

Human Trafficking, Vulnerability and the State

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Abstract: This article looks at human trafficking from a perspective influenced by the ‘vulnerability theory’ developed by Martha Fineman and her associates. It draws particularly on empirical studies of human trafficking from Albania to the UK and elsewhere. It suggests that Fineman’s approach needs to be modified to see the state not only as ameliorating vulnerability, or failing to do so, but as actively creating and using vulnerability to control or exploit its population. The fact that people are placed, for political, social and economic reasons, in situations of heightened vulnerability does not of itself deprive them of agency or responsibility. People should, however, be understood as ‘vulnerable subjects’ whose capacity for autonomy may be lost when they are deprived of supportive social relationships. The implications of this view for the criminal responsibility of trafficking victims are explored.

Introduction

In keeping with the theme of this issue, this article focusses on the trafficking of vulnerable adults; invulnerable adults, as well as children, are beyond its scope. But who are these invulnerable adults? To be human is to be vulnerable – to disease, cold, hunger, the disruption of social relationships on which we depend. As Martha Fineman, the most influential legal scholar of vulnerability puts it, vulnerability is ‘*the primary human condition*’.¹

Clearly this special issue is not intended to be about adults in general, but about adults who are vulnerable in particular ways; but this, too, can be said of most if not all victims of trafficking. To be trafficked is to be transported (either between countries or within any country) with a view to exploitation, whether in the form of sexual exploitation, labour exploitation or the removal of organs.² While people will submit to exploitation for a variety of reasons (for example, are academics ‘vulnerable’ to working far longer hours than we are paid for?), the exploitation involved in many cases of human trafficking is so egregious that people would be unlikely to submit to it unless something in their situation made

¹ M. A. Fineman, ‘Vulnerability, Resilience, and LGBT Youth’ (2014) 23 *Temple Political & Civil Rights Law Review* 307.

² Modern Slavery Act 2015, s. 2.

them particularly vulnerable to coercion, manipulation or deception. It seems a reasonable assumption and, as we shall see, one borne out by evidence, that most victims of trafficking are vulnerable, not just in the 'ontological' sense that all humans are vulnerable, but in the sense that their particular *situation* makes them more vulnerable than others.³

In the context of human trafficking, there is little sense in distinguishing between vulnerable adults and adult victims in general. It is, of course, possible to identify people whose vulnerability stems in part from their physical or mental characteristics, such as, those with learning disabilities (considered in greater detail in Brookbanks' article in this issue). But as Jonathan Herring argues in *Vulnerable Adults and the Law*, such people are especially vulnerable only when they lack the social support that they need.⁴ Theirs, too, is a particular type of situational vulnerability. The focus of our inquiries should be on what creates situational vulnerability and what can be done to counter it.

By shifting our focus in this way we can avoid attributing vulnerability in an essentialising fashion to certain social groups.⁵ Such attributions can produce a doubly invidious effect. Those framed as 'vulnerable' can be treated as lacking in agency and in need of paternalistic, coercive control, while those *not* deemed vulnerable can be stigmatised as a threat – and therefore in need of coercive control without any benevolent *façade*. We can see this clearly in relation to human trafficking. Trafficking for sexual exploitation is often conflated with sex work in general to produce an image of all sex workers as passive victims in need of rescue. This obscures the possibility that many sex workers may be exercising meaningful choice, albeit often with a limited and unattractive range of options. Coercive measures against sex work can then be justified as part of an anti-trafficking policy and in the interest of the paternalistic 'rescue' of sex workers. Those who cannot be portrayed as fitting the passive-victim stereotype may be punished rather than helped.⁶ Trafficking, in contrast, is often also (erroneously) equated with people-smuggling and used to justify a tightening of border controls.

³ On the distinction between ontological and situational vulnerability, see E. Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* (Routledge: London, 2014).

⁴ J. Herring, *Vulnerable Adults and the Law* (Oxford University Press: Oxford, 2016) 2.

⁵ V. E. Munro and J. Scoular, 'Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK' (2012) 20 *Feminist Legal Studies* 189, 196; M. A. Fineman, 'The Vulnerable Subject and the Responsive State', (2010) 60 *Emory Law Journal* 251, 266; K. Brown, K. Eccleston and N. Emmel, 'The Many Faces of Vulnerability' (2017) 16(3) *Social Policy & Society* 497.

⁶ A. Carline, 'Of Frames, Cons and Affects: Constructing and Responding to Prostitution and Trafficking for Sexual Exploitation' (2012) 20 *Feminist Legal Studies* 207, 211, J. Scoular and M. O'Neill 'Regulating Prostitution: Social Inclusion, Responsibilization and the Politics of Prostitution Reform' (2007) 47 *British Journal of Criminology* 764.

Border controls, however, are an important source of situational vulnerability. As a recent report by the Anti-Trafficking Monitoring Group (ATMG) argues:

a number of measures in the [Immigration Act 2016] increase vulnerability of migrants to exploitation, including:

- Measures making it illegal for those without status to rent accommodation;
- Measures creating criminal offences for landlords who ‘know or have reasonable cause to believe tenants are disqualified from renting as a result of their immigration status;’
- New eviction powers to proprietors;
- A new offence of illegal working.⁷

Moreover, as ATMG points out, rules tying overseas domestic workers to specific employers make them vulnerable to abuse and exploitation. The rise of homelessness, linked to austerity measures, ‘has meant a rise in the number of people who are extremely vulnerable to trafficking and exploitation’; and a programme of returning trafficked migrants to their countries fails to address their vulnerability to re-trafficking.⁸

The broader point made by the ATMG is that the causes of vulnerability are largely systemic,⁹ and attributable in particular to the laws, policies and practices of states. We shall develop a similar argument in relation to one state which is perceived to be a major source of trafficking to the UK and has experienced widespread internal human trafficking, namely Albania.

The rest of the article is structured as follows. First, we examine Fineman’s approach to vulnerability and explain why we are adopting it only with some significant modifications. We then turn to our case study of Albania, which can be seen both as a vulnerable state and one which produces situations of particular vulnerability to human trafficking. In light of this, we then look at the ethical and legal questions concerning the responsibilities of citizens, corporations of the state *towards* victims of trafficking, and the responsibility *of* victims of trafficking for offences they may commit as a result of their victimisation. The main point that emerges from the discussion of Albania is that the mere fact that people are in a vulnerable situation does not deprive them of agency or responsibility. Organised

⁷ Anti-Trafficking Monitoring Group, *Before the Harm is Done: Examining the UK’s Response to the Prevention of Trafficking* (ATMG: London, 2018) 43 (footnotes omitted). Available at: <http://www.antislavery.org/wp-content/uploads/2018/09/Before-the-Harm-is-Done-report.pdf> (accessed 22 October 2018).

⁸ *Ibid.* at 44-5, 47, 54.

⁹ *Ibid.* at 11.

crime may provide people with resources with which they attempt to reduce their vulnerability, but it may then place them in a situation in which any meaningful agency is lost. The different ways in which the law on duress, abuse of process and the defences under the Modern Slavery Act 2015, s. 54 respond to this situation are discussed towards the end of the article.

Vulnerability, the Human Condition and Human Trafficking

Several influential moral and political theories, notably those of Judith Butler,¹⁰ Robert Goodin, Brian Turner and Alasdair Macintyre,¹¹ stress the importance of vulnerability as an aspect of the human condition and a source of moral obligations. In legal studies, however, the term ‘vulnerability theory’ is associated particularly with the work of Martha Fineman¹² and her associates in the Vulnerability and the Human Condition Initiative.¹³ For Fineman, vulnerability as an aspect of the human condition is constant and universal, even though different people experience it in different ways. Our bodily condition and social relations are always susceptible to changes that affect our well-being. Vulnerability theory does not regard people as more or less vulnerable, but rather as experiencing in different ways the vulnerability we all share. People do, however, vary in their degree of resilience, that is, ‘the means and ability to recover from harms or setbacks’.¹⁴ Those means and abilities are acquired and developed largely through social institutions, particularly those of the state. A ‘responsive state’ is ethically obliged to respond to vulnerability through the equitable provision of the resources that sustain resilience.¹⁵

While we are sympathetic to the aims of vulnerability theory, there are two aspects of it that we find problematic in the context of human trafficking. First, states do not only provide, or fail to provide, the resources needed sustain the resilience of potential trafficking victims, i.e. their ability to recover when they have been harmed. Rather, they often *create*, either as a matter of deliberate policy (as in the UK’s ‘hostile environment’ for illegal migrants) or by ineptitude and corruption, the very vulnerabilities (in the sense

¹⁰ J. Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso: London, 2006); J. Butler, *Frames of War* (Verso: London 2010). See also Gilson, above n. 3, whose work builds on Butler’s but is more systematically argued; and Carline, above n. 6, for a Butlerian perspective on human trafficking.

¹¹ R. E. Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (University of Chicago Press, 1985); B. S. Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press: University Park, 2006); A. Macintyre, *Dependent Rational Animals* (Open Court: Chicago, 1999).

¹² The original formulation of the theory is in M. A. Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1.

¹³ A group of scholars centred at Emory University in Atlanta (<http://web.gs.emory.edu/vulnerability/>). We are greatly indebted to the excellent papers and discussions at a Workshop organised by the Initiative at Leeds University in September 2018.

¹⁴ Fineman, above n. 1 at 320.

¹⁵ Fineman, above n. 5 at 251.]

of increased risks of harm to their basic interests) that traffickers exploit. That the state can create vulnerability should not be a controversial point for criminal lawyers. Through criminal law, the state renders people vulnerable to punishment if they commit certain acts, usually in an attempt to reduce the vulnerability of others to the harm such acts would cause.

In writing of the state creating or aggravating vulnerability, we (and ATMG) are using the word 'vulnerability' in its ordinary sense – that of being exposed to some risk of harm to which one lacks an effective defence. Vulnerability theory does not use the word in its ordinary sense but rather as a term of art,¹⁶ defined in Fineman's recent work as 'the continuous susceptibility to change in both our bodily and social well-being that all human beings experience'.¹⁷ Vulnerability theorists equate vulnerability with 'ontological'¹⁸ or 'universal' vulnerability, and avoid using it in the sense of situational vulnerability; the risk of specific harms that a person is exposed to here and now, which is obviously greater for some people, at certain times, than for others. Given this conception of vulnerability, 'the right question', as Phil Bielby puts it in the context of mental health, 'is to ask how constraints on one's resilience to cope with universal vulnerability are causing one's lived experience of vulnerability to be more acute or onerous than that of someone else, rather than whether one is vulnerable or not, or how vulnerable one is.'¹⁹

The laudable aim of this way of framing the question is to promote solidarity and avoid invidious distinctions between those who are deemed vulnerable (and in need of paternalistic control) and those who are not (and can therefore be treated punitively or held responsible for their own misfortunes). It is important, particularly in the context of human trafficking, to challenge such invidious dichotomies. But redefining the concept of vulnerability in this way may also have less salutary consequences. It may obscure the ways in which states do not merely *fail to respond* to vulnerability, but positively *use* situational vulnerability as a tool to control or exploit their populations. And it can leave the vulnerability theorist and the exponent of conventional vulnerability discourse talking past each other, because each uses the same word in a different way. It seems to us more illuminating to use the word 'vulnerability' in more or less its ordinary sense, while emphasising the universal vulnerability that all humans (and other animals) share, and recognising that when people do find themselves in particularly vulnerable situations, this can usually be

¹⁶ Thanks to Stu Marvel for pointing this out.

¹⁷ M. A. Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133, 142.

¹⁸ Gilson, above n. 3.

¹⁹ P. Bielby, 'Not "Us" and "Them": Toward a Normative Legal Theory of Mental Health Vulnerability' [2018] *International Journal of Law in Context* 1, 4.

attributed to inadequate social provision rather than some irremediable deficiency on their part. Jonathan Herring's work on vulnerable adults makes both those points very effectively while also using the word 'vulnerability' in a fairly conventional sense, which he defines as follows:

P is vulnerable if the following three factors are present:

1. P faces a risk of harm.
2. P does not have the resources to be able to avoid the risk of harm materializing.
3. P would not be able to adequately respond to the harm if the risk materialized.²⁰

The second reservation which we have about vulnerability theory concerns its emphasis on the role of the state in promoting resilience. Judith Butler and her colleagues have expressed concern that Fineman's analysis encourages feminists to rely on paternalistic state institutions.²¹ A more specific concern in the context of transnational human trafficking is that the theory fails to explain clearly to whom, and why, the state owes an obligation to promote resilience. Fineman avoids entering into debate about the limits of citizenship,²² but we have to consider why the state owes an obligation to migrant victims of trafficking.

Leaving aside the legalistic answer that it has accepted such obligations in international law,²³ the obvious answer is that we all, as vulnerable human beings, owe an obligation to help our fellow humans who are experiencing acute vulnerability, but we largely delegate this obligation to the state. The moral basis for this obligation can be found in a modified form of Kantianism, which starts by recognising that to experience oneself as an autonomous moral subject is a precarious achievement, which vulnerable humans can attain, at best, only for a part of their lives, and only with the support of others.

Subjects who acknowledge their own vulnerability ought to recognise that, since they need others to respond to their vulnerability with care rather than exploitation, they should

²⁰ Herring, above n. 4 at 25.

²¹ J. Butler, Z. Gambetta and L. Sabsay, 'Introduction' in Butler et al (eds), *Vulnerability and Resistance* (Duke University Press: Durham, NC, 2016) 4, 11.

²² Fineman, 'The Vulnerable Subject', above n. 5, 256.

²³ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000); Council of Europe Convention on Action against Trafficking in Human Beings (2005); Directive 2011/36/EU (2011) on preventing and combatting trafficking.

respond to the vulnerability of others in the same way.²⁴ We shall argue that this conception of a vulnerable subject helps to understand the legal position of victims of trafficking. Others might prefer the more Levinasian approach of Judith Butler, according to which it is an ineluctable fact of moral experience 'that others make moral claims upon us...that we are not free to refuse'.²⁵ Either way, the primary obligation is one that each of us owes to our fellow humans in need, and any obligation laid on the state is derivative from this obligation. The question arises whether we can simply rely on the state to discharge this responsibility for us, particularly in the case of human trafficking where many individuals and corporations benefit from the exploitation of trafficked persons.

Vulnerability and trafficking: the Albanian case

To illustrate the relationship between vulnerability and human trafficking we draw on the literature about human trafficking within and from Albania. First, however, we must enter an important caveat: the current reality of human trafficking from Albania, in particular to the UK, is difficult to ascertain. Statistics from the National Referral Mechanism indicate that Albanians constitute a significant proportion of those *referred* to the NCA as being *potential* victims of trafficking.²⁶ We cannot, however, find any figures on how many of these cases receive a positive reasonable grounds (or conclusive grounds) decision from the Competent Authority indicating a probability that they actually *are* victims of trafficking.²⁷ Still less, of course, do we know how many of these decisions are correct – assuming that there is such a thing as an objectively correct decision to be made. There is, however, evidence from research studies to suggest that the level of human trafficking from Albania has declined substantially in recent years.²⁸ Much of the literature on Albanian organised

²⁴ See D. Engster, *The Heart of Justice: Care Ethics and Political Theory* (Oxford University Press: Oxford, 2007) Ch 1; P. Formosa, 'The Role of Vulnerability in Kantian Ethics' in C. Mackenzie, W. Rogers and S. Dodds (eds.) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press: Oxford, 2014); P. Bielby, 'Justifying Mental Health Rights from a Gewirthian Perspective' in P. Bauhn (ed) *Gewirthian Perspectives on Human Rights* (Taylor & Francis: London, 2016).

²⁵ J. Butler, *Precarious Life* (Verso: London, 2004) 131, drawing on E. Levinas, *Totality and Infinity: An Essay on Exteriority* (Duquesne University Press: Pittsburgh, 1969).

²⁶ NCA Annual Report 2017: Modern Slavery and Human Trafficking: National Referral Mechanism Statistics. Available at: <www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/2017-nrm-statistics/884-nrm-annual-report-2017/file> (accessed 17 October 2018).

²⁷ *Ibid.* at 5. The 'standard of proof' for a 'reasonable grounds' decision is obscurely worded, and could be interpreted as close to 'reasonable suspicion' or to 'clear and convincing evidence'. See Home Office, *Victims of Modern Slavery – Competent Authority Guidance, version 4.0* (2018), 50. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744070/victims-of-modern-slavery-competent-authority-v4.0-EXT.PDF (accessed 22 October 2018).

²⁸ I. Jusufi, 'Albania's Transformation since 1997: Successes and Failures' (2017) 23(77) *Croatian International Relations Review* 109; J. Arsovska, 'Decline, Change or Denial: Human Trafficking and EU Responses in the Balkan Triangle' (2008) 2(1) *Policing: A Journal of Policy and Practice* 50; F. Zhilla, and B. Lamallari 'Albanian Criminal Groups', (2015) 18(4) *Trends in Organized Crime* 329.

crime dates from a decade or more ago and should not be taken as portraying the current situation. What it reveals about the situation in Albania between 1991 and c. 2008 nevertheless remains an interesting illustration of general issues about vulnerability, organised crime and the state.

A Vulnerable State?

From the perspective of vulnerability theory, institutions as well as states can be considered vulnerable.²⁹ The notion of institutional vulnerability has not been very precisely defined but we would suggest that it involves the risk to an institution of either losing the capacity to achieve its organisational goals, or being deflected from pursuing them, for example, by corruption.

What is particularly significant in a state such as Albania is its vulnerability to losing capacity through infiltration by organised crime groups and the corruption of public officials.³⁰ Such corruption may cause a state to become 'fragile' and incapable of delivering crucial public goods such as safety, security and other basic services.³¹ In such a situation, criminal enterprises are able, by the use of force, threats, and the corruption of public officials, to profit from illicit activities for which there may be great public demand.³² The general population loses trust in the state's capacity to provide for its wellbeing³³ and the state may appear to be working in favour of criminal networks³⁴ rather than protecting its citizens. In such fragile states, criminal groups can undertake different activities, such as human trafficking, and infiltrate into the legitimate economy through corruption of its agents.³⁵

In this sense, state institutions are particularly vulnerable to transnational organised crime (TOC). Jan van Dijk argues that one of the most important impacts of TOC on a state is the harm it does to the quality of its governance.³⁶ He states that by corrupting and otherwise compromising the integrity of public officials and institutions through corruption

²⁹ Fineman, above n. 5 at 273; S. Marvel, 'The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage' (2015) 64 *Emory Law Journal* 2047, 2066.

³⁰ J. van Dijk, 'Mafia Markers: Assessing Organized Crime and Its Impact Upon Societies (2007) 19(4) *Trends in Organized Crime* 39.

³¹ P. Miraglia, R. Ochoa and I. Briscoe (2012), *Transnational Organised Crime and Fragile States*, OECD Development Working Paper 3/2012. Available at <<https://www.oecd.org/dac/accountable-effective-institutions/WP3%20Transnational%20organised%20crime.pdf>> (accessed 2 October 2018) 4.

³² J. S. Albanese, *Organized Crime in Our Times*, 6th ed (Anderson: Cincinnati, 2010) 4.

³³ Miraglia, et al., above n. 31, 14.

³⁴ F. Varese, (2000), 'Pervasive Corruption', in A. Ledeneva and M. Kurkchiyan (eds.), *Economic Crime in Russia* (Kluwer Law International: London, 2000).

³⁵ J. van Dijk, above n. 30

³⁶ *Ibid.*

and threats, organised crime erodes the state's long-term capacity to provide for the common good. Where national and local authorities are incapable of delivering crucial public goods such as safety, security and other basic services, they face a loss of legitimacy that can endanger their ability to remain in power.³⁷ The combination of lack of capacity and lack of legitimacy is sometimes referred to as state 'fragility'.³⁸ TOC can infiltrate the structural composition of states, feeding on weaknesses and eventually heightening fragility,³⁹ which might be considered an extreme form of institutional vulnerability.

The problem with this language of 'fragility' and 'vulnerability' is that it assumes the state in question has a goal of delivering public goods but lacks the capacity to do so. Some states, however, are more aptly described as kleptocracies,⁴⁰ or 'sultanistic regimes'⁴¹ whose organisational goal is to enrich the ruling elite and bestow sufficient patronage to maintain the loyalty of subordinate power-holders. A state that appears to its citizens to be captured by, or systematically to favour, criminal networks can fall irretrievably into a legitimacy crisis⁴² as the general population loses trust in the state's capacity or willingness to provide for their wellbeing.⁴³

Particularly in a case such as the Albanian state, however, we should be wary of the idea that the state was captured by some powerful, cohesive, mafia-like organisation. It seems more likely that the state was undermined through a series of interactions between small, fluid, opportunistic criminal organisations and equally opportunistic officials and political parties.⁴⁴ Exploitation of women for prostitution appears often to be a family or clan-based business, one that does not require a large investment.⁴⁵ This is consistent with a general pattern discerned by Miraglia and colleagues, in which 'long-standing hierarchical and patrician organisations operating in a manner similar to legitimate transnational firms' are giving way to 'interconnected, flexible and opportunistic networks', particularly in criminal

³⁷ Varese, above n. 34; J. West, 'The Political Economy of Organized Crime and State Failure: The Nexus of Greed, Need and Grievance' (2006) 6 *Innovations: A Journal of Politics*, 6.

³⁸ Miraglia et al., above n. 31 at 5.

³⁹ *Ibid.* at 4.

⁴⁰ S. Rose-Ackerman, *Corruption and Government* (Cambridge University Press, 1999), 113.

⁴¹ H. E. Chehabi and J. J. Linz (eds.), *Sultanistic Regimes* (Johns Hopkins University Press: Baltimore, 1998).

⁴² Varese, above n. 34.

⁴³ Miraglia et al., above n. 31 at 14.

⁴⁴ F. Zhila and B. Lamallari, *Evolution of the Albanian Organised Crime Groups* (Open Society Foundation: Tirana, 2016); I. Gjoni, 'Organized crime and national security: The Albanian case', MA Diss., US Naval Postgraduate School, Available at <https://core.ac.uk/download/pdf/36695412.pdf> (accessed 17 October 2018); R. Vogler, 'Organised Crime, People Trafficking and Corruption: The Albanian Question', paper presented at the Round Table 'Tackling Corruption Relating to Human Trafficking', 19 April 2017, RUSI, London. For the 'mafia' image see X. Raufer, 'A Neglected Dimension of Conflict: The Albanian Mafia' in J. Kohler and C. Zürcher (eds.), *Potentials of Disorder: Explaining Conflict and Stability in the Caucasus and in the Former Yugoslavia* (Manchester University Press, 2003).

⁴⁵ Arsovska, above n. 28, 50, 52.

markets concerned with logistics rather than production.⁴⁶ Their operation 'depends crucially on the co-operation of local officials and security forces, and on the consent or indifference of the public'. In the case of Albania, there is evidence that security forces, and former security service members who retain close ties to the state, have been active in human trafficking.⁴⁷ Moreover, ordinary people may have co-operated with traffickers because it was, for them, a form of resilience: a way of coping with dire economic circumstances when other institutions failed. Court case analysis by Tota and Mecka showed that traffickers had family relations with the victim and relatives had supported the trafficking for economic necessity.⁴⁸

Albanian organised crime groups started to develop rapidly after the fall of communism in the early 1990s. Illegal migration of Albanians to Western European countries was virtually uncontrolled owing to lack of police manpower, expertise and funds. In this environment, it was relatively easy formal and informal networks to establish themselves in the business of human trafficking.⁴⁹ Ethnic Albanian criminals began to gain a reputation in criminal and law enforcement circles as pimps and traffickers in women for sexual exploitation.⁵⁰ They took over prostitution markets in London, Amsterdam, Paris, Athens, Frankfurt, and other cities.⁵¹ The money from prostitution was invested in Albania or re-invested in the criminal business itself.⁵²

In 1997, Albania experienced a collapse of order and widespread violence, which resulted in a situation where the government was overthrown and some 2,000 people were killed. The 1997 disorder came as a result of the collapse of fraudulent financial pyramid schemes. Albania's transitional period from communism to democracy, which began in 1990, led to the establishment of new structures for profiting from the country's resources.⁵³ As the pyramid schemes collapsed and many people lost their life savings, an opposition political party opened the prisons and released the inmates. All manner of guns

⁴⁶ Miraglia, et al., above n. 31 at 7-8.

⁴⁷ G. Xhudo, 'Men of Purpose: the Growth of the Albanian Criminal Activity' (1996) 2(1) *Transnational Organized Crime* 1; Center for Study of Democracy, *Partners in Crime: The Risks of Symbiosis between Organized Crime and the Security Sector in Southeast Europe* (author: Sofia, 2004) 91; J. Leman, and S. Janssens 'Albanian Entrepreneurial Practices in Human Smuggling and Trafficking: On the Road to the United Kingdom via Brussels, 1995–2005' (2012) 50(6) *International Migration* 166, 167; Zhilla and Lamallari, above n. 44 at 27.

⁴⁸ N. Tota and N. Mecka, 'Some Phenomenological Characteristics of The Human Trafficking in Albania during the Period from 2003 to 2014' [2015] *European Scientific Journal* (special ed.) 303.

⁴⁹ M. H. Meçe, 'Effectiveness of Counter-Trafficking Response in Albania' (2016) 14 *Social Change Review* 25, 29.

⁵⁰ J. Arsovska, above n. 28 at 52.

⁵¹ J. Bennetto, 'Albanians Taking over London Vice' *The Independent* (25 November 2002); see, also, J. Bennetto, 'New Vice Squad to Tackle Airport Sex-Slave Auctions' *The Independent* (5 June 2006).

⁵² Arsovska, above n. 28.

⁵³ Jusufi, above n. 28 at 81.

and munitions were abandoned and could be taken freely.⁵⁴ The resulting situation is vividly described by Jusufi:

Almost every family was armed. Tanks replaced normal traffic on the streets. The whole of the Albanian population had access to arms. The feeling that as far as the state went they were on their own, led the majority of citizens to shut themselves up at home in terror. The availability of arms led to emergence of potentially criminal thugs firing guns.... Violence escalated at the individual level as well. There was an unexpected revival of blood feuds, or revenge killings. An increasing number of people, as a result, were indirectly involved in blood feuds. The prisons opened, releasing criminals and political prisoners. Thousands of Albanians fled or attempted to flee on boats to Italy.⁵⁵

In the period following the near financial collapse of 1997 and the conflict in Kosovo (1998–1999), Albanian organised crime groups expanded their operations to Western Europe and the United States. Media coverage of their activities reached a peak. Albanian criminals were considered to be a ‘dangerous breed’, posing a threat to society.⁵⁶

A World Bank study of the transition period in Albania used the concept of vulnerability to describe ‘the new conditions of social weakness suddenly created by the turmoil in society, which are qualitatively different from poverty’, although they often overlap with it in practice.⁵⁷ The researchers argued that social exclusion and gender abuse were also major contributors to vulnerability. They wrote that vulnerable groups of these kinds were seen mostly in the cities and rural communities of the middle and coastal regions, where uncontrolled migration flows accelerated the breakdown of the traditional family structure in a context in which no mechanisms were in place to provide support and protection and women considered their circumstances intolerable.⁵⁸ John Davies, in a controversial study,⁵⁹ added that an increasing number of women were deliberately resorting to illegal migration and sex work to escape intolerable social traditions.⁶⁰

⁵⁴ J. Arsovska ‘The “G-local” Dimension of Albanian Organized Crime: Mafias, Strategic Migration and State Repression’ (2014) 20(2) *European Journal on Criminal Policy and Research* 205, 214.

⁵⁵ Jusufi, above n. 28 at 89.

⁵⁶ Arsovska, above n. 54 at 205.

⁵⁷ G. La Cava and R. Y. Nanetti, *Albania: Filling the Vulnerability Gap* (World Bank Technical Paper no. 460, 2000). Available at: <<http://documents.worldbank.org/curated/en/587091468742830114/pdf/multi-page.pdf>> (accessed 18 October 2018) 1.

⁵⁸ *Ibid.* at 2.

⁵⁹ J. Bindel, ‘The shocking tale of John Davies, pro-prostitution academic & trafficking denier, recently jailed for fraud’. Available at: <https://www.feministcurrent.com/2016/06/10/john-davies-pro-prostitution-academic-trafficking-denier-jailed/> (accessed 26 September 2018).

⁶⁰ J. Davies, *My Name Is Not Natasha* (Amsterdam University Press, 2009) 115.

Albania remains a country of origin of women trafficked mainly for the purposes of sexual exploitation; however, since 2005 there has been a decline in the number of persons being trafficked.⁶¹ From 2005 onwards, Belgian police increased their interventions on Belgian motorways, resulting in a decrease of Albanians operations on the human trafficking route between Brussels and England (which involved the smuggling or trafficking of people of many nationalities besides Albanians).⁶² The problem of human trafficking has not been resolved but rather, as Limanowska explains, the traffickers became more professional and changed their *modus operandi* in response to counter trafficking measures.⁶³

Kevin Bales has argued that corruption is a driving factor of human trafficking.⁶⁴ Cho et al⁶⁵ and van Dijk and Klerx-van Mierlo⁶⁶ have shown correlations between perceived levels of corruption, actual victimisation by corruption, and poor performance on measures of anti-trafficking effectiveness. Distrust in the judicial system and in police corruption also increased the risk of sex trafficking in Albania. Albanian police have facilitated sex trafficking by collaborating with smugglers while victims have found their case dropped or delayed for years. Ongoing relationships between politicians, public servants, and criminals have strengthened the positions of criminal organizations at the borders, and police have regularly helped falsify documents.⁶⁷

Leman and Janssens write that following the collapse of communism in 1991, some of the former Albanian security service or *Sigurimi* agents who lost their jobs when the agency was restructured (although former colleagues remained employed by the new security service) offered their services to criminal organisations.⁶⁸ Having joined criminal organisations which were active in human smuggling and trafficking, they brought typical intelligence techniques into the criminal network for internal secret communication.⁶⁹ They

⁶¹ Jusufi, above n. 28 at 109.

⁶² J. Leman and S. Janssens, above n. 47 at 167.

⁶³ B. Limanowska, *Trafficking in Human Beings in South Eastern Europe* (UNDP: Sarajevo, 2005).

⁶⁴ K. Bales 'What Predicts Human Trafficking?' (2007) 31(2) *International Journal of Comparative and Applied Criminal Justice* 269.

⁶⁵ S.-Y. Cho, A. Dreyer and E. von Neumayer, *The Spread of Anti-Trafficking Polices: Evidence from a New Index* (CEGE Discussion Papers, no. 119, University of Göttingen, 2011)

⁶⁶ J. van Dijk and F. Klerx-van Mierlo, 'Indicators of Corruption: Further Explorations of the Link Between Corruption and Implementation Failure in Anti-Trafficking Policies' (2011), available at <https://www.uni-heidelberg.de/fakultaeten/wiso/awi/humantrafficking/papers.html> (accessed 31 Oct 2018).

⁶⁷ V. Bekteshi, E. Gjermeni and M. Van Hook 'Modern Day Slavery: Sex Trafficking in Albania' (2012) 32 *International Journal of Sociology and Social Policy* 480, 484.

⁶⁸ Leman and Janssens, above n. 47 at 167. See also Xhudo, above n. 47.

⁶⁹ Center for the Study of Democracy, *Partners in Crime. The Risks of Symbiosis between the Security Sector and Organized Crime in Southeast Europe* (Author: Sofia, 2004). See also J. Leman and S. Janssens 'An Analysis of Some Highly-Structured Networks of Human Smuggling and Trafficking from Albania and Bulgaria to Belgium' (2006) 22(3) *Migracijskei Etnicketeme* 231, 232.

collaborated closely with corrupted border and visa control officials.⁷⁰ These former intelligence service members could also activate their contacts within Western embassies to obtain visas, and they facilitated the access to hotels or other places of stay for the temporary housing of people in transit.⁷¹

In short, the Albanian state by a combination of corruption, economic mismanagement and a failure to respond to the needs of women, the Roma and other socially vulnerable groups, has done much to create and perpetuate conditions in which Albanians are vulnerable to human trafficking. How far this should be interpreted as a case of state vulnerability, as opposed to state institutions deliberately pursuing criminal objectives, is a difficult question.

Victims of Trafficking as Vulnerable Subjects

Little work has been done to apply vulnerability theory to crime,⁷² and, in particular, to organised crime. We would suggest, however, that just as writers such as Diego Gambetta conceptualise organised crime as creating alternative sources of trust and protection where the state is weak,⁷³ organised crime can be understood as an alternative source of resilience, both for active participants and for those who use their services; but one which at the same time tends to create acute situational vulnerabilities. For example, in remote rural areas of Albania, and in marginalised urban areas, human trafficking has become a source of resilience for families and clans who exploit young women as sex workers.⁷⁴ Court case analysis by Tota and Mecka showed that traffickers in Albania often had family relations with the victim and relatives had supported trafficking out of economic necessity.⁷⁵ Leman and Janssens state that, in Albania, the entrepreneurial techniques for human trafficking networks remain clan-related with the potential use of violence and absolute control.⁷⁶ A perverted understanding of the Kanun (a mediaeval codification of Alba-

⁷⁰ Center for the Study of Democracy, *The Drug Market in Bulgaria* (Author: Sofia, 2003).

⁷¹ M. Hajdinjak, *Smuggling in Southeast Europe. The Yugoslav Wars and the Development of Regional Criminal Networks in the Balkans* (Center for the Study of Democracy: Sofia, 2002)

⁷² But see S. Marvel, 'The Vulnerable Subject of Rape Law: Rethinking Autonomy and Consent' (2016) 65 *Emory LJ Online* 2035.

⁷³ D. Gambetta, *The Sicilian Mafia: The Business of Private Protection* (Harvard University Press: Cambridge, MA, 1993).

⁷⁴ Miraglia, et al., above n. 31 at 10; Arsovska, above, n. 28 at 52.

⁷⁵ Tota and Mecka, above n. 48.

⁷⁶ Leman, and Janssens, above, n. 47 at 169.

nian customary law) has been used by Albanian traffickers to justify a complete devaluation of the position of women.⁷⁷ Women become economic assets; a source of resilience for the family or clan, but certainly not for themselves.

Other women, as well as men, turn to smugglers or traffickers in an attempt to achieve resilience by migrating. As discussed above, many Albanians and especially women have experienced acute vulnerability since the fall of communism, for reasons that include but are not reducible to severe poverty. Violation of women's labour and social rights and a wide gender wage gap also increased women's vulnerability.⁷⁸ Roma women and rural women have been considered especially vulnerable to trafficking.⁷⁹

When people facing acute situational vulnerability seek out the services of people smugglers, they are displaying a degree of resilience, 'bouncing back' from economic disaster and gender-based abuse. At the same time, they make themselves vulnerable to 'smugglers who turn out to be traffickers'.⁸⁰ In the words of the Upper Tribunal's Country Guidance:

Although such women cannot be said to have left Albania against their will, where they have fallen under the control of traffickers for the purpose of exploitation there is likely to be considerable violence within the relationships and a lack of freedom: such women are victims of trafficking.⁸¹

Acknowledging the initial resilience of many of those who become victims of trafficking runs counter to the dominant, gendered narrative of traffickers kidnapping, deceiving, exploiting, and sometimes enslaving naïve women.⁸² It must be acknowledged, however, that for some Albanian women the dominant narrative is close to the truth. In one-third of the Belgian judicial files examined in Leman and Janssens' study of human smuggling and trafficking from Albania, via Belgium, to the UK, 'lover boy' techniques, where the victim is manipulated into seeing the perpetrator as her boyfriend, were used to lure young

⁷⁷ J. Arsovska, 'Understanding a "Culture of Violence and Crime": the Kanun of Lek Dukagjini and the Rise of the Albanian Sexual-slavery Rackets', (2006) 14 *Crime, Criminal Law and Criminal Justice in Europe* 161; J. Arsovska, 'Gender-based Subordination and Trafficking of Women in Ethnic Based Context. The Upward Revaluation of the Kanun Morality', (2006) 6 *Kolor, Journal on Moving Communities* 3.

⁷⁸ Meçe, above n. 49 at 42.

⁷⁹ V. Lesko 'Assistance and Reintegration Work with Women and Girls from Minority Communities' CAAHT 2005 Annual Conference, Sheraton Hotel, Tirana, Albania, Institute for Gender Applied Policies.

⁸⁰ J. Berman, 'Biopolitical Management, Economic Calculation and Trafficked Women' (2010) 48(4) *International Migration* 84, 86.

⁸¹ *TD and AD (Trafficked women)* CG [2016] UKUT 00092 (IAC), [119(c)].

⁸² J. Campbell, 'Shaping the Victim: Borders, security, and human trafficking in Albania' (2013) 2 *Anti-Trafficking Review* 81, 85.

women into prostitution. (As the files covered varying numbers of migrants, with some running into thousands, it is unclear what proportion of individual women were recruited in this way.) In Leman and Janssens' view, under such circumstances, 'there is not much room left for a woman's personal agency.'⁸³

Nevertheless, migrants who deliberately turn to those they take to be smugglers in order to reach the UK or another relatively wealthy country, in some cases with the intention of earning money by sex work, may be supposed to exercise a degree of rational agency at this initial stage, at least up to the point when the traffickers reveal their true colours.⁸⁴ This is consistent with the idea of a 'vulnerable subject', capable of exercising autonomy and agency but dependent for those capacities on the support of others, and so always vulnerable to betrayal. From the point of view of vulnerability theory we are all (at best) vulnerable subjects, but in our view some subjects, for social and economic reasons, are more vulnerable than others. The implications of such vulnerability for criminal responsibility will be discussed below.

Responsibility and Vulnerability

In this part of the article, we turn to discussion of the ethical and legal issues surrounding the responsibilities of the state and others towards victims of trafficking, and the responsibility of the victims for any offences they may commit at the instigation of their traffickers or exploiters. It may be helpful at this stage to summarise the relevant principles that emerge from the discussion so far.

- (1) Vulnerability is a universal feature of the human condition and gives rise to an ethical responsibility to help others overcome their vulnerability, or at least a negative duty not to exploit the vulnerability of others. That responsibility can be justified along Kantian lines (as we prefer) or on the even more demanding lines of Levinasian ethics.
- (2) The responsibilities of the state towards victims of trafficking are not duties towards its citizens, but rather duties owed *by* its citizens to humanity at large, which for practical reasons must be largely, but not entirely, delegated to the state.

⁸³ Leman and Janssens, above n. 47 at 173.

⁸⁴ Berman, above n. 80; A. Gallagher, 'Trafficking, Smuggling and Human Rights: Tricks and Treaties', (2002) 12 *Forced Migration Review* 25.

- (3) In addition to universal human vulnerability it is important (*pace* Fineman) to take account of situational vulnerability, i.e. the features of a person's situation that expose them to heightened risks of particular kinds of harm.
- (4) Individual characteristics such as disabilities may mean that a situation is one of heightened vulnerability for a person with those characteristics but would not be so (to the same degree) for others. Rather than regarding certain groups of people as vulnerable *per se*, we should consider the situations in which they would experience heightened vulnerability.⁸⁵
- (5) To alleviate their vulnerability people need resources for resilience (the capacity to recover from harms or setbacks) but they also need protection against situational vulnerability, i.e. against being exposed to heightened risks of harm. (The ability to *escape* from an existing situation of vulnerability can be considered as a form of resilience.)
- (6) People are responsible, i.e. answerable to public criticism, for wrongful acts committed when they had the capacity to recognise and respond to the reasons for acting otherwise than they did.⁸⁶ As vulnerable subjects, most of us have those capacities some of the time, but not throughout our lives.

In light of those principles, let us consider firstly the responsibility of the state, citizens and corporations *towards* victims of trafficking, and then the extent to which victims can justly be held responsible.

Responsibilisation and Preventive Strategies

According to Garland's notion of 'responsibilisation',⁸⁷ the burden of crime control is shared among participants 'making individuals, private sector and community responsible for public tasks'⁸⁸ and relieving the state of exclusive responsibility for crime control initiatives. Responsibilisation is seen as a neoliberal strategy whereby citizens and potential victims will be assigned to take up more responsibility for risk management.⁸⁹ Since vulnerability

⁸⁵ See Herring, above n. 4.

⁸⁶ See J.M. Fischer and M. Ravizza, *Responsibility and Control* (Cambridge University Press, 1998). We have greatly simplified their view, but the nuances need not concern us here.

⁸⁷ D. Garland, *The Culture of Control* (Oxford University Press, 2001) 126-7.

⁸⁸ W. Schinkel and F. van Houdt, 'The Double Helix of Cultural Assimilationism and Neo-liberalism: Citizenship in Contemporary Governmentality' (2010) 61(4) *British Journal of Sociology* 696, 699.

⁸⁹ A. Heber, 'The Hunt for an Elusive Crime – An Analysis of Swedish Measures to Combat Sex Trafficking' (2018) 19 (1) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 3, 8.

theory is conceived largely as an antidote to neoliberalism,⁹⁰ we might expect it to reject any kind of responsabilisation; but we would suggest that a more nuanced view is called for. What critics of responsabilisation usually object to is that it shifts responsibility onto vulnerable people themselves to provide their own means of resilience, for example by insurance. By stressing human interdependence in the face of universal vulnerability, the theory aims to provide a normative basis for a welfare state and welfare-oriented laws. But this recognition of human interdependence can also support notions of responsible or active citizenship and social inclusion which are not far removed from the thinking associated with responsabilisation.⁹¹ The second in our own list of six principles also points in this direction.

We can take an example from an article by Anita Heber which gives a critical account of the trend towards responsabilisation in Swedish anti-trafficking policy. She quotes the following statement from the Swedish government crime prevention agency, Brå:

Human trafficking is dependent on these legal actors, who are often unaware that they play roles that are important for organised crime. They include ferry companies, bus companies, travel agencies, restaurants, estate agents, housing agencies and landlords. By giving these groups knowledge about how they become involved in procuring and human trafficking, and how they are utilised without being aware of it, they may become more cautious and observant. This will prevent crime.⁹²

The problem with this statement, we would argue, is not with the idea that citizens and businesses could become more knowledgeable and observant, but that (according to Heber) the 'knowledge' on offer is seriously distorted, conflating sex trafficking (a relatively rare phenomenon in Sweden) with sex work in general, while paying little attention to trafficking for labour exploitation.

Situating modern slavery in the context of responsabilisation would favour strategies that 'decentre' criminal law enforcement in favour of a multi-agency regulatory approach.⁹³ There are undoubtedly good reasons to be suspicious of attempts to market this kind of

⁹⁰ Fineman, above n. 15 at 134

⁹¹ Schinkel and van Houdt, above n. 88; D. Gilling, *Crime Prevention: Theory, Policy and Politics* (UCL Press: London, 1997); G. Hughes, *Understanding Crime Prevention: Social Control, Risk and Late Modernity* (Open University Press: Buckingham, 1998).

⁹² *Sexuell Människohandel. En Fråga om Tillgång och Efterfrågan* [Sexual Human Trafficking. A Question of Supply and Demand] (2008), quoted by Heber, above n. 89 at 12.

⁹³ S. Fouladvand, 'Decentering the Prosecution-Oriented Approach: Tackling Both Supply and Demand in the Struggle against Human Trafficking' (2018) 52 *International Journal of Law, Crime and Justice* 129.

multi-agency social control as 'progressive governance'.⁹⁴ The danger of this neo-liberal approach would be that it offers social inclusion to those who responsibly deal with social problems on the one hand and continued exclusion to those who seek or remain involved with human traffickers (or more generally, who choose to continue as sex workers) on the other. The outcome for those who do not responsibly 'exit' sex work involves further criminalisation and marginalisation.⁹⁵ Moreover the plight of victims of trafficking, coupled with conflation of trafficking with migration and sex work,⁹⁶ provide a convenient rationale for increasingly coercive control of both migration and sex work in general.

In contrast, an approach which stressed the responsibility of corporations and consumers to avoid benefitting, knowingly or unwittingly, from trafficking for labour exploitation, either internationally or within the UK, could be genuinely progressive. In this respect the duty of firms with a turnover over £36 million per annum to publish a slavery and human trafficking statement to ensure that modern slavery is not involved in their supply chains⁹⁷ is a small but welcome step in the right direction. Another is the 'safe car wash app' which enables car wash customers to complete a short survey on working conditions.⁹⁸

Criminal Responsibility and Defences

We turn now to the question of how far people classed as victims of human trafficking can be held responsible for any offences they commit. Under the Modern Slavery Act 2015, s. 45, an adult who acted under compulsion attributable to slavery or to exploitation consequent on being a victim of trafficking will have a defence to some charges (subject to long and somewhat arbitrary list of exclusions),⁹⁹ 'if a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act'.¹⁰⁰ In the case of a defendant under 18, the word 'compulsion' is not used and the test is one of whether a reasonable person in the same situation and with the same relevant characteristics would do the act.¹⁰¹ Compared to the defence of duress, the new defence is somewhat more flexible in taking account of situational vulnerability. However, the person in that situation is still expected to act as a 'reasonable person', or in other words an autonomous moral subject. The law will not recognise the

⁹⁴ J. Scoular and M. O'Neill 'Regulating Prostitution' (2007) 47(5) Br J Criminol 764.

⁹⁵ Ibid. at 765.

⁹⁶ S. Fouladvand, 'Corruption and Human Trafficking: A Holistic Approach' in N. Ryder and L. Pasculli, (eds.), *Corruption in the Global Era: Causes, Sources and Forms of Manifestation* (Routledge: London, forthcoming).

⁹⁷ Modern Slavery Act 2015, s. 54; O. Martin-Ortega, 'Human Rights Risks in Global Supply Chains: Applying the UK Modern Slavery Act to the Public Sector (2017) 8(4) *Global Policy* 512.

⁹⁸ Available at: <<https://www.theclewerinitiative.org/safecarwash>> (accessed 15 October 2018).

⁹⁹ Modern Slavery Act 2015, Sch. 4; K. Laird, 'Evaluating the Relationship Between Section 45 of the Modern Slavery Act 2015 and the Defence of Duress: an Opportunity Missed?' [2016] Crim LR 395, 396.

¹⁰⁰ Modern Slavery Act 2015, s. 45(1)(d).

¹⁰¹ Ibid. s. 45(4).

fragility of human autonomy unless it is manifested in a medically diagnosable condition that will constitute a 'relevant characteristic' of the defendant.¹⁰² As Karl Laird argues, it seemingly 'requires a victim of slavery or relevant exploitation to be evaluated against a standard they could not possibly have been expected to achieve'.¹⁰³ A more appropriate test, in line with our focus in principle (6) above on the defendant's ability to recognise and respond to reasons for acting otherwise, might be whether the defendant was unable, as a result of slavery or exploitation, to see any reasonable alternative to acting as they did. A vulnerability-focused approach would concur with Laird's call 'to construct a more humanising defence',¹⁰⁴ and give the vague word 'humanising' a particular meaning: that the defence should reflect an understanding of human beings as vulnerable subjects, rather than the abstract individuals of traditional criminal law doctrine.

As we hope the preceding discussion has made clear, this is not to endorse the stereotype of trafficked persons as passive victims entirely lacking in agency. In relation to Albania, we suggested that when people in a highly vulnerable situation turn to smugglers for help with migration, possibly with the intention of engaging in sex work, this may at least initially constitute a form of resilience, a way of seeking control over one's life and escaping from extreme poverty, gender-based violence and other hardships. When the smugglers turn out to be traffickers, however, the migrant may be faced with such levels of coercion and manipulation that they lose any meaningful degree of autonomy. Such cases raise a thorny question in the theory and doctrine of criminal law: the extent to which people can be held responsible for bringing about their own lack of responsibility.¹⁰⁵

The law gives different answers to these questions depending on whether a defendant can benefit from the specific defence under the Modern Slavery Act 2015, s. 45, or whether they have to rely on the common law of duress or abuse of process. The latter will apply if either the offence is one of those listed in Schedule 4 of the Act, to which the statutory offence does not apply (e.g. manslaughter,¹⁰⁶ burglary or assisting illegal immigration), or it was committed before s. 45 came into force. The law is not concerned with whether a person in a position of such extreme vulnerability is somehow to blame for being in that situation.

¹⁰² Ibid. s. 45(5).

¹⁰³ Laird, above n. 99, 399.

¹⁰⁴ Ibid., 396.

¹⁰⁵ P. H. Robinson, 'Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine' (1985) 71 *Virginia Law Review* 1.

¹⁰⁶ Offences of murder raise unique issues, being excluded both from the statutory offence and from duress: see N. Wake 'Human Trafficking and Modern Day Slavery: When Victims Kill' [2017] *Crim LR* 658.

It is otherwise where the defendant relies on the common law, as can be seen in the recent case of *R v GS*.¹⁰⁷ The appellant was a drugs 'mule' arrested and convicted in 2007. In 2015 she was granted asylum on the basis that she was a victim of trafficking and that her life would be in danger if she was sent back to Jamaica. The Competent Authority accepted that, on the balance of probabilities, she was a victim of trafficking for the purposes of forced criminality. However, her status as a refugee and her leave to remain in the UK would be at risk unless her conviction was overturned.¹⁰⁸ She relied on reports from two psychologists to the effect that she had suffered cognitive impairment as a result of head injuries and her

'vulnerable personality', coupled with her lowered intellect, accounted 'for her lack of judgment and acquiescence in being manipulated into committing the offence'. The Applicant was of 'borderline intelligence' and 'overly compliant'. She had been traumatised by her experiences; her lowered intellect and 'current emotional state' made her 'vulnerable to exploitation by her more able peers'.¹⁰⁹

Her appeal was on the basis that the law had developed since 2007 to the point where it would be considered an abuse of process to prosecute a victim of trafficking in her situation, and given the risk to her immigration status there would be 'substantial injustice' if the decision were allowed to stand.

The Court of Appeal considered the case under the law of abuse of process as it had developed since 2008, not under s. 45 of the 2015 Act.¹¹⁰ It concluded that the psychological evidence would be largely inadmissible at trial,¹¹¹ and that the applicant was not under such a level of compulsion that it was not in the public interest for her to be prosecuted. In reaching the latter decision, the Court attached great weight to the fact that,

cognisant of the risk, she returned to the UK and resumed contact with those whom she knew were involved in the drugs trade. That there were or may have been health issues prompting her return to the UK does not bear on the resumption of contact with those who had, on her own account, already trafficked her to the Bahamas.¹¹²

¹⁰⁷ [2018] EWCA Crim 1824.

¹⁰⁸ *Ibid.* at [65].

¹⁰⁹ *Ibid.* at [42], quoting the report of Dr Egnal.

¹¹⁰ *Ibid.* at [58], [64], [75]; *R v O* [2008] EWCA Crim 2835.

¹¹¹ *R v GS*, above n. 107 at [72].

¹¹² *Ibid.* at [81].

Applying the principles outlined above, both aspects of the Court of Appeal decision are questionable. In relation to admissibility, the Court seems to have asked itself the wrong question, namely whether or not the expert evidence would have been admissible in relation to the defence of duress that GS raised at trial. It is unclear whether the Court answered this question correctly, as the evidence was arguably inadmissible in so far as it suggested a link between GS's psychological compliance and her brain injury.¹¹³ The real issue is how far the prosecution would have been obliged to consider the psychologists' reports in exercising its discretion whether to prosecute in circumstances where the victim had been compelled to participate in crime even if the defence of duress was unavailable.¹¹⁴ The medical evidence was relevant to the question whether the crime had in fact been committed under compulsion not amounting to duress, so that it ought not to be prosecuted in light of the Council of Europe Convention Against Trafficking in Human Beings, Art. 26. To answer that question requires an understanding of the interaction between the individual's characteristics (including brain injury) and her situational vulnerability, and a psychological report may help to illuminate that difficult issue.

The ruling on abuse of process adopts a 'reasonable person' approach that ignores the fragility of human autonomy and prioritises punishment over compassion for human vulnerability. It is understandable that the House of Lords in *Hasan*¹¹⁵ should wish to deny a defence of duress to someone who had apparently chosen a career within the illegal economy where it was predictable that his employers would use harsh measures to enforce their orders. As Baroness Hale said in that case, however,

It is one thing to deny the defence to people who choose to become members of illegal organisations, join criminal gangs, or engage with others in drug-related criminality. It is another thing to deny it to someone who has a quite different reason for becoming associated with the duressor and then finds it difficult to escape.¹¹⁶

In *GS*, the applicant's motives for renewing contact with her traffickers are unclear, but there is no indication it was with intention of becoming involved in criminality. If she merely showed poor judgement, she had already paid a heavy price without being criminally punished. Typically victims of trafficking will fall into the second category described by Baroness Hale, and it is therefore right that they are not denied a defence under the

¹¹³ *R v Bowen* [1996] 2 Cr App R 157, 167.

¹¹⁴ *R v N* [2013] QB 379 at [13].

¹¹⁵ *R v Hasan* [2005] 2 AC 467. See also *R v Brandford* [2017] 4 WLR 17 (CA).

¹¹⁶ *Hasan*, above n 115 at [78].

Modern Slavery Act on the grounds of voluntary association with a person from whom some form of compulsion was foreseeable.

Conclusion

We have used the example of human trafficking to explore the possible value of a form of vulnerability theory to criminal law. We have taken Martha Fineman's influential theory as a starting point but have modified it in two respects. First, in common with Jonathan Herring,¹¹⁷ we take account of situational vulnerability as well as universal vulnerability. In this way we can avoid pathologising 'vulnerable adults' as a category of defective beings without embracing the strikingly counter-intuitive claim that all human beings are equally vulnerable all of the time, even if that vulnerability manifests itself in different ways. An exponent of vulnerability theory orthodoxy might respond that it is precisely this counter-intuitive view that gives the theory its heuristic power,¹¹⁸ but we are not convinced. Secondly, we adhere to a modified version of the Kantian idea of moral autonomy (though perhaps not very much modified, given careful attention to the nuances of Kant's texts),¹¹⁹ in which moral autonomy is regarded as a fragile condition which human beings can attain only intermittently and with the support of others.

Vulnerability theory offers both a social analysis of law and an ethical framework. Ethical conclusions cannot be straightforwardly read off from the social analysis, but it is important to stress that the theory does not imply that because people are vulnerable they are passive or lacking in agency. Much of the time people display resilience in 'bouncing back' from adversity. Sometimes they do so by criminal means, or with help from organised crime. People rely on relations with others to maintain their resilience but those relations are not necessarily benign or motivated by human solidarity. Relations of a less benign kind can quickly turn from sources of resilience to sources of acute situational vulnerability, as the example of human trafficking illustrates all too clearly. The law should take account, to a greater extent than it currently does, of the position of those who are not ideal passive victims but who at the time of their alleged offence lack the supportive social relations that make autonomy possible. Reforms to the criminal law, however, are not going to solve the problem of trafficking. For that we have to look to wider changes in the labour market, in which corporations and consumers as well as the state have a part to play.

¹¹⁷ Herring, above, n. 4.

¹¹⁸ We took this to be the view of several participants at the Leeds workshop, above n. 13.

¹¹⁹ Formosa, above n. 24.