The Current Landscape of Human Trafficking Law

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1 Introduction

Slavery should be the best term. But it carries still-fresh imagery in the collective memory that does not cover the full spectrum of slavery's contemporary manifestations. Human trafficking is slavery, but its definition goes beyond the conventional sense of owning humans as property. It requires neither movement nor ownership nor commerce, and while it might be more accurate to retain the word "slavery," human trafficking is coerced exploitation in all forms [1]. Human trafficking is, most generally, the taking control of people and forcing them into labor or sexual servitude [1].

Like most legal fields in this country, there is no unitary "law of human trafficking." Laws are patchworks that may or may not apply everywhere, depending on which body creates them. Federal laws might apply everywhere, but state law is not so conveniently uniform. Further complicating the patchwork is that even though federal law may apply everywhere, courts do not always interpret laws uniformly across the country. This chapter attempts to provide a brief background on the structure of law generally in the United States with an overview of the various legal schema fighting human trafficking. It is important to remain aware that legal questions are not easily answered. The contents of this chapter are an informational introduction to a broad and complex field of law, and therefore cannot be relied on as legal advice.

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2 Content

2.1 Three Branches on Two Levels

First, it is important to clarify what "law" refers to here. For many, "the law" means the statutes enacted by elected representatives in Congress or state legislatures. For others, "the law" refers to the policing and prosecution required to enforce statutes. Another conception is that law is what happens in courts, and justice may be its goal. They all count as "law." Those essential facets side law's broader definition as "[t]he regime that orders human activities and relations through systematic application of … force" [2].

In two levels, federal and state, the great force of law splits into three powers. One power *creates* laws, a second power *enforces* those laws, and a third power *interprets* the laws when questions arise. These powers (and the branches that take their names from them) are the legislative, executive, and judicial powers, respectively. It is important to differentiate these branches of government because one cannot understand a field of law like human trafficking without understanding that each branch has a different role in combating it—a President cannot change Congress's laws, just as amending a law will not cure lax enforcement. By the end of this chapter, the reader will understand that the three roles work together (and separately) to combat human trafficking.

Another important theme is that the power of law in the United States also splits into at least two levels: state and federal. On the one hand, the Constitution states that federal law is the "supreme law of the land" [3]. On the other, states (or "the people"), by default, hold any power that the Constitution does not specifically grant the federal government [4]. It can be an ordeal determining when federal law takes precedence over state law, but readers should know at least that human trafficking laws exist in both federal and state spheres. There is not enough room to detail each state's legal framework to combat human trafficking, but the reader should know that states play large and varied roles in combatting human trafficking. All states have some degree of human trafficking laws. Some are more comprehensive than others.

3 Anglo Law Inheritance

When the American colonies won their independence from England, they also won sovereignty over their laws. At the same time, the former colonies inherited a body of law that they were not entirely sure they wanted to keep [5], one that had evolved over hundreds of years in English courts. The system, called common law, relied, and continues to rely, on law developed by judges to fill in the blanks left by a lack of written legislation (first from the Crown, then from Parliament, and now from Congress and state legislatures).

Absolute prohibitions on human trafficking are relatively recent. History has been rife with it, and there have long been laws governing the treatment of slaves [6]. By

the ninth century, an early restriction on the slave trade in England banned selling Christian slaves abroad [7]. But neither the Crown nor Parliament had made any formal attempt to end slavery by the time the early English colonists arrived in the Americas. By the time English courts declared slavery abolished in England, slavery had already taken root in the American colonies, and its illegality in England did not apply to the colonies [8]. By the eve of American independence, English courts had taken the approach that, since slavery had never been formally legalized, it could not technically be legal without Parliament explicitly saying so [9]. When the UK Parliament did finally address the issue, it abolished slavery in nearly the entire empire, but that was 50 years after the end of the American Revolution and therefore 50 years too late [10]. As a result, the United States would face bitter infighting that would culminate in a gruesome war before it could finally abolish slavery.

4 Constitutional Background

The Thirteenth Amendment to the United States Constitution is the foundation of federal law prohibiting human trafficking [11]. Its 1865 ratification abolished slavery and involuntary servitude, following the Civil War's end, and authorized Congress to pass enforcement laws. Before that, the Constitution, reflecting a series of compromises between slavers and abolitionists, provided varying degrees of protection to what we now call human trafficking.

The Constitution originally barred Congress, until 1808, from banning slave importation from abroad [12]. Congress did ban importing slaves in 1808 [13], but many states continued to allow slavery itself, as well as domestic slave markets. Another of the Constitution's sections granted slaveowners the right to reclaim runaway slaves or indentured servants from states that had prohibited slavery [14].

The Constitution, however, was very limited in scope before the Civil War. It was not a document to centralize authority. Instead it was, for the most part, a narrow grant of authority to the new federal entity and a restraint on its potential growth. States continued, as they do today, as the prime lawmakers for activity within their borders. So, while the system of black slavery was banned by constitutional amendment in 1865 [11], other forms of involuntary servitude persisted under state laws.

5 Legislation/Statutes

5.1 Federal Law

While involuntary servitude has plagued humanity throughout its history, the first comprehensive human trafficking legislation in the United States would not come until the year 2000. Still, between the Thirteenth Amendment and the start of the twenty-first century, the United States Code (USC) has gradually built a framework for punishing the full scope of what we now call human trafficking. The USC can be accessed, free of charge, through the Office of the Law Revision Counsel of the

United States House of Representatives' website [15]. The USC's Title 18 is the criminal code. Its 77th chapter is *Peonage, Slavery, and Trafficking in Persons*, and it represents the core of current human trafficking law, (so, to a lesser extent, does its 117th chapter—*Transportation for Illegal Sexual Activity and Related Crimes*) [16]. This section describes how this core came into being and how other laws have accreted around it in recent years.

Despite having to wait until 1808 to ban importing slaves [13], Congress could, and did, ban *exporting* slaves in 1794 [17]. By 1820, Congress began deeming ship crews dealing in slaves to be pirates, which carried a death sentence if convicted [18]. Congress banned buying or selling slaves in the District of Columbia in 1850 [19]. It took limited action to further restrict the trafficking of humans during the Civil War. One example was the 1862 ban on Americans participating in the "the Coolie Trade," a system of involuntary servitude involving Chinese laborers [20]. Congress also waited until 1862 to free the District of Columbia's slaves [21], shortly after doing so in the territories that had not yet become states [22].

After the Civil War, the United States ratified the Thirteenth Amendment abolishing slavery. Congress soon began passing laws providing for abolition's enforcement [23]. In the wake of the Thirteenth Amendment's ratification, Congress passed one of its first laws banning involuntary servitude under a name other than slavery: peonage—i.e., debt bondage [24]. In doing so, it indirectly recognized that involuntary servitude was not limited to the South's plantation system of black slavery. In peonage's case, the statute initially targeted the race-neutral system found in the former Spanish territory that would become the state of New Mexico. This system allowed people to fall through debt into what the Spanish called *peonaje* (peonage) [25]. While initially targeting peonage in New Mexico, the Act's language was broad enough to eventually extend to debt bondage throughout the United States [26]. Despite its illegality, peonage would continue and grow. Several years later, Congress would target another group of traffickers called *padrones* who imported Italian children into involuntary servitude in the United States [27]. By the 1870s, these provisions had become codified into Titles 70 (Crimes) and 71 (The Slave-Trade) of the Revised Statutes of the United States, a precursor to the United States Code [28].

In the 1880s, a new term began circulating in the press: "white slavery" [29]. Through a mix of truth and newspaper sensationalism, the public began awakening to the idea that prostitution might not be merely an immoral choice made by immoral women. Despite the damning racial implications baked into the term "white slavery," the rhetoric opened a dialog that had an important effect in furthering the development of federal anti-trafficking law. This next step, which would come in 1910, was the Mann Act, officially titled the White-Slave Traffic Act [30].

The Mann Act, at its most basic, prohibited the moving of women across state lines "for the purpose of prostitution[,] … debauchery, or any other immoral purpose" [31]. A reasonable question might be why Congress required the crossing of state lines to trigger Mann Act enforcement. The answer to this is based on the fact that Congress may only legislate on topics the Constitution has granted it [32].

Instead of basing the Act on the Thirteenth Amendment's specific grant of power to enforce slavery's abolition, Congress based its power to legislate the Mann Act on the Constitution's Commerce Clause. The Commerce Clause grants Congress the ability "to regulate Commerce … among the several States" [33], which, in 1910, meant commerce that crossed state lines [34]. As a result, many federal statutes are framed around targeting conduct "involving interstate commerce."

5.2 Trafficking Victims Protection Act of 2000 (TVPA)

Toward the end of the twentieth century, gaps in the law of human trafficking began showing that required a more robust legal framework. The core human trafficking laws had been on the books for a long time—many of them since the early 1800s. The problem was not one of archaic laws in a modern world—much of the core laws remain even today remarkably similar to how they first appeared in legislation. The problem was that traffickers were successfully operating in gray areas on the fringes of what the core laws covered. These more insidious methods required that the gaps be filled with legislation, and that legislation would become the Trafficking Victims Protection Act of 2000 (TVPA) [35]. The TVPA has been amended and strengthened multiple times since the original legislation became law [36, 37–43, 44], and it is still developing.

One of the TVPA's most potent measures was an addition to Chapter 77 extending the scope of what constitutes coercive force. A new section to Chapter 77 criminalized coerced "labor or services" through insinuations that someone, whether the victim or anyone else, "would suffer serious harm or physical restraint" [45, 46]. The addition also extends punishment to people who, without directly participating, gain from human trafficking when they either know or should know that it's happening [47]. Those two facets of the new section removed much of traffickers' ability to skirt the intent of slavery's prohibition. First, the new section meant that those using psychological coercion could be prosecuted. Second, criminals—especially in organized crime—find ways to distance themselves from their crimes by using intermediaries. This can make it hard to pin a crime on someone who ordered the crime but did not directly commit it. Chapter 77's new section allowed prosecutors to tackle criminals responsible for human trafficking that did not actively do the deed. The vast majority of human trafficking prosecutions fall under that section or another TVPA addition, Section 1591 [48].

Section 1591 criminalizes two types of sex trafficking [49]. First, it bans sex trafficking using force, fraud, or coercion. Second, it bans sex trafficking *of children* by any means whatsoever, not just by force, fraud, or coercion. This second aspect removes the burden from prosecutors to prove that someone used force, fraud, or coercion when children are involved. So anyone who "recruits, entices, harbors, transports, provides, obtains, or maintains" someone in order "to engage in a commercial sex act" will be automatically afoul of the law when the victim is under 18. With adult victims, there must be force, fraud, or coercion. The section also

punishes those who benefit from this kind of sex trafficking when they know or should know that it is occurring. So between Section 1591's treatment of sex trafficking and Section 1589's treatment of forced labor, there is a huge range of conduct that essentially includes most of the conduct in Chapter 77's older provisions and expands its coverage. Other additions included a separate crime for traffickers who take victims' passports or immigration documents as well as a requirement that traffickers pay restitution to their victims [50]. Victims even have the ability to file civil suits against their traffickers [51]. These additions have provided valuable padding to Chapter 77's core provisions.

Punishing criminals is only one of three fundamental facets to human trafficking legislation. The other two involve protecting victims and preventing trafficking in the first place [52]. The original TVPA provided the beginnings of a framework for caring for victims. The most concrete provisions were for for immigrants, since they are especially vulnerable to trafficking, and could have faced deportation before the TVPA. After the TVPA, immigrant victims of severe forms of trafficking are able to remain in the country and remain eligible for government benefits in a status that is effectively the same as refugee status [53]. Not only did this remove a way that victims have been punished, it also incentivized victim cooperation in the efforts to prosecute traffickers. This section, as expanded over the past 20 years, provides for long-term assistance for children, grants for victim care and housing, protections for victims in custody, training for government officials, and information for victims [54].

Prevention finds the widest spread of statutory law, and its measures touch on everything from foreign relations to public health to immigration to domestic security. The prevention side seeks to stop human trafficking before it happens and break the patterns that lead to exploitation. Legislation aimed at preventing human trafficking includes the deterrent measures found in Chapter 77's criminal provisions, but also focuses on helping inform and empower those vulnerable to trafficking. Its measures primarily seek to inform the public, train government officials, and strengthen vulnerable communities.

5.3 State Laws

It would take an entire chapter to provide even a basic overview of state laws combatting human trafficking [55]. Each state presents its own legal system, its own problems, and its own legislature. As a result, there are 50 different systems that approach this problem in ways that have a lot of overlap, but also many differences. While this is not the place to detail each state's laws, readers living in the United States should be aware that federal law is not the only law of human trafficking. States are, after all, the primary law enforcement entities. They possess what is known in constitutional law as "the police power," under which they remain the primary legal force except where the Constitution expressly delegates power to Congress [32]. There are attempts, though, at crafting uniform laws, as well generally as toward human trafficking specifically.

5.4 Attempts at Uniform State Human Trafficking Laws

State law can be an irregular patchwork of conflicting—or at least incongruous—laws [56]. But states often base legislation on what they have seen work in other states. Many of those laws, too, are based on wording created by the Uniform Law Commission (ULC), a non-profit and non-partisan organization that has provided language for huge amounts of state legislation [57]. In 2013, the ULC released its model human trafficking legislation, the Prevention of and Remedies for Human Trafficking Act (PRHTA). As of early 2022 nine states plus one territory (the U.S. Virgin Islands) have adopted it in some form [58].

The PRHTA is important for the same reason the Palermo Protocol (discussed below) is important. It provides a framework for consistent punishment of traffickers, protection for victims, and efforts at prevention that include public awareness and interstate partnerships. Like the Palermo Protocol, it is aspirational, in that its provisions are merely recommendations until a legislative body enacts them. Most importantly, it is a foundation to build upon. Considering how slow the process can be to change the law, it is impressive that those nine states have enacted the PRHTA in the short amount of time since its release. That number will likely grow in coming years.

6 Enforcement Through Federal Administrative Agencies

The executive branch enforces Congress's laws. This power to execute laws is vested in the President, but delegated to various administrative agencies either through Congress's explicit directions or through the President's prerogative. Having a feel for Congress's laws only shows part of a picture that is incomplete without an idea of how the executive branch enforces those laws.

The President, like any executive, will have to conduct operations without being told all of the details on how to conduct them. When Congress passes a law, for example, it is up to the President (and the administrative agencies under the President), to decide how best to execute the law. Sometimes Congress will order the head of an agency to issue rules that clarify how the law will be executed. These rules end up in the Code of Federal Regulations, which is vast, but available online and becoming easier to search and browse as the government modernizes its publicly available legal information [59].

In addition to the rulemaking the TVPA would require from the executive branch, Congress also ordered the President to assemble an interagency task force to monitor and fight human trafficking [60]. The Secretary of State heads the task force, and it must include the heads of several named departments, and the President has discretion to name other officials to the task force [60]. Congress expects this task force to come up with ways to coordinate among the various federal agencies, state entities, and international bodies to bring forth the law's intent. As touched on above, this is an example of the degree of discretion that the executive branch has in implementing Congress's laws.

The section sets out several responsibilities for the task force that include what kind of record keeping and reports it will issue as well as the goals for a separate Office to Monitor and Combat Trafficking [60]. Knowing what the statute says is one thing, though. Knowing how the executive branch brings it to fruition is another. The agencies assembled into the task force give a hint into how they fit together to prosecute criminals, protect victims, and prevent human trafficking. Some, like the Department of Justice, will heavily play the prosecution role [61]. Others, like the Department of Health and Human Services, play more of a victim protection role [62]. One might expect the Department of Education [63] and the Department of Labor [64] to focus more on prevention. At the same time, each department's role reinforces the others.

A concrete example of the executive branch giving life to Congress's TVPA directions is the National Human Trafficking Hotline. The Hotline is an interesting example of how an otherwise vague legal mandate for agencies to cooperate to protect victims became, through administration enforcement, a tangible resource. The TVPA called for grants to be given to organizations that would help the broader goal of victim protection. It did not say who should get the grant money or what, specifically, the recipients should do with it, but the Department of Health and Human Services (HHS) had a vision of what it wanted. One of the grants it made led to an organization called the Polaris Project establishing the National Human Trafficking Hotline [65, 66]. While the HHS funds the Hotline, Congress has the final say over the details or existence of that funding, or the way that the Hotline is publicized [36, 67]. Any time Congress makes a law, administrative agencies must do their best to give meaning to those laws through enforcement, just as the judicial branches must make sense of them through interpretation.

7 Judicial Approaches

Judges have two essential functions relevant to the operation of human trafficking law—and law in general. First, judges must interpret what the laws mean and what laws apply when the answers are not always clear. Second, judges will apply the law to the facts of whatever cases are before them. Sometimes, in the case of some civil trials or when criminal defendants waive the right to a jury trial, judges will also determine facts and decide guilt; but that is generally a jury's role.

7.1 Interpretation

If legislation were always clear, there would be little need for professional judges or lawyers. Interpretations can vary over time and have lasting effects on all facets of life. In the case of human trafficking, one such interpretation led to some of the legal gaps that Congress sought to remedy in passing the TVPA. This 1988 case, United States v. Kozminski [68], dealt with Chapter 77's involuntary servitude statute. The case dealt with a couple who operated a farm. They had two mentally handicapped

men working there in terrible conditions. The couple kept the men working there through psychological coercion, and prosecutors asked the Court to consider this involuntary servitude.

After a jury found the Kozminskis guilty, they appealed and the case worked its way up to the United States Supreme Court. Government lawyers, wanting to preserve as many tools as possible to fight involuntary servitude, urge a broad interpretation of the term that would include "compulsion of services by any means" [68, p. 950]. The Court felt this proposed interpretation would include "psychological coercion as well as almost any other type of speech … to persuade a reluctant person to work" [68, p. 950]. The Court was not comfortable extending the law that far (that is Congress's job, after all), and it felt that "the risk of arbitrary or discriminatory prosecution" inherent to broad legislation was too great [68, p. 950]. So it adopted a narrow interpretation of involuntary servitude that required, for adults at least, that the coercion be by actual or threatened physical force (putting them in chains, say) [68].

That single visit to the Supreme Court led to an immediate and drastic reduction in the scope of what could be punished under Chapter 77's ban on involuntary servitude. But it also planted a seed that would grow into the will to enact the TVPA, and Congress called out the case by name as part of the TVPA's purpose [69]. It is not just the fate of a defendant that can turn on a court's interpretation of a single word—entire fields of law can change.

7.2 Sentencing

When a law's interpretation has been settled, a court will have to apply it. In a criminal case, it will generally be the jury's role to apply the law to the facts of the case to determine guilt. Once a defendant is found (or pleads) guilty, it falls upon a judge to sentence the guilty party. To assist judges in that effort, the United States Sentencing Commission issues sentencing guidelines [70]. These guidelines are not mandatory [71], but they have starting point for judges weighing sentences [72]. In practical terms, this means that judges have a great deal of discretion when choosing how long to sentence convicted traffickers. While there is a lot that goes into calculating the guidelines' sentence ranges, anyone can access the materials and see what is considered.

8 International Efforts

Human trafficking knows no borders, and combatting it requires multi-national cooperation. The tricky part about international law is that each country is responsible for enforcing it. No international entity forces countries to abide by treaties—only diplomacy or war can do that. Still, countries normally find it beneficial to do what they say they will do after signing a pact—otherwise other countries won't bother cooperating with them.

In the United States, there are essentially two things that can happen with a treaty. In both, the President will have signed an agreement with another country or countries. But for it to become binding law, the Senate must ratify the treaty by a two-thirds majority [73]. Without Congress ratifying it, U.S. cooperation is merely at the whim of whoever is President at any given time.

The earliest U.S. treaties operated in a world of ubiquitous slavery; therefore, many early treaties covered one country's treatment or return of slaves to another [74]. Some of the earliest U.S. treaties negotiated provisions banning the enslavement of U.S. citizens [75]. At the same time, the United States negotiated many treaties even before its own abolition of slavery that aimed at either limiting the growth of, or ending altogether, slavery. The 1814 Treaty of Ghent between the United States and Britain, for example, which ended the War of 1812, declared the slave trade "irreconcilable with the principles of humanity and [j]ustice" [76]. The two countries pledged their desire "to promote its entire abolition" [76]. Even after the Thirteenth Amendment's abolition of slavery, numerous treaties into the twentieth century reflect ongoing efforts to extinguish slavery [77, 78]. So rather than considering slavery to have ended with the U.S. Civil War only to resurge in the late twentieth century, it is important to recognize that slavery has never disappeared.

The United States signed an early multilateral anti-human-trafficking agreement in the twentieth century's early years [79]. The 1904 agreement sought cooperation for identifying and preventing international traffic in women "intended for debauchery" [79]. The 1926 Slavery Convention showed further awareness that slavery could be more insidious than had previously been accounted for. The Convention recognized situations "analogous to slavery," though the original text still limited its definition of slavery to cases where someone exercised "rights of ownership" over another [80]. The Convention's definition would eventually expand to include debt bondage, serfdom, forced marriage, and child labor [81].

The same legal gaps, however, that led to the Congress's enactment of the TVPA also led the international community to revamp its treatment of human trafficking. The vehicle for this new attempt to modernize international human trafficking efforts would become known as the Palermo Protocol [82], and the Senate would approve it in 2004. The Palermo Protocol is a supplement to the 2001 United Nations Convention Against Transnational Organized Crime [83]. Its most important function is an attempt at standardizing the definition and language of human trafficking. Its third article sets that definition. First, there must be the act of "recruitment, transportation, transfer, harbouring or receipt of persons." Second, the act must include the use or threat of "force or other forms of coercion," abduction, fraud, deception, abuse of power, abuse of someone vulnerable, or the exchange of "payments or benefits to achieve the consent of a person having control over another person." Third, the goal of the act must be exploitation, which is defined broadly. The broad scope of exploitation includes "sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs" [82].

It's important to note that the Palermo Protocol itself does not change or dictate any country's laws. A country adopting the Protocol is making a commitment to conform its laws to the Palermo Protocol's spirit and function. It is the country's

responsibility to act on that commitment as it sees fit, and the degree to which countries match the Protocol's provisions reflects their collective wills. There may be diplomatic pressure to reform law, but it is up to the participating countries themselves to do it.

9 Conclusion

The law of human trafficking is not simple, and this chapter is only a superficial introduction to the legal framework currently in place. The general theme of all human trafficking laws worldwide is that they seek to prosecute offenders, protect victims, and prevent trafficking, before it starts, through public awareness and partnerships. These laws target the purposeful exploitation of vulnerable individuals through force, threats, or coercion by certain acts which reduce them to or maintain them in a state of servitude. The reader should now be familiar with how these laws came into being and how they currently relate to each other.

This basic understanding of the law of human trafficking will leave readers better able to identify potential victims of human trafficking and help them. Readers should have the vocabulary to make meaningful contributions to organizational policies, especially those measures aimed at protecting the victims of human trafficking. What the reader will not be, however, is an expert on the law, and it is crucial to seek legal counsel when important questions arise.

Discussion Questions

- Look up the law for the state in which you live.
- State the definition of human trafficking according to the Palermo Protocol.
- Identify the protections afforded to victims of human trafficking in the U.S.

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