideration of a broader range of ideas, increasing the likelihood that policy makers and other stakeholders together will identify and pursue better ideas for prevention programs and discard the less viable ideas.110

International development has a wealth of experience—both in terms of what works and what does not work—in dealing with poverty alleviation, sustainability, and community partnerships. Each of these areas also looms large in the human trafficking context, and therefore drawing on development expertise can help strengthen antitrafficking initiatives significantly.

CONCLUSION

In widening our lens and viewing the problem of human trafficking from a range of perspectives, the limits of a criminal law approach and the value of other approaches become clear. The current scheme, with its significant reliance on criminal law, is not well designed to stop human trafficking. Therefore, other perspectives are needed, as they bring additional laws and regulations to bear on human trafficking. These perspectives also help incorporate important methodologies that will help strengthen antitrafficking law and programming. By drawing on different perspectives, we can


108. See Besette, supra note 107, at 16 (arguing that development must be defined by each community's cultural context and that various groups in the community "must play an active part in the process"). On the challenges of engaging historically marginalized communities, see, for example, Todres, supra note 16, at 26–27.

109. Swaminathan S. Aiyar, World Bank, Sourcebook for Community Driven Development in Sub-Saharan Africa 27 (2001), available at http://siteresources.worldbank.org/INTCDD/Resources/africasourcebookcdd.pdf ("People who have survived in difficult economic and political conditions have considerable knowledge and capacity."); Eade, supra note 106, at 51 ("An approach to development that does not take into account the diversity of people’s experiences also risks failing to build on their many varied capacities.").

110. See Udaya Wagle, The Policy Science of Democracy: The Issues of Methodology and Citizen Participation, 33 Pol’y Sci. 207, 207 (2000) ("[C]itizen participation is important ... to improve the quality of information provided to make appropriate policy decisions . . . ."); Jennings, supra note 107, at 2 ("[P]articipation increases the odds that a program will be on target and its results will more likely be sustainable."); see also David Orentlicher, Diversity: A Fundamental American Value, 70 Mo. L. Rev. 777, 780 (2005) ("[D]iversity both promotes good outcomes and discourages bad outcomes.").
engage other sectors of society in addressing the problem of human trafficking. In the end, achieving meaningful progress in reducing human trafficking will require the participation of every sector of society. That includes not only law enforcement and social services, but also the health care sector, education sector, transportation sector, tourism industry, airline industry, shipping industry, textiles industry, media, and many other stakeholders that either come into regular contact with vulnerable populations or whose business benefits from or facilitates (often unknowingly) human trafficking.

After more than a decade of experience, the international community has a body of evidence from which it must learn in order to move forward in a more constructive fashion. Each instance in which a trafficker is apprehended and prosecuted or a survivor is assured needed services should be celebrated. However, each of those cases also reflects a failure to prevent the harm from occurring in the first place. We must do better. To make significant progress, every sector of society must be involved and all ideas and perspectives must be brought to bear, so that one day we can celebrate the end of this gross violation of human rights and human dignity.