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Victims of Trafficking, Reproductive Rights, and Asylum

Diana Tietjens Meyers

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[–] Abstract and Keywords

Sex trafficking is a crime prohibited by international law. Traffickers not only violate victims' rights to liberty and security of persons; they also violate victims' reproductive rights with potentially devastating consequences for their health and reproductive capabilities. Nonetheless, international antitrafficking and refugee law presents obstacles to viewing trafficking victims as refugees and granting them asylum. International law spotlights the crime of trafficking in persons and treats the human rights of victims as an ancillary matter, and domestic laws follow suit. However, a number of precedents in international and domestic law support construing trafficking victims as coming under refugee law and private oppression as included within refugee law. The chapter concludes by outlining arguments from reproductive rights to expand asylum rights to sex trafficking victims.

Keywords: sex trafficking, reproductive rights, refugee, asylum, human rights

The aim of this chapter is to extend and complement the compelling arguments that others have already made for the claim that women who are citizens of economically disadvantaged states and who have been trafficked into sex work in economically advantaged states should be considered candidates for asylum. These arguments cite the sexual violence and forced labor that trafficked women are subjected to along with their well-founded fear of persecution—stigmatization, social ostracism, and re-trafficking—if they are repatriated.¹ What has not been considered is that reproductive rights are also at stake. This chapter explains how reproductive rights are implicated in sex trafficking. Moreover, it contends that sex traffickers' abuse of women's reproductive rights is persecutory and that this persecutory abuse obliges destination states to offer asylum to transnational trafficking victims.

I start by tracing the emergence and encoding of reproductive rights doctrine in international human rights instruments. I then examine studies of women who are in posttrafficking recovery programs in order to ascertain the impact of their past experience of forced sex work on their reproductive freedom and health. On the basis of these findings, I maintain that, among other outrages, sex trafficking systematically violates victims' reproductive human rights. In view of this abuse, women trafficked into sex work might seem to be prime candidates for asylum in destination states. Yet economically well-off destination states are not particularly receptive to this idea, and international law provides some justification for their chilliness. Preliminary to challenging them, I explicate four ways in which international antitrafficking law and international refugee law interfere with viewing women trafficked into sex work as refugees and approving their applications for asylum.

The second half of this chapter undertakes to overcome those legal obstacles. In the interest of parsimony and because there are many continuities between US refugee law and antitrafficking law and the policies of similar destination states, I focus mainly on the United States in this part of the chapter. To anchor my argument, I spotlight two precedents in refugee law for taking reproductive human rights seriously and several precedents for treating trafficked women as members of a distinct social group as required by refugee law. I then urge that a law enforcement gestalt has gained undue influence over US legal practices where antitrafficking law intersects with refugee protection law. A human rights

gestalt is needed as a counterweight, for otherwise victims of sex trafficking and the reproductive abuse they have suffered are erased. Taking up a human rights perspective and mobilizing precedents, I show that respecting the reproductive human rights of women who have been trafficked into sex work entails that affluent destination states must recognize their right to asylum.

The ethical obligations of destination states that flow from this conclusion are twofold. First, it is incumbent on destination states, especially those that encourage sex trafficking by providing strong markets for paid sex work and little deterrence to sex traffickers, to offer an effective remedy to women victimized by transnational criminal organizations operating in their territory. Because the principal remedies that they have at their disposal are asylum and medical care, there is an ethical imperative to recognize traffickers' violation of the reproductive rights of trafficked sex workers as a form of persecution, to amend antitrafficking legislation to secure the right to asylum for sex trafficking victims, and to link refugee status to appropriate remedial health care. Second, there is an ethical imperative to ensure that immigration judges evaluate asylum claims advanced by trafficked women on their merits. But the conditions in which immigration judges work make them susceptible to being swayed by commonplace implicit biases against undocumented migrants, against poor women of childbearing age, and against sex workers. To curb these subconscious attitudes, I advocate reforming the institutions in which asylum cases are adjudicated in several respects. Without these reforms, equitable statutory remedies for women trafficked into sex work may come to nothing because of the illicit impact of implicit biases against trafficked asylum seekers. Both legislative and procedural reforms are vital to realizing women's reproductive human rights.

A Brief History of Reproductive Human Rights

Reproductive rights have figured in the human rights regime from the beginning. Article 16 of the Universal Declaration of Human Rights states that "men and women of full age ... have the right to marry and found a family." Subsequent covenants that transformed the aspirations of the Universal Declaration into international law amplify on this theme. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights reaffirm the right to marry and have children. Article 10 of the Covenant on Economic, Social, and Cultural Rights adds that working mothers should receive paid leave from work or leave with social security benefits before and after the birth of a child. Article 12, which recognizes the right to the "highest attainable standard of physical and mental health," also calls for the "reduction of the still-birth rate and of infant mortality." Prenatal care for pregnant women, safe birthing conditions, and adequate pre- and postnatal maternal nutrition are indispensable to achieving these aims. This acknowledgment of gender difference and women's specific role in reproduction is exceptional in the early development of human rights law. Perversely, the only other explicit affirmation of women's reproductive rights in these founding covenants provides for stays of death sentences for pregnant women (ICPR, Art. 6, Sec. 5).

It was not until late in the 1970s that women's reproductive rights gained the attention they deserve in the arena of international law. CEDAW, the Convention on the Elimination of All Forms of Discrimination Against Women, articulates a number of reproductive rights. With respect to employment, CEDAW emphasizes that workplaces should be safe for women in their reproductive years and during workers' pregnancies, that terminating pregnant employees is impermissible, and that provisions must be made for paid maternity leave or comparable social security benefits for working women (Art. 11). For the first time, the topic of family planning is featured prominently in a legally binding human rights document. According to CEDAW, health care services must include provision of family planning methods (Art. 12), and rural women must have access to the same information about and access to family planning techniques as urban women (Art. 14). After reiterating the right to consensual marriage, Article 16 declares women's all-important right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education, and means to exercise these rights." Whereas previous thinking about reproductive rights had focused on protecting women's reproductive health and function, CEDAW finally affirms women's right to reproductive freedom and self-determination.²

The right to found a family together with the right to reproductive health—for most women, this is necessary as a means to exercising the former right—is well established in human rights law. Although controversial in some quarters, the right to reproductive freedom has been steadily upheld in documents issued by international conferences on population and development and women's rights as human rights.³ Moreover, these consensus documents explicitly urge destination nations to extend full reproductive rights to migrants regardless of their legal status.⁴ Although the United States is not a State Party to the International Covenant on Economic, Social, and Cultural Rights, and it is one of the seven nations

worldwide that are not States Parties to CEDAW, in practice the United States realizes at least as many of women's reproductive rights as many of the States Parties to all of the treaties that encode these rights. I argue that fully realizing women's reproductive rights and eliminating inconsistencies in US law entail modifications in US refugee law with respect to victims of transnational sex trafficking as well as extending the right to reproductive health to these women.

Sex Trafficking and Reproductive Health

No one has accurate information about reproductive health outcomes resulting from sex trafficking because all well-designed studies are based on interviews with women who are receiving rehabilitative services and reviews of their medical records. These women represent a tiny minority of trafficked women. However, there is little reason to doubt that complete data would disclose at least as severe a problem. After all, whatever proportion of women who have left forced sex work with previously untreated, fertility-threatening sexually transmitted infections (STIs) and whatever proportion of women who have left forced sex work and report undergoing forced abortions, the proportions are likely to be greatly magnified the longer women are trapped in trafficking schemes.

Two widely cited, Coalition Against Trafficking in Women (CATW)-sponsored studies of the reproductive health consequences of sex trafficking rely on data collected from female sex workers with no attention to possible differences between trafficked and voluntary sex workers or between settings in which sex work is legal and settings in which it is criminalized.⁵ Forced sex work is always illegal under international law. The 2000 UN "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime," often called the Palermo Protocol, defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁶

The protocol goes on to specifically include sexual exploitation. Thus, trafficked sex workers have been tricked or coerced in the recruitment and relocation process, held in debt bondage or imprisoned in brothels at their destinations, or both. In what follows, I rely on studies that take care to distinguish voluntary sex work from forced sex work and to collect data exclusively from survivors of sex trafficking.

Stolen Smiles, an omnibus study of the health consequences for eastern European women trafficked into sex work in western Europe, reports that the single biggest concern of women in posttrafficking treatment programs is their future fertility.⁷ Although the study denies that infertility is an inevitable consequence of forced sex work, it also acknowledges that the women's fears are warranted.⁸ Only 38% of the women report consistent use of condoms, but the authors of the study suspect that this percentage is inflated because 29% of the women in this cohort had contracted STIs.⁹ Nor did many of them receive medical care befitting the risky nature of their work. Medical care mainly took the form of abortions—a procedure that greatly benefits traffickers and that these trafficked women also value.¹⁰ Unsurprisingly, though, abortions augmented the dangers to these women's reproductive health because they were often performed by unqualified practitioners in unsanitary environments.¹¹ Likewise, untreated chlamydia, pelvic inflammatory disease, and HIV threaten trafficked women's fertility, as do ectopic pregnancies.¹² Although *Stolen Smiles* is upbeat about some of the benefits of posttrafficking medical intervention, the study's concluding observation is grim: "Infertility and other resulting complications, including cervical cancer, may be the unalterable personal legacies of their nightmare."¹³ In violating women's right to reproductive self-determination, sex traffickers violate their right to reproductive health.

A study that documents the reproductive health experiences of Nigerian women trafficked into sex work reports similar but less detailed findings. Sixty-nine percent of the women contracted STIs, and the investigators stress that if left untreated, STIs can lead to pelvic inflammatory disease, ectopic pregnancy, and infertility.¹⁴ Ninety-one percent of the women in the study said they had no access to birth control.¹⁵ In a statistic that is somewhat puzzling in light of the previous one, 80% of the women said their traffickers forced them to have abortions or forced them to use contraceptives.¹⁶ Perhaps this statistic breaks down as follows: The percentage of this cohort that was forced to use contraceptives was very small, and the percentage that was forced to undergo abortions was very large. If so, the seeming tension between the claim that 91% of the women were not provided with contraceptives and the claim that an unspecified percentage of the women in the study were forced to use contraceptives would be resolved. The key point, however, is that regardless of whether women are procured in Eastern Europe or sub-Saharan Africa, sex traffickers

trample on their human rights to reproductive self-determination and reproductive health. There is no reason to believe that the reproductive rights of women trafficked from other regions fare better.

Women Trafficked Into Sex Work as Candidates for Asylum

The purpose of recognizing refugees and granting asylum to them is to protect people from persecution. The 1951 Geneva Convention Relating to the Status of Refugees defines a refugee as a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [sic] nationality and is unable or, owing to such fear, is unwilling to avail himself [sic] of the protection of that country.”¹⁷ The convention never defines persecution. But it is clear that refugees are fleeing a credible and wrongful threat of severe harm in their homeland, a threat that targets them because of their adverse positioning in a stratified social system or their opposition to the state. Moreover, were they to return to their homeland, they would in all likelihood be subjected to renewed persecution.

From one angle, women trafficked into sex work seem like prime candidates for refugee status and asylum. Widely cited legal scholar James Hathaway defines persecution as “a sustained or systemic violation of basic human rights demonstrative of a failure of state protection.”¹⁸ By definition, sex trafficking organizations violate their victims’ rights to liberty and reproductive self-determination. In colloquial terms, trafficked sex workers are sex slaves—their bodies are under the control of their traffickers and their customers. Moreover, the abusive conditions in which trafficked women are compelled to perform sexual services and the scarcity of medical services provided to them put their reproductive health and thus their right to found a family in jeopardy. These sustained violations of basic human rights notwithstanding, there are major obstacles to classifying trafficked sex workers as refugees.

Call the first obstacle the “smuggled woman” problem. A growing social scientific literature reveals that most adult women trafficked into sex work are also economic migrants—that is, they have knowingly availed themselves of trafficking networks in order to be smuggled into more prosperous nations in the hope of economic betterment. According to Dina Haynes, “Victims of human trafficking are people who [were] determined to improve their lives but had that desire exploited.”¹⁹ Likewise, Louisa Waugh points out that women in posttrafficking recovery programs think of themselves as “migrants who’d been brutalized because they’d had to resort to desperate measures.”²⁰ Thus, many trafficking scenarios start with a smuggling scenario. The would-be migrants are neither naïve country girls, nor are they duped about their employment prospects abroad.²¹ Rather, they are extremely poor women who have no job opportunities sufficient to meet their needs (often family members’ needs as well) in their home countries.²² Seeking a solution, they allow themselves to be recruited by known traffickers in order to obtain fake travel documents and assistance in crossing otherwise closed borders, all the while hoping to escape from poverty.²³ When they reach their destinations, they are forced into prostitution.

In many host countries, however, their cooperation with transnational criminal gangs in the procurement and transport process earns them the label “smuggled,” an epithet that excludes them from the category “trafficked.” In the United States, for example, the Trafficking Victims Protection Act of 2000 mandates procedures for handling alleged trafficking cases and for providing benefits to individuals certified as trafficking victims. Under the TVPA, qualifying for benefits comparable to those provided to refugees is contingent on being certified as “severely trafficked.” But to obtain certification, a female foreign national working in the US sex industry is for all practical purposes required to prove that she was kidnapped by, sold to, or deceived by a trafficker at her point of origin.²⁴ If certified as a victim of severe trafficking, the applicant may apply for a T visa, which can but does not automatically lead to permanent residence.²⁵ Although application numbers and rates of approval for T visas have increased markedly since the inception of the program, government statistics do not differentiate between applications from women trafficked into sex work and individuals trafficked for other types of labor.²⁶ Moreover, the number of T visas granted is tiny compared to estimates of the number of women trafficked for sex work in the United States.²⁷ Disappointing as these numbers are, they are unsurprising, for as we have seen, few of the women doing forced sex work are brought to their destinations through force or fraud. Absent certification as a severely trafficked person, trafficked sex workers apprehended by law enforcement officers are relegated to the status of undocumented migrants and processed for deportation despite being forced to perform commercial sexual services in the United States.²⁸ Consent at any stage of a woman’s journey into forced sex work nullifies her claim to be severely trafficked.

Call the second obstacle the “crime stopper” problem. What I have already stated about US policy regarding trafficking

victims adumbrates this additional obstacle. As the official title of the UN protocol on trafficking implies, international law views trafficking in persons first and foremost as an issue concerning catching and punishing transnational criminals as opposed to an issue concerning the human rights of trafficking victims. Arresting and prosecuting traffickers are prioritized over rectifying the wrongs done to trafficked victims of human rights abuse. Thus, international law obliges states to pass antitrafficking legislation independent of refugee law. The annual US Trafficking in Persons Report and the favorable treatment accorded countries that score well on prosecuting traffickers reinforce this orientation. One result is that women who claim to have been trafficked into sex work are funneled into the criminal law apparatus—in the United States they must agree to cooperate with prosecutors pursuing cases against traffickers—and into a special system of accreditation for extended residence that need not conform to established criteria for gaining asylum. Indeed, the criteria for obtaining a T visa in the United States are more difficult to satisfy than those that asylum seekers must meet.²⁹ By splitting antitrafficking law away from human rights law and segregating sex trafficking victims from refugees, the legal system closes off the human rights remedy *par excellence*—namely, asylum.

Call the third obstacle the “social group” problem. To qualify for refugee status, the Geneva Convention states, you must be persecuted “for reasons of race, religion, nationality, membership of a particular social group or political opinion.” Unfortunately, sex traffickers appear to be equal opportunity predators. They do not target women on account of their race, religion, or nationality and certainly not on account of their political views. Nevertheless, there are patterns of vulnerability that are typical of trafficked sex workers. They commonly report a history of domestic violence, alcoholic or absent husbands, children to support, jobs lost and ensuing debt, and/or insufficient income to pay for housing and other essential expenses; they come from regions where women do not enjoy equal rights and that are undergoing economic turmoil coupled with deepening poverty.³⁰ Still, an asylum claimant must be persecuted because she is a member of a distinct social group, and delineating such a social group for women forced into sex work poses a challenge.

Although persecution on account of gender is a recognized ground for refugee status, the category “women” is too broad to characterize the individuals persecuted by sex traffickers. Yet the social group consisting of women forced into sex work or at risk of being forced into sex work is unacceptable because it is circular—it defines the group targeted for persecution as those who have been persecuted in a particular way or are vulnerable to that type of persecution.³¹ If the diverse women trafficked into sex work are to gain access to the refugee system, the group(s) to which they belong must, on the one hand, be demarcated narrowly enough to exclude women who are not targeted by traffickers and must, on the other hand, be demarcated independently of being targeted by traffickers. Under US law and in line with the UNHCR’s guidelines, a cognizable social group is one whose members “share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.”³²

Call the last and least of the obstacles the “government role” problem. Recall that the Geneva Convention requires a refugee to be “unable or ... unwilling to avail himself [*sic*] of the protection” of the state she has fled, and Hathaway contends that persecutory harms must be “demonstrative of a failure of state protection.” Accordingly, paradigmatic cases of persecution are situations in which the state or an agent of the state inflicts or threatens to inflict harm rising to the level of persecution. But transnational trafficking gangs are not government institutions or agents appointed to act on behalf of government institutions. Consequently, it is not obvious that they can count as persecutors, and if they do not count as persecutors, the women whose rights they violate cannot count as refugees and are not eligible for asylum.

Fortunately, recent advances in refugee law render this problem more tractable than the others I have enumerated. In the United States, for example, the persecutor can be “persons or an organization that the government was unable or unwilling to control.”³³ Thus, a showing that transnational trafficking organizations operate with impunity or with the complicity of corrupt government officials in a trafficked woman’s home country suffices to establish the requisite government role in the persecution. And it is often uncontroversial that sending states have no power or wish to rein in trafficking.

Precedents for Asylum for Women Trafficked Into Sex Work

As I have pointed out, there is an international convention governing the treatment of refugees. For better or worse, implementation of the convention is left to each signatory state. As a result, there is considerable variation in the refugee legislation and judicial history of different States Parties. In the interest of parsimony, but with the caveat that uniformity is not to be found in this evolving and state-relative area of law, I will focus on US refugee law while occasionally noting

what I take to be more equitable policies elsewhere.

In 1996, the United States enacted legislation that directly addresses, albeit somewhat obliquely, one aspect of the reproductive rights of migrants. Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act makes a special allowance for certain victims of reproductive rights abuse:

A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.³⁴

Section 601 grants preferential treatment to those victims of reproductive rights abuse whose reproductive rights have been violated in the context of a coercive population control policy. In singling out this subset of victims, the law discounts the primary reason for ensuring access to the right to asylum in cases of persecutory reproductive rights abuse. To wit, coerced abortion and sterilization violate the right to bodily integrity that underwrites the right not to be tortured or subjected to cruel, inhuman, or degrading treatment.

Section 601 seems to have its moral priorities upside down and its psychology muddled. The provision exempts any Chinese person (men are often the beneficiaries of this provision) who has been forced to undergo an abortion or sterilization procedure or fears being forced to do so from proving persecution on account of her political opinion.³⁵ Yet the proximate wrong would seem to be being subjected to a nonconsensual medical procedure. Ever since the revelations that Nazi doctors performed sadistic experiments on concentration camp inmates, nonconsensual medical procedures have been considered anathema to human rights. Yet Section 601 identifies the principal wrong as a violation of freedom of conscience and the intrusion on bodily integrity as secondary. Unless nonconsensual abortion or sterilization is performed pursuant to a government's population control program, Section 601 provides no remedy. Furthermore, for many Chinese couples, especially in rural, agricultural China, having more than one child is an economic imperative or is dictated by the cultural value placed on begetting a son. It is odd, then, that Congress instructs the Immigration and Naturalization Service (INS) to project dissident political opinions onto people who may have quite different reasons for their resistance. What Section 601 fails to acknowledge is that the right to reproductive self-determination—the entitlement to choose whether and when to have children—is not contingent on people's reasons for exercising it. Even so, US hospitality to these ostensible political dissenters is limited, for Section 601 allows only 1,000 of them to be granted asylum in each fiscal year.³⁶

In view of the persistence of uneasy relations between China and the United States, China's one-child policy, and residual opposition to abortion rights in the United States, Section 601 appears to be an extension of US foreign policy and a sop to a US voting bloc that incidentally fulfills international human rights law. Nevertheless, it amounts to a fissure in US defenses against recognizing reproductive human rights for purposes of refugee law that I propose to exploit in the next section.

The groundbreaking US Board of Immigration Appeals (BIA) decision *In Re Fauziya Kasinga* (1996, hereafter *Matter of Kasinga*) furnishes another precedent pertinent to the availability of asylum as a remedy for reproductive rights abuse. *Matter of Kasinga* considers the application of a 19-year-old woman from Togo whose father had protected her from female genital mutilation (FGM) but whose relatives demanded that she undergo the procedure after her father passed away. I will skip over the details of her flight. What is crucial is that she requested asylum upon arrival in the United States. Although initially denied, the BIA granted her request on several grounds:

FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions.³⁷

Binaifer Davar, who helped to write the INS guidelines "Considerations for Asylum Officers Adjudicating Asylum Claims From Women" (1995), sums up the *Kasinga* ruling as an "unprecedented recognition and protection of a woman's right to bodily and sexual identity."³⁸ She then proceeds to argue that *Matter of Kasinga* sets the stage for a full appreciation

in US refugee law of the significance of the wrong of sexual violence and its links to violations of reproductive rights as well as the right to bodily and sexual integrity.³⁹ Davar condemns trafficking as a violation of the right to bodily and sexual integrity. Additionally, she underscores the attention paid in *Matter of Kasinga* to the harmful health consequences of FGM, and she points out that sex trafficking inflicts comparable harms on women.⁴⁰ Still, there is a noteworthy oversight in her argument. Although Davar places violations of reproductive rights under the umbrella of sexual violence, she does not make the connection between sex trafficking and violations of reproductive rights. I will make a case for that connection in the next section.

The evidence suggests that granting asylum to sex trafficking victims is by no means a growing trend.⁴¹ Nevertheless, there are US, UK, and Canadian cases in which victims of sex trafficking have been granted asylum.⁴² The US case is another slap at China's human rights record. A Chinese woman who was trafficked for sex work within China reached the United States, where she applied for and was granted asylum. The decision in the case notes that she would be vulnerable to re-trafficking if repatriated to China. The particular social group to which she belongs and which provides another part of the justification for granting her asylum is "women in China who oppose coerced involvement in government sanctioned prostitution."⁴³ Again, the case appears to pivot on a political opinion ascribed to the applicant while the harms of forced sex work and the attendant violations of human rights are consigned to the periphery.

The UK case seems less in thrall to ulterior geopolitical posturing and convoluted analysis. It concerns a Ukrainian woman who had been trafficked into Hungary for sex work, who escaped and returned to the Ukraine, but who then fled to the United Kingdom and sought asylum there. This case also recognizes that the woman would be in danger of resumed persecution by criminal gangs that traffic in women if returned to the Ukraine, and it defines the particular social group to which she belongs and on account of which she was initially trafficked as "women in Ukraine who are forced into prostitution against her will."⁴⁴ As glad as I am that the United Kingdom provided a safe haven for this woman, I am skeptical that this decision supplies a strong precedent for future asylum cases stemming from sex trafficking. Its definition of the particular social group on account of which the victim was persecuted is vulnerable to the charge of circularity, for it cites gender only in conjunction with persecution by sex trafficking to define the particular social group.

The Canadian case furnishes a potentially far-reaching precedent for granting asylum to trafficked women. This decision grants asylum to another Ukrainian woman who had been trafficked into sex work and cites her membership in the following particular social group as the basis for her persecution: "impoverished young women from the former Soviet Union recruited for exploitation in the international sex trade."⁴⁵ In my view, this formulation breaks new ground because it incorporates the gender, age cohort, and economic status of the victim as well as the social and economic upheaval in the victim's homeland into the set of characteristics that define the individuals whom transnational trafficking organizations single out for persecution. Unlike the UK decision, the Canadian decision avoids collapsing into circularity by conjoining gender with multiple attributes that are known to figure in traffickers' targeting tactics.⁴⁶ Women are preyed upon because most purchasers of sexual services are heterosexual men; young women are preyed upon because they are perceived as more desirable by the main clientele; poor young women are preyed upon because they are eager to change their economic fortunes; poor, young women in patriarchal societies with foundering economies have no hope of economic betterment in their homelands and thus make ideal targets for traffickers. Like the two preceding decisions, the Canadian decision adds that upon return to the Ukraine there would be a "reasonable possibility that she would be subjected to abuse amounting to persecution at the hands of organized criminals" and that she would not be able to seek protection from Ukrainian authorities in view of the ties between organized crime and the government and the government's inability to combat trafficking.⁴⁷

Summing up, there is plenty of precedent for overcoming the government role problem in asylum cases stemming from sex trafficking. Additionally, these cases make a start at overcoming the social group problem for sex trafficking victims seeking asylum. But whereas reproductive human rights factor into decisions to grant asylum to individuals seeking to escape from state-sponsored forced abortion or sterilization or seeking to escape from customary FGM practices, reproductive rights have yet to become central to understandings of persecution in relation to sex trafficking. I believe that the smuggled woman problem and the crime-stopper problem help to suppress reproductive rights issues in refugee law with respect to sex trafficking victims.

Consolidating the Reproductive Rights Argument for Asylum

A law enforcement gestalt frames both the smuggled woman problem and the crime stopper problem, and both

problems privilege sovereign governance over individual human rights. The crime stopper problem fastens attention on incarcerating perpetrators and sidelines victims except in their instrumental role as sources of evidence. The smuggled woman problem compounds this marginalization of victims. In all but a few cases, it denies victimhood in the name of policing borders and exerting state control over the composition of the populace. Once victims of sex trafficking have been classified as malefactors along with traffickers, law enforcement—deporting victims and prosecuting traffickers—becomes the preeminent objective.

In practice, the law enforcement gestalt creates a presumption against refugee status for women trafficked into sex work. We have seen, for example, that US law not only directs women who claim to be sex trafficking victims into the T visa system but also sets more stringent evidential standards for obtaining a T visa than it does for obtaining asylum through regular refugee proceedings. However, this presumption conflicts with US obligations as a signatory and State Party to the Palermo Protocol.⁴⁸ Article 14 of the Palermo Protocol states:

Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.

Raising an all but insuperable barrier to asylum for victims of one type of human rights abuse plainly abrogates the obligations of States Parties to the Refugee Convention and violates the rights of victims under the Convention. Similarly, the US distinction between a severely trafficked person and a trafficked person is incompatible with the Palermo Protocol. As Rey Koslowski points out, under the protocol “a smuggled woman becomes a trafficking victim when she arrives at her destination and is forced into prostitution.”⁴⁹ Coercion in the recruitment and transport process is not a necessary condition for trafficking. I do not doubt the legitimacy of putting legal pressure on the activities of transnational sex trafficking organizations, including their role in smuggling undocumented migrants. However, deporting women who have been forced into sex work at their destinations does not deter traffickers with side businesses in human smuggling. Moreover, implementing the Palermo Protocol requires that a human rights gestalt counterbalance the law enforcement gestalt. In particular, the human rights abuse systematically inflicted on women trafficked into sex work must be brought to the fore and redressed. In addition to bringing US law into alignment with US commitments under international refugee and antitrafficking law, I urge that two glaring inconsistencies regarding reproductive rights in US immigration law be eliminated.

It is altogether arbitrary to confine the remedy of asylum to persons whose human right to reproductive self-determination has been violated pursuant to government-mandated population control policies. Forced contraception (whether temporary or permanent) and forced abortion are no less abhorrent when imposed by sex traffickers than they are when imposed by public officials.

Indeed, the former may well be more deplorable than the latter. Population control, when not an excuse for eugenic population pruning, can be a legitimate state interest. The same cannot be said of the profit motive of gangs of outlaws run amok. As it is acknowledged that traffickers plying their trade in countries with apathetic or complicit governments can be persecutors, the difference between the agents of persecution in the two cases is of no moral significance. If not, the protections of Section 601 of the US Illegal Immigration Reform and Immigrant Responsibility Act should be extended to women trafficked into sex work, for traffickers usurp their right to reproductive self-determination as surely as any government does.

Sex trafficking is also inimical to the right to reproductive health. Although *Matter of Kasinga* does not cite this right as a reason to grant asylum, the decision does cite the adverse effects of FGM on sexual function. Although sexual dysfunction ordinarily refers to problems with sexual desire, arousal, or orgasm and pain during intercourse, *Matter of Kasinga* cites Namib Toubia’s research on FGM, which takes a broader view of sexual function. For example, Toubia states that chronic pelvic infection is a common complication of FGM and that chronic pelvic infection heightens the risk of infertility.⁵⁰ In the same vein, she points out that many women who have undergone genital mutilation procedures fear becoming infertile because of the condition of their genitals.⁵¹ The similarities between the detriments to reproductive health caused by FGM and those caused by forced sex work are striking. Inasmuch as the BIA has ruled that possessing intact genitals is so fundamental to a woman’s identity that she should not be compelled to submit to having them altered, surely an intact capacity to conceive and give birth to a child is also so fundamental to a woman’s identity that she should not be compelled to submit to treatment likely to irreparably damage it. It follows that being trafficked into sex work

constitutes persecution comparable to being subjected to FGM.

Finally, in many instances, repatriating women who have been trafficked into sex work deprives them of the right to found a family. So valorized is the virginity of brides and so stigmatized is sex work that many sex trafficking survivors are cruelly ostracized when they are returned to their communities of origin. Moreover, once a woman has been trafficked into sex work, her traffickers regard her as their property. Although she may have originally colluded with traffickers in order to migrate, she can expect to be tracked down and re-trafficked if she is deported from her destination state.⁵² Unable to find work or make a marriage and pursued by transnational trafficking gangs, women trafficked into sex work are highly vulnerable to re-trafficking.⁵³ Thus, repatriation often amounts to *refoulement*—return to persecution—and *nonrefoulement* is a cardinal principle of international refugee law.

All the elements are now in place to justify making asylum available to migrant women forced into sex work. I have argued that the harms resulting from forced sex work rise to the level of persecution. It is indisputable that violations of reproductive human rights can be persecutory. I have identified the persecutory agent. The persecutors are transnational criminal gangs that operate with little or no interference from legal authorities in countries where women are recruited and in destination countries.⁵⁴ I have specified the features of the particular social group that is targeted by these transnational gangs. They are poor, young females in states where women are routinely discriminated against in education and employment and/or where law and order have broken down because of social upheaval, widespread poverty, or recent armed conflict. Although it may be necessary to refine this formulation to reflect changing local conditions in source countries, it provides a legally tenable framework for future asylum claims. Add to all of this the likelihood of *refoulement* if women trafficked into sex work are not granted a safe haven in destination states, and the justification is complete.

The Ethical Obligations of Destination States

For the United States (and states with similar trafficking and immigration policies), the overarching obligation that flows from my line of argument in the preceding sections is to modify the laws and practices governing the treatment of women trafficked into sex work in order to secure their right to asylum. Denying this right or constructing elevated requirements for accessing it is inconsistent with the Refugee Convention and the Palermo Protocol. The obligation to reform trafficking and immigration policy in this way is all the more stringent because destination states provide vast markets for commercial sexual services, thereby fostering the high profitability of trafficking sex workers, and also because their enforcement of antitrafficking laws is lax.

But the ethical obligations of destination states do not end with legislative reform, for immigration procedures are organized in ways that allow implicit bias to unfairly shape outcomes and these unreliable procedures must be reformed. Issues concerning stereotyping and bias recur throughout the literature on sex work and migration. Preliminary to suggesting ways in which to counteract implicit bias in immigration hearings, I will comment on three strands of prejudice that distort perception of women trafficked into sex work.

Martha Nussbaum's work on disgust is a good place to start getting a purchase on one relevant type of implicit bias. Nussbaum sums up her understanding of disgust in the following passage:

Because disgust embodies a shrinking from contamination that is associated with the human desire to be non-animal, it is more likely to be hooked up with various forms of shady social practice, in which the discomfort people feel over the fact of having an animal body is projected outward on vulnerable people and groups.⁵⁵

She goes on to point out that semen is among the types of bodily discharge that are regarded as disgusting, and that this disgust transfers to persons who have frequent contact with it.⁵⁶ It is a short step to the observation that "sex itself has something disgusting about it, something furtive and self-contaminating, particularly if it is the body of a female whose (receptacle of countless men's semen) that inspires desire."⁵⁷ Along similar lines, Dina Haynes comments that one mechanism through which the victims of sex trafficking are othered hinges on the sexualization of racial/ethnic stereotypes.⁵⁸ Because only a disreputable type of person becomes a sex worker, character assassination follows on the heels of victimization.

Another strand of implicit bias concerns poor women of reproductive age.

The same attitudes that sparked the wave of resentment against single mothers on welfare that led to the gutting of

social benefits for women with dependent children in the United States infect perceptions of women trafficked into sex work. Trafficked women are presumed to be uneducated and unqualified for jobs in today's economy, and an unknown percentage of them fall into trafficking schemes because they are trying to migrate in order to send remittances home to their children. Thus, their immigration cases trigger the stereotype of the lazy, lying, irresponsible, poor young woman. Inasmuch as the statutory grounds for excluding claimants from the United States include the likelihood of becoming a "public charge," this implicit bias can sabotage a trafficked woman's otherwise worthy application for asylum.⁵⁹

A third pair of stereotypes interferes with seeing women trafficked into sex work as refugees and hence as candidates for asylum. On the one hand, we have an image of persecuted individuals as brave opponents of tyranny. On the other hand, we have an image of trafficking victims as helpless, passive pawns of ruthless thugs. Insofar as the latter image frames perception of an applicant for asylum, its irreconcilability with the image of a "proper" candidate for asylum undermines her case. Indeed, because qualifying as a "severe" trafficking victim under US law requires proving that no voluntary action of your own contributed to your plight, the law demands that trafficking victims present themselves as conforming to the helpless, passive stereotype, which in turn undermines their plausibility as asylum seekers.⁶⁰

This pileup of perception problems gives rise to grave epistemic injustice with dire material consequences for many asylum seekers.⁶¹ In asylum hearings, the credibility of the applicant is crucial, but the stereotypes I have sketched, if allowed to prevail, raise doubts about her truthfulness in virtue of her presumptive character as a member of the very sort of group that is apt to be persecuted through sex trafficking. But, as Laurence Kirmayer points out, if the asylum seeker attempts to address probable biases in her sworn testimony, "any trace of this effort will cast doubt on [her] account."⁶² In contrast, Fatma Marouf focuses on ways to improve the institutional setting in which US immigration proceedings are conducted rather than on ways asylum seekers or their attorneys can overcome the implicit biases of judges. It seems, therefore, that Marouf's remedies for the problem of implicit bias in asylum proceedings hold most promise.

Marouf exposes a number of institutional arrangements that conduce to the influence of implicit bias in immigration hearings. Immigration judges are Department of Justice civil servants, most of whom previously held positions in the Department of Homeland Security that required regarding prospective immigrants with suspicion.⁶³ As a result, many judges adopt an "inquisitorial" posture in hearings.⁶⁴ To ensure greater impartiality, Marouf recommends separating the appointment of immigration judges from the Department of Justice.⁶⁵ She goes on to point out that immigration judges work under appalling conditions. Their calendars of cases are overloaded; they have insufficient support staff to do legal research; and they are expected to deliver oral decisions on the spot.⁶⁶ Correcting for implicit bias is possible given familiarity with widespread prejudices, strategies for counteracting them, and time to deliberate carefully. But the highly pressured context in which US immigration judges are currently obliged to work thwarts even the most fair-minded judges. Marouf's solution, of course, is to reduce judges' caseloads and eliminate the rushed schedules they are expected to maintain.⁶⁷

The reforms Marouf advocates would benefit all asylum seekers in the United States, but for my purposes it is key that they would give women seeking asylum in the aftermath of forced sex work a better chance of getting a fair hearing. None of these measures will accomplish much, however, if immigration judges are not sensitized to the prejudicial stereotypes that may mislead them and if they receive no training in how to curb implicit biases. Still, as early as 1995, the INS took the initiative in educating judges about the distinctive issues that persecution on account of gender raises.

"Considerations for Asylum Officers Adjudicating Asylum Claims From Women" acknowledges the distance between salient understandings of persecution and the forms of persecution that primarily impact women, and it instructs judges in how to respond appropriately to gender-based claims.⁶⁸ Yet change has come slowly, and the full implications of persecutory abuses of women's reproductive rights remain far from adequately appreciated. For reasons that are easy to fathom, sexual violence and reproductive defilement carry an extraordinarily intense emotional charge that is profoundly unsettling—more so than familiar, though horrifically cruel forms of persecution, such as extrajudicial incarceration, death threats, and torture. As a result, there is strong resistance to extending asylum to women trafficked into sex work based on violations of their reproductive rights.

This resistance is strengthened, perhaps masked, by appeals to the so-called floodgates argument. Floodgates arguments rest on demographic considerations, for they claim that a certain type of persecution is so pervasive that the receiving nation must protect itself from a potentially overwhelming influx of migrants. But by itself this demographic concern is plainly insufficient to justify excluding a particular type of asylum seeker. To be ethically convincing, a

floodgates argument must invoke a normative claim that the alleged persecution is so trifling or tractable that the state is justified in barring these victims. Dina Haynes questions the cogency of the demographic worry, for there is no reason to believe that more women would be induced to attempt migration than is presently the case, nor is there reason to believe that women would willingly endure the brutality of forced sex work in order to qualify as refugees in destination states.⁶⁹ I have argued that the normative claim is a travesty. On the contrary, acknowledging asylum claims stemming from abuse of trafficked women's reproductive rights is vital both because of the gravity of the reproductive harm inflicted and because equitable application of legal principles demands it.

Still, granting women who have been trafficked into sex work access to the right to asylum is not a sufficient remedy for the human rights violations they have suffered. Asylum in many destination states is an effective guarantee of victims' future reproductive self-determination, but by itself asylum does nothing to restore or limit the damage to their reproductive health. In her capacity as Special Rapporteur on Trafficking in Persons, Joy Ngozi Ezeilo forcefully argues that trafficked persons have a right to an effective remedy and that helping victims to recover from the ordeal of trafficking is an essential component of an effective remedy.⁷⁰ Not surprisingly, she emphasizes that furnishing medical and psychological care is often vital to the recovery of trafficking victims.⁷¹ In view of the high incidence of serious harm to the reproductive health of women trafficked into sex work, it follows that providing an effective remedy to them requires, at a minimum, diagnosing and treating STIs.

The reforms that the United States would need to put in place in order to comply with this tenet of international law are somewhat less momentous than the changes in refugee law and implementation that I have advocated so far. Under current trafficking law, persons certified as trafficking victims are eligible for Medicaid, Refugee Medical Assistance, and medical testing and treatment for communicable diseases.⁷² If trafficking victims were viewed as asylum seekers, they would receive the same health benefits once their asylum applications were successful. However, in view of the connection between untreated STIs and infertility, the high incidence of STIs among women trafficked into sex work, and the protracted process of applying for asylum, these health care provisions must be extended to victims of sex trafficking during the asylum application process in order to ensure respect for their reproductive human rights. This modest expansion of health care rights would go a long way toward realizing sex trafficking victims' reproductive rights.⁷³

Now that covering contraception is mandatory for all US health insurance, sex trafficking victims would be entitled to the means of managing their fertility.⁷⁴ However, one recovery scenario poses a serious political problem in the United States. Many states do not pay for abortion through their Medicaid programs, and it remains illegal to use federal funds to pay for abortions. Yet it is altogether possible that some victims of sex trafficking will escape from their traffickers and apply for asylum while pregnant. Studies indicate that many of them will want to terminate their pregnancies, and being able to do so may well be critical to their recovery processes. If so, the United States and other destination states with restrictive abortion policies will need to permit federal funding of abortions for some sex trafficking victims in order to provide an effective remedy for the reproductive abuse these women have endured.⁷⁵ In sum, destination states that fail to classify women trafficked into sex work as legitimate asylum seekers or that fail to provide prompt remedial health care to them are flouting ethical obligations of the first magnitude.⁷⁶

Notes:

(1-) Binaifer A. Davar, "Rethinking Gender-Related Persecution, Sexual Violence, and Women's Rights: A New Conceptual Framework for Political Asylum and International Human Rights Law," *Texas Journal of Women and the Law* 6 (1997): 241–256; Tala Hartsough, "Asylum for Trafficked Women: Escape Strategies beyond the T Visa," *Hastings Women's Law Journal* 13 (2002): 77–116; Dina Francesca Haynes, "Used, Abused, Arrested, and Deported: Extending Immigration Benefits to Protect Victims of Trafficking and to Secure Prosecution of Traffickers," in *Women's Rights: A Human Rights Quarterly Reader*, ed. Bert B. Lockwood (Baltimore, MD: Johns Hopkins University Press, 2006); Dina Francesca Haynes, "(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act," *Georgetown Immigration Law Journal* 21 (2007): 337–381.

(2-) For a helpful discussion of the links between women's right to reproductive self-determination and the right to life, the right to liberty and security of the person, and the right to found a family, see Rebecca J. Cook, "International Human Rights and Women's Reproductive Health," in *Women's Rights, Human Rights: International Feminist Perspectives*, ed. Julie Peters and Andrea Wolper (New York: Routledge, 1995).

(3-) Aliya Haider, "Out of the Shadows: Migrant Women's Reproductive Rights Under International Law," *Georgetown*

Immigration Law Journal 22 (2008): 429–457, 438.

(4.) Haider, 438.

(5.) Elzbieta M. Gozdziaik and Elizabeth A. Collett, “Research on Trafficking in North America: A Review of the Literature,” *International Migration* 43 (2005): 99–128, 107, 113–114.

(6.) <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (accessed September 7, 2013).

(7.) Cathy Zimmerman et al., *Stolen Smiles: The Physical and Psychological Health Consequences of Women and Adolescents Trafficked in Europe*, London School of Hygiene & Tropical Medicine: <http://genderviolence.lshtm.ac.uk/files/Stolen-Smiles-Trafficking-and-Health-2006.pdf> (2006), 3, 63.

(8.) Zimmerman et al., 64.

(9.) Zimmerman et al., 61.

(10.) Zimmerman et al., 62, 68.

(11.) Zimmerman et al., 69. A study of the health consequences of sex trafficking in Southeast Asia reports that septic abortions are a major danger faced by trafficked sex workers in Burma and Thailand. Chris Beyrer and Julie Stachowiak, “Health Consequences of Trafficking of Women and Girls in Southeast Asia,” *Brown Journal of World Affairs* 10 (2003): 105–117, 106, 111.

(12.) Zimmerman et al., 64, 65.

(13.) Zimmerman et al., 69, 70.

(14.) S. Abdulraheem and A. R. Oladipo, “Trafficking in Women and Children: A Hidden Health and Social Problem in Nigeria,” *International Journal of Sociology and Anthropology* 2 (2010): 34–39, 37, 39.

(15.) Abdulraheem and Oladipo, 37.

(16.) Abdulraheem and Oladipo, 37.

(17.) <http://www.unhcr.org/3b66c2aa10.html>.

(18.) James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 104–105.

(19.) Haynes 2007, 373; also see Wendy Chapkis, “Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants,” *Gender and Society* 17, no. 3 (2003): 923–937, 931–932.

(20.) Louisa Waugh, *Selling Olga*, xv. Kara notes that in Central and Eastern Europe seduction coupled with promises of lifelong romance in the West is another common ploy to lure women into trafficking schemes Siddharth Kara, *Sex Trafficking*, 9.

(21.) Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (New York: Columbia University Press, 2009), 7. Louisa Waugh, *Selling Olga: Stories of Human Trafficking and Resistance* (London: Orion Books, 2007), xiv, 63.

(22.) Suzanne Dayley, “Rescuing Young Women From Trafficker’s Hands,” *New York Times*, October 15, 2010. Siddharth Kara, *Sex Trafficking*, 7, 23–30, 115, 142. Louisa Waugh, *Selling Olga*, 3, 73

(23.) Liz Kelly adds a layer of complexity to the economic forces shaping these women’s decisions. Many “smuggled” women borrow money from relatives in order to seek their fortunes in foreign sex industries. If they are deported and return empty-handed, they are unable to repay their debts and feel compelled to submit to re-trafficking in the hope of making good on their debts if not improving family finances. Thus, the cycle of sexual abuse commonly enters a new iteration. Liz Kelly, “‘You Can Find Anything You Want’: A Critical Reflection on Research on Trafficking in Persons Within and Into Europe,” *International Migration* 43, no. 1/2 (2005): 236–265, 248.

(24.) Jacqueline Bhabha, “International Gatekeepers? The Tension Between Asylum Advocacy and Human Rights,”

Victims of Trafficking, Reproductive Rights, and Asylum

Harvard Human Rights Journal 15 (2002): 155–181, 175–176; April Rieger, “Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States,” *Harvard Journal of Law and Gender* 30 (2007): 231–256, 249; Hartsough, 99.

(25.) Hartsough, 101.

(26.) http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t-I918u_visastatistics_2012-dec.pdf

(27.) As Gozdziaik and Collett point out, disputed definitions of sex trafficking, not to mention the underground nature of the enterprise, make accurate counts of victims impossible and estimates highly conjectural (pp. 107–108). Nevertheless, they cite the official US estimate for 2004 of 14,500–517,500 (p. 117).

(28.) Rieger, 249.

(29.) Rieger, 252–253.

(30.) Not surprisingly, some trafficked women tell stories that smack of ambitions to upward mobility and heightened consumerism rather than escape from poverty (Christine M. Jacobsen and May-Len Skilbrei, “Reproachable Victims?” *Ethnos* 75 (2010): 190–212, 199–200). However, because stories of desperate flights from severe poverty and/or domestic abuse and the need to support family back home predominate in the literature, I center my discussion on that background narrative (see Louisa Waugh, 15–16, 31–32; Abdurhaem and Oladipo, 37–38; Hartsough, 80; Natasha Ahmad “Trafficked Persons or Economic Migrants? Bangladeshis in India,” in *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*, ed. Kamala Kempadoo (Boulder, CO: Paradigm Publishers, 2005), 212–213, 224–225; Jan Boontinand, “Feminist Participatory Action Research in the Mekong Region,” in *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*, ed. Kamala Kempadoo (Boulder, CO: Paradigm Publishers, 2005), 186, 192–193; Siddarth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (New York City: Columbia University Press, 2009), 25, 114–115, 143, 172.

(31.) Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge From Deprivation* (Cambridge: Cambridge University Press, 2007), 324–325.

(32.) *Matter of Acosta* (<http://www.justice.gov/eoir/vll/intdec/vol19/2986.pdf>, accessed September 15, 2013, p. 212).

(33.) *Matter of Acosta*, p. 222.

(34.) Quoted by Paula Abrams, “Population Politics: Reproductive Rights and U.S. Asylum Policy,” *Georgetown Immigration Law Journal* 14 (2000): 881–905, 882.

(35.) Canadian law regarding forced abortion or sterilization does not hinge on holding an oppositional political opinion but rather on membership in a particular social group. See *Cheung v. Canada* (http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&category=&publisher=CAN_FCA&type=CASELAW&coi=CHN&rid=&docid=3ae6b70b18&skip=0, accessed September 15, 2013).

(36.) Abrams, 904.

(37.) *In Re Fauziya Kasinga* (<http://www.justice.gov/eoir/vll/intdec/vol21/3278.pdf>, accessed September 14, 2013), p. 361.

(38.) Davar, 243–244.

(39.) Davar, 245, 249–250.

(40.) Davar, 250.

(41.) Stephen Knight, “Asylum From Trafficking: A Failure of Protection.” *Immigration Briefings: Practical Analysis of Immigration and Nationality Issues*. No. 07-07 Thomson/West (July 2007); also see Haynes (2007).

(42.) Haynes (2007), 476–477.

(43.) Angelika Kartusch, *Reference Guide for Anti-Trafficking Legislative Review*, (<http://www.osce.org/odihr/13986>, accessed September 15, 2013), OSCE/ODIHR (2001), 69.

(44.) Kartusch, 69.

(45.) Kartusch, 69.

(46.) The 2006 2nd Circuit Court of Appeals decision in *Gao v. Gonzales* held that “the statutory term ‘particular social group’ is broad enough to encompass groups whose main shared trait is a common one, such as gender, at least so long as the group shares a further characteristic that is identifiable to would-be persecutors and is immutable or fundamental.” *Gao v. Gonzales* 440 F.3d 62 (2d Circuit 2006, p. 3 (<http://cgrs.uchastings.edu/documents/legal/gao.pdf>, accessed September 21, 2013). Additionally, in the 2012 7th Circuit Court of Appeals decision in *Cece v. Holder*, the majority held that the persecutory harm feared by an asylum seeker could be a component of the definition of the particular social group to which she belongs but could not be the whole of it (http://scholar.google.com/scholar_case?case=17906068323051465130&q=cece+v.+holder&hl=en&as_sdt=2,33&as_vis=1, accessed September 17, 2013).

(47.) Kartusch, 69.

(48.) See <https://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>.

(49.) Rey Koslowski, “Response to ‘The New Global Slave Trade’ by Harold Honfju Koh,” in *Displacement, Asylum, Migration: The Oxford Amnesty Lectures 2004*, ed. Kate E. Tunstall (Oxford: Oxford University Press, 2006), 259–260. Also see UNHCR “Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked” 7 April, 2006 <http://www.refworld.org/docid/443679fa4.html> (accessed February 13, 2014).

(50.) Namid Toubia, “Female Circumcision as a Public Health Issue,” *New England Journal of Medicine* 331, no. 11 (1994): 712–716, 713. (<http://www.nejm.org/doi/full/10.1056/NEJM199409153311106>, accessed October 15, 2013).

(51.) Toubia, 714.

(52.) According to the UNHCR “Guidelines on International Protection Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked,” a refugee need not have left her country of origin because of persecution or fear of persecution:

The requirement of being outside one’s country does not, however, mean that the individual must have left on account of a well-founded fear of persecution. Where this fear arises after she or he has left the country of origin, she or he would be a refugee *sur place*, providing the other elements in the refugee definition were fulfilled. Thus, while victims of trafficking may not have left their country owing to a well-founded fear of persecution, such a fear may arise after leaving their country of origin. In such cases, it is on this basis that the claim to refugee status should be assessed. (Paragraph 25)

From the standpoint of international law, then, the smuggled woman problem is a red herring.

(53.) UNHCR. “Guidelines on International Protection Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked.” 2006, 7; Haynes (2006), 461–462, 471–472, 476; Waugh, 39.

(54.) Leslie and John Francis show that lack of enforcement of laws prohibiting sex trafficking is not a problem unique to source countries. It is also a failing of destination states, including the United States. See their “Trafficking in Human Beings: Partial Compliance Theory, Enforcement Failure, and Obligations to Victims,” in *Poverty, Agency, and Human Rights*, ed. Diana Tietjens Meyers (New York: Oxford University Press, 2014).

(55.) Martha C. Nussbaum, “‘Secret Sewers of Vice’: Disgust, Bodies, and the Law,” in *The Passion of the Law*, ed. Susan Bandes (New York: NYU Press, 1999), 22.

(56.) Nussbaum, 24.

(57.) Nussbaum, 40.

(58.) Haynes 2007, 356; also see Haynes (2006), 456. For a recap of the workings of explicit bias in US immigration law,

see Fatma E. Marouf, "Implicit Bias and Immigration Courts." *New England Law Review* 45 (2010-2011): 417–434, 422–423.

(59.) Hartsough, 99; Rieger, 253.

(60.) Kara Abramson, "Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol." *Harvard International Law Journal* 44, no. 2 (2003): 473–502, 495.

(61.) For a pertinent account of testimonial injustice and hermeneutical injustice that addresses the problem of implicit bias, see Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2007).

(62.) Laurence J. Kirmayer, "Failures of Imagination: The Refugee's Narrative in Psychiatry," *Anthropology and Medicine* 10, no. 2 (2003): 167–185, 174.

(63.) Marouf, 429.

(64.) Marouf, 430.

(65.) Marouf, 430.

(66.) Marouf, 431–433.

(67.) Marouf, 434.

(68.) A 1995 memorandum distributed to the INS Asylum Officer Corps, http://cgrrs.uchastings.edu/documents/legal/guidelines_us.pdf (accessed October 21, 2013).

(69.) Haynes (2006), 479; Haynes (2007), 377.

(70.) See the 2011 Report to the UN General Assembly of the Special Rapporteur on Trafficking in Persons, Especially Women and Children <http://www.ohchr.org/Documents/Issues/Trafficking/A-66-283.pdf> (accessed February 12, 2014).

(71.) Ibid.

(72.) See the US Office of Refugee Resettlement's "Fact Sheet: Victim Assistance" <http://www.acf.hhs.gov/programs/orr/resource/fact-sheet-victim-assistance-english#Benefits> (accessed February 12, 2014).

(73.) Although the focus of this paper is women from economically disadvantaged, source states who are trafficked into sex work in economically advantaged, destination states, I note that the points I am making about the obligation to provide remedial health care apply equally to native born women who are trafficked into sex work in their home countries.

(74.) See US Affordable Care Act of 2010 <http://www.hrsa.gov/womensguidelines/> (accessed February 12, 2014).

(75.) The summary of the Justice for Victims of Trafficking Act of 2015, which at this writing has been passed by the US Senate but not the House, states, "The bill prohibits the use of amounts from the Fund for any abortion or for health benefits coverage that includes coverage of abortion, except where the pregnancy is the result of rape or incest or the woman's life is in danger unless an abortion is performed" (<https://www.congress.gov/bill/114th-congress/senate-bill/178>, accessed April 28, 2015). If the bill is passed and signed into law with this language intact, it is possible that victims of sex trafficking will qualify for funding for abortions. Since sex acts performed by women trafficked into sex work are by definition nonconsensual, any pregnancies resulting from these forced sex acts should count as resulting from rape.

(76.) I thank Francoise Dussart for helpful discussion of this topic, Jean Connolly Carmalt for valuable suggestions regarding human rights and refugee law, and Leslie Francis for her incisive comments on an earlier draft.

Diana Tietjens Meyers

Diana Tietjens Meyers, Professor Emerita of Philosophy, University of Connecticut

