

Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers

Dina Francesca Haynes*

People migrate; they move around the world for many reasons, sometimes born of necessity, sometimes born of desire. Events such as civil war, political upheaval, genocide, extreme economic disparity, and environmental disasters trigger migration, as do more personal factors such as interpersonal relationships and the desire to provide a better life for one's children. Perhaps out of respect for his or her own inherent human dignity, the migrating individual determines to move in order to tap opportunities and resources that exist elsewhere. Some migration is volitional, and some migration is forced. In either instance, migration can be born of desperation, and scholars from many disciplines have argued about the extent to which one can really consent to do something when she feels she has no viable alternative.¹

This article is premised on the notion that migration is the result of a combination of both human nature—a natural tendency to want to improve one's circumstances and those of one's progeny—and a lack of viable alternatives. This article argues that it is time the law recognized migration as such and responded evenhandedly to the exploitation of all migrants, rather than protecting exploited trafficked persons (and even then not always well) while failing to protect and recognize those migrants who fall just short of the trafficking definition. Part I looks at migration generally, surveying migration theory and examining the psychology of migration. Part II explores the notion of exploitation and the extent to which people in transit are particularly vulnerable due to the very factors which drove them to migrate. It looks at the characteristics of exploitation, from the perspective of both the exploiter and the exploited, setting forth the legal theory and laws available to those who are exploited, and detailing the marked differences between those available to trafficked persons as opposed to those not trafficked, but merely exploited. Part III proposes that law alone may be insufficient to respond to exploitation for a multitude of reasons, including the private sphere nature of migration, as migrants move through and into new cultures, legal systems, and labor markets, in which the migrant lives and works on the fringes of society, not fully embraced by it. This section details the variety of ways in which law enforcement officials are not fully employing the available laws, and the reasons why the available laws fail both trafficked persons and those who are exploited. Part IV looks at the relationship between exploitation and political and economic systems, both of which appear to support the notion that, on the one hand, exploitation is morally

* Dina Francesca Haynes is an Associate Professor of Law at New England Law | Boston. She has also taught at Georgetown University, American University, and the University of Nevada at Las Vegas. Prior to teaching, she served as a Protection Officer for UNHCR, Director General of Human Rights for OSCE in Bosnia and Serbia, and an attorney for the U.S. Department of Justice. I would like to thank my research assistant, Laura Nazarro, for her invaluable research assistance, and Professor William Aceves for his early comments on this article.

¹ See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989). See generally John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 635 (1994) (“[A]re women frequently victims of exploitation, as some feminists claim, because their actions, although free in some superficial sense, are ultimately the result of socially imposed values and beliefs?”).

and perhaps even legally wrong, but which on the other hand appear to accept it as a necessary characteristic of doing business in the global market. Part V suggests that a drastic change of perspective is necessary to eliminate the ease with which exploitation occurs in the name of global competitiveness and the free market, and prescribes some of the steps that can be taken to achieve that change in perspective and to begin to respond more appropriately to rampant exploitation.

I. Migration

Over the past century, increasing poverty in Africa, Eastern Europe, Latin America, and Asia, combined with and relative to the increasing accumulation of wealth in the Northern and Western Hemispheres, has spurred massive migration from the South and East to the West and North. Coupled with ethnic conflict and civil war across Southeastern Europe, much of Africa, and parts of Southeast Asia, and exacerbated by globalization, the relative ease of movement, and the availability of transportation, hundreds of millions of people are on the move.²

Migration is a chaotic process,³ no matter the impetus. Migrants live between nations, between homes, often separated from family, and the society, language, and culture with which they are familiar. All categories of migrants—those who determine to move on, those who are forced, and those who feel they have no alternatives—are vulnerable to certain types of human rights violations. It should come as no surprise that the very notion of human rights law was created with the protection of refugees in mind.⁴ People moving between nations are often legally, physically, psychologically, financially, and emotionally vulnerable. Everywhere that people migrate or dream of migrating, there are people who prey on the particular kinds of vulnerability that arise from the passage of migration; that is, there are people who know too well how to exploit the very desire or need to move.

A. Human Rights and Migration

The dream of improving one's circumstances drives the vast majority of migration. Yet, the process of migration itself is often a rudderless, chaotic, transitory state that one must pass through in order to achieve that dream. This sense of indignity and being rudderless is compounded by traffickers and employers that exploit migrants, who are already treated like "the

² According to the United Nations, hundreds of millions of people migrate each year. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The International Labour Organization (ILO) estimated that 120 million people migrated in 1994, or roughly 2% of the world's population, of which 15–20 million were refugees and asylum seekers, while the rest moved to find work or to be with family who had already moved. Women are now estimated to be the majority of migrants. International Labour Organization, Press Release, Mar. 2, 2000, ILO/00/2; see also International Labour Organization, Current Dynamics of International Labour Migration: Globalisation and Regional Integration (June 14, 2002), <http://www-ilo-mirror.cornell.edu/public/english/protection/migrant/about/index.htm> ("Today, ILO estimates, there are roughly 20 million migrant workers, immigrants and members of their families across Africa, 18 million in North America, 12 million in Central and South America, 7 million in South and East Asia, 9 million in the Middle East and 30 million across all of Europe. Western Europe alone counts approximately 9 million economically active foreigners along with 13 million dependents.").

³ James T. Fawcett, *Migration Psychology: New Behavioral Models*, 8 J. POPULATION & ENV'T 5, 6 (1985) ("For many people, movements across space are among the most significant transitional events marking the life course.").

⁴ See, e.g., Refugee Convention, *supra* note 2; HANNAH ARENDT, IMPERIALISM 147 (1968).

scum of the earth” by states they hope to enter,⁵ and who are right-less and devalued as a matter of both fact and law.

Thus, migrants are perfect prey. One of the human rights abuses inflicted on the most vulnerable during these periods of chaos is human trafficking, in which people are forced, coerced, or tricked into becoming human commodities, for the profit of the trafficker, in the form of sex workers, spouses for sale, or, as is most often the case, domestic laborers and indentured servants trapped in debt peonage. Another abuse of human rights is the exploitation of agricultural and other low-wage earners whose ability to remain in the country to which they have migrated, the United States, for instance, is closely tied to the extent to which they make their employers happy by accepting long hours, low pay, and dangerous working conditions without complaint.

When viewed as a legal matter, and reduced to the legality or illegality of the migration in question, the migration process becomes even more chaotic. The countries through which migrants must pass to reach their ultimate destination may not welcome them or allow passage.⁶ The country of final destination also may not welcome them, regardless of whether the migrant intends to remain (immigrate) or merely stay for a short period. For all intents and purposes, under most laws the intent of the migrant means little; only the legal perception of the host country has significance. Even those who will ultimately be eligible for protection by law (for instance, those legally determined to be refugees, asylum seekers, or trafficking victims) must first prove their case and demonstrate their right to remain or pass through, and even then will be entitled to far fewer legal protections than citizens.⁷

During this vulnerable period of physical, cultural, social, and economic dislocation and potential relocation, when people exist in between state protection mechanisms, human rights protections become crucial to ensure that migrating persons do not fall in between the cracks of sovereignty. Sovereignty, the principle under which states protect, defend, define themselves, and decide who is one of them and who is not, is both the enemy and the potential savior of the migrant.

Migrants are not only likely to be economically and emotionally vulnerable during the chaos of relocation; they are also likely to exist in fact, if not always in law, between state protection mechanisms. In other words, they often cannot rely on the protection of the state they have left behind, which might be unable (as a weak or failing state) or unwilling (due to state-sponsored discrimination or unwillingness to fight for the rights of someone seeking to relocate)

⁵ The phrase was first used by Hannah Arendt in describing the plight of refugees after World War II. ARENDT, *supra* note 4.

⁶ Mexico, for instance, regularly sends back people from Guatemala, Honduras, and El Salvador who pass through Mexico seeking to enter the United States in a plan coordinated with the United States. Velia Jaramillo, *Mexico's "Southern Plan": The Facts—Crackdown Underway on Migration From Central America*, PROCESO, June 26, 2001, available at <http://www.worldpress.org/0901feature22.htm>.

⁷ Due Process protections are extremely limited for certain categories of noncitizens in the United States. See *Demore v. Kim*, 538 U.S. 510 (2003); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889). See also *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”).

to protect them. At the same time, they have not yet procured, and may not ever procure, the protection of the state in which they hope to land.

During the movement and even once a migrant arrives in a country in which she hopes to remain, she exists essentially within the private sphere. The private sphere connotes a realm—unlike public life which is open, visible, transparent, condoned by society, and protected by law—that is centered around the family, home, and personal traditions. It is a secretive place, and often outside of, or on the fringes of, legal and societal protections and recognition.⁸ Despite moving around the world and across borders, which might seem logically to be the most public of activities, the migrant lives on the fringe of society, both in the process of moving and upon arrival at the final destination. Even for those who will ultimately be welcomed by law and society (and arguably even for those who arrive legally), the cultural, social, linguistic, and economic transitions that migrants undergo will relegate them, for some time at least, to living on the fringes. Thus, migrants exist in the private sphere.

Assuming she is able to enter the country she seeks to enter, the migrant may become a prospective immigrant, subject to the country's immigration laws, policies and practices, and societal attitudes towards migrants. Among the many laws that govern immigration, three types of claims are recognized as human rights issues: asylum,⁹ protection from human trafficking,¹⁰ and protection from torture.¹¹ While labor rights of migrants, too, are also rightly coming to be understood as a human rights issue, though perpetually in flux and heavily subject to political trends,¹² the three foregoing human rights laws offer, at least once adopted as domestic law,¹³ a corresponding form of immigration relief that recognizes that migrants need protection upon reaching the country of destination. The adoption of such laws demonstrates that states can create categories of immigrant status in compliance with international laws, when the states recognize that some types of migration *should* be seen and responded to through a human rights framework.

⁸ For explanations on the private sphere, *see generally* JUDITH A. BAER, *OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE* (1999); Barbara Ehrenreich & Arlie Russell Hochschild, *Introduction to GLOBAL WOMAN: NANNIES, MAIDS AND SEX WORKERS IN THE NEW ECONOMY* 12 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2003) [hereinafter *GLOBAL WOMAN*] (“[I]t is striking how invisible the globalization of women’s work remains, how little it is noted or discussed in the First World. [Domestic workers caring for other women’s children] is a ‘secret affair’ conducted in plain view of the children . . . [who then also] learn how adults make the visible invisible.”); Lynn May Rivas, *Invisible Labors: Caring for the Independent Person*, in *GLOBAL WOMAN* at 70, 76 (“Immigrant women are easily cast into roles that require invisibility [such as personal caregiver], because they already belong to a category that is socially invisible.”); MACKINNON, *supra* note 1, at 172.

⁹ Refugee Convention, *supra* note 2.

¹⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000 (*entered into force* Dec. 25, 2003) [hereinafter *Trafficking Protocol*].

¹¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 6 U.S.T. 3314, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987).

¹² International Convention on the Protection of All Migrant Workers and Members of Their Families, 30 I.L.M. 1517 (*entered into force* July 1, 2003). For a discussion of the limitations of this Convention, *see infra* Part IV.C.

¹³ In the United States, the corresponding domestic laws are contained within the Immigration and Nationality Act. *See, e.g.*, 8 U.S.C. § 1158 (governing asylum); 8 U.S.C. § 1231(b)(3) (prohibiting the removal of persons likely to be tortured). The Trafficking Victims Protection Act makes visas available to victims of severe forms of trafficking. *See* 22 U.S.C. § 7105.

Unfortunately, domestic interpretations of those international obligations are so cluttered by the myriad political issues with which they are conflated that at times the laws can scarcely be employed to do what they purport to do—protect victims of human rights abuses from further harm.¹⁴ For instance, in the U.S., the interpretation of domestic laws derived from international human rights laws prefers a simple victim story to one that is complicated by a parallel story about the desire to leave behind economic and social or cultural malaise.¹⁵ The justification for this preference, whether acknowledged or not, is fear; in this case, fear of “opening the floodgates.” The United States, like most other first-world and financially well-off countries, only wants “real victims,” not “economic refugees.”¹⁶ This fear that the floodgates might be forced open due to hordes of migrants is not statistically founded, however. The fear is also unreasonable, as it presupposes at least three circumstances which have to be true for the hordes to appear: 1) that people everywhere want to move to the United States; 2) that these same prospective immigrants’ desire to “be an American” is so great that they would rather migrate and “become Americans” than remain and contribute to the long term improvement of their countries of origin, or remain and work temporarily, given a viable choice;¹⁷ and 3) that all of these people are willing to put themselves in harm’s way in order to get here.

This differentiation between those who supposedly have no volition in their movement or who are at risk of imminent physical and emotional harm, and those who are believed to have more choice in the matter or who are at risk of “only” economic, social, or cultural harm (and for which no similar immigration benefits are offered) presents an incongruous picture of the present day preferences of immigrants. Furthermore, this differentiation does not comport with the modern economic realities of a globalized world. Today’s immigration laws make it risky to acknowledge that individual agency and purpose drove the migrant’s decision to move on and improve her life.¹⁸ Asylum seekers, for instance, must prove that they fled because they were persecuted or feared persecution.¹⁹ Expressing a will to depart, to explore, to find work elsewhere, are all deemed to directly contradict and undermine that subjective fear of persecution.²⁰ Similarly, trafficking victims must prove that they were severely exploited.²¹ Speaking of one’s initial desire to see the world, even if gone horribly awry once traffickers find them and exploit that desire, lends credence to the government’s argument that one was

¹⁴ For instance, human trafficking is conflated with the abolition of prostitution, terrorism, and fears of the floodgates opening. “Guestworker” provisions are overwhelmed by free market notions, by the economy, by fear of floodgates, and even by concerns over terrorism. See 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*, 21 GEO. IMMIGR. L.J. 337 (2007) [hereinafter Haynes, *(Not) Found*].

¹⁵ See Dina Francesca Haynes, *Client Centered Human Rights Advocacy*, 13 CLIN. L. REV. 379 (2006) [hereinafter Haynes, *Client-Centered*].

¹⁶ Shirley Chisholm, *U.S. Policy and Black Refugees*, 12 ISSUE: A.J. OF OPINION 22 (1982) (describing the U.S. position denying asylum to Haitians as “economic refugees” while granting asylum to Cubans as “political asylees”); David E. Sanger, *Japan to Deport Chinese “Economic Refugees,”* N.Y. TIMES, Sept. 12, 1989, available at <http://query.nytimes.com/gst/fullpage.html?res=950DEFDF1231F931A2575AC0A96F948260>; *Israel Turns Away Darfur Refugees*, CNN, Aug. 19, 2007, <http://www.cnn.com/2007/WORLD/meast/08/19/israel.darfur/index.html> (suggesting refugees were economic, not political, refugees).

¹⁷ This tends to be disproved by the vast number of remittances sent back to the home country.

¹⁸ See Dina Francesca Haynes, *Human Trafficking and Migration*, in HUMAN RIGHTS IN CRISIS 111 (Alice Bullard ed., Ashgate 2008); Haynes, *(Not) Found*, *supra* note 14.

¹⁹ 8 U.S.C.A. §1158 (West 2006 & Supp. 2008).

²⁰ See, e.g., Haynes, *(Not) Found*, *supra* note 14, at 337, 353 (describing Ahn’s story).

²¹ 22 U.S.C. § 7101.

smuggled, not trafficked, because she sought to go in the first place.²² The legal fiction is that one can either be a victim or a capable person of free will, but not both.²³

B. The Psychology of Migration

Despite the lack of legal acceptance of the notion of volition as a basis for seeking to immigrate, many people around the world do yearn to breathe free, to improve their circumstances, to manifest their destinies, and to pull themselves up by their own bootstraps. The fact that our laws fail to recognize and accept the motivations that drive migrants to move may rest more squarely on the limited utility of attempting to counter a problem (in this case exploitation) with a law.²⁴ Laws are best at punishing wrongdoing, and less effective at protecting persons, particularly when at the policy level there exist countervailing concerns (in this case fear of floodgates opening and fear of admitting terrorists) outweighing concern for the exploited. Not all laws fail in this regard. For instance, human rights laws attempt to provide a basis for rights aside and apart from those recognized or respected by the state, and in particular for refugees and migrants.²⁵ Nevertheless, other disciplines come closer to understanding migration for what it is, and look at it unflinchingly and unclouded by political and economic concerns.

Social scientists studying migration theory, for instance, understand migration as the natural result of individual free will, recognizing the intersection between the individual and the society, which a migrant chooses to leave or to enter.²⁶ Migration theory, unlike many laws purporting to address the rights of persons to enter a country (e.g., immigration laws and national security laws) understands that migration can be interpreted as the result of individual free will, particularly when viewed from the perspective of a lifetime.²⁷

Viewed from a longer-term perspective, it is reasonable to view individual relocation as inevitable and as a result of long-term changes in social and economic structures.²⁸ “Time-geography,” a social science term of art, is used to explain migration in this way:

Everything is connected to everything else and . . . changing over time New conditions are created constantly, conditions that affect and govern the individuals’ actions. By studying migration patterns and migration behaviour [we

²² See Haynes, *(Not) Found*, *supra* note 14, at 353–55.

²³ See Haynes, *Human Trafficking and Migration*, *supra* note 18.

²⁴ See *infra* Part III.

²⁵ See Refugee Convention, *supra* note 2, at ch. 1, art. 1 (laws on statelessness).

²⁶ Olof Stjernström, *Theory and Migration: Towards a Framework of Migration and Human Actions*, EUROPEAN J. GEOGRAPHY, Dec. 15, 2004 (*Cybergeo*, Espace, Société, Territoire art. 254), available at <http://www.cybergeo.eu/index3827.html?file=1>.

²⁷ *Id.* at 2 (“[M]igration patterns can be explained either in macro-terms, where individual behaviour is seen as a result of changes in the surrounding (structure), or in micro-terms where individual decision-making and individual values are given more substance.”).

²⁸ *Id.* (“At first glance, all migration is a question of human movements over the earth’s surface. The reason to migrate varies. What influence has the structure over the individual decision and what choices are open to the migrant?”).

understand] these changes and the importance of time, spatial and social constraints [and how they] affect individual behaviour.²⁹

Simply put, it is human nature for people to recognize when the social and political landscape changes, as it is for humans to take advantage of that awareness by choosing to move to where there are more opportunities for themselves and their children.

Some people who move are forced to leave and migrate,³⁰ and some are even literally snatched by traffickers who kidnap them, but most move because they want to or feel that they must try to find a better life for themselves.³¹ In fact, research on migration has revealed that sometimes it is not the most impoverished who migrate to flee crushing poverty, but rather educated people from the emerging middle classes who yearn for opportunities they believe might exist in other countries that are not apparent in their own.³² Other studies in migration theory describe the “new migrant” as a woman hoping to escape familial expectations, such as the expectation to care for elderly relatives, to marry, to carry out gender roles determined by society, or to turn over paychecks to male relatives.³³

Migration psychologists, too, have noted several different relevant factors central to the migration decision: 1) behavioral economics; 2) a person’s “life space,” or “subjective action space,” which looks at the ways in which migrants selectively process information; and 3) the decision process itself, marked by phases of desire, deliberation, and expectation that the movement will occur.³⁴ More recent work in this field differentiates between external and internal constraints, with the former accounting for the “absence of volitional control and result[ing] in the non-actualization of choice”³⁵—meaning that while international law and domestic immigration laws differentiate only between forced and so-called “economic” migration, there might be many factors besides being literally forced to migrate that would result in migration without volitional control, migrating because one simply has no choice.

²⁹ *Id.* at 13 (“The description and understanding of the phenomenon of migration is heavily related to the level of analysis. Human movements across the surface could be described as it is, as physical movements. Human movements could be understood as a reflect of physical conditions in the environment or it could, at last, be understood as a result of social conditions in the society.”).

³⁰ And, accordingly, there is a separate study of the theory of forced migration. See, e.g., Stephen Castles, *Towards a Sociology of Forced Migration and Social Transformation*, 37 *SOC.* 13 (2003).

³¹ *But see infra* Part IV.C. for a discussion on consent and the extent to which it really exists in the context of such extreme global economic disparity.

³² GENDER, MIGRATION AND DOMESTIC SERVICE 10, 73 (Janet Henshall Momsen ed., 1999) (finding that from Mexico and the Philippines, the migration trend is women with high school degrees and pre migration clerical or retail jobs migrating to the United States who then wind up in domestic service).

³³ Rhacel Salazar Parreñas, *The Care Crisis in the Philippines: Children and Transnational Families in the New Economy*, in *GLOBAL WOMAN*, *supra* note 8, at 39 (describing emigration from the Philippines as “Philippines divorce”).

³⁴ Fawcett, *supra* note 3, at 7–8 (summarizing the work of geographer Julian Wolpert, the first to consider migration as a subject of study in 1965).

³⁵ *Id.* at 10 (quoting Desbarats).

Advocates and social scientists studying the phenomena of human trafficking and indentured servitude have also clearly understood that human trafficking begins in large part with an individual who exercises some agency to improve his circumstances, but then has that desire exploited. These scholars have identified the primary so-called “push factors”—those factors that will lead a person away from their home and into the hands of the trafficker.³⁶ At their most elemental, these factors are simply social, economic, and political powerlessness and disparity.³⁷ But, reviewing this list of push factors, set forth below, it is easy to see that these factors do not just describe the way in which people are rendered susceptible to human trafficking. Rather, they are the very same factors most likely to compel people to migrate. In other words, the factors that trigger migration are the same factors that “push” victims into human trafficking. From the perspective of the victim of exploitation, the initial factors were the same—the combined desire to improve one’s circumstances along with the personal and legal vulnerability that first compels, and then is exacerbated by, the process of migration.

Indeed, while the push factors have been identified by those who study human trafficking, they may well apply to all migrants, or at least the vast majority, even those who will never fall victim to anyone. Some examples of push factors are: 1) poverty, unemployment, and education costs that pressure families to allow or compel children to drop out of school and that force women into the informal workforce; 2) war, civil strife, and extreme economic disparity fracturing families and extended family units; and 3) being a refugee or displaced person. It is only the degree of vulnerability and chance that leads from a path of straightforward migration, albeit still chaotic, to one further complicated by human trafficking, indentured servitude, or labor exploitation. And, of course, even those who have never migrated can wind up internally trafficked, in indentured servitude or exploited within their own countries. If we are to combat trafficking and exploitation in general (and it is not at all clear that we wish to combat the latter, as will be discussed below), then we must be willing to empower those who would otherwise be vulnerable to them. We must also be willing to acknowledge that we purposefully ignore the suffering that exploitation causes when it suits our economic interests.

II. Exploitation

Exploitation connotes one person willingly taking advantage of the desperation or need of another. It is both a moral and economic concept, and sometimes a legal one. The notion of “exploitation” is an acknowledgement of the power differential inherent in the relationship between the one who secures something (often labor) and the one who provides it. Specifically, the term exploitation refers to the upper hand wielded by the former over the latter, in which the one who secures labor opts to cheapen, undermine, or devalue the labor, and the humanity of the one providing it.³⁸ It refers to the relationship between the devaluing of the labor and the devaluing of the human person providing it, and the exploiter’s choice of financial gain or personal profit over the dignity of the human person being exploited. One who exploits is

³⁶ Bridget Anderson & Julia O’Connell Davidson, *Trafficking—A Demand Led Problem?*, Save the Children (2002), available at <http://www.unodc.org/pdf/brazil/trafficking-a%20demand%20led%20problem.pdf>.

³⁷ See Haynes, *Human Trafficking and Migration*, *supra* note 18.

³⁸ It is important to note, however, that economic decisions drive the actions of both parties, and migration psychology has just begun to look at the “behavioral economics” that drive migration. Fawcett, *supra* note 3, at 7.

willing to devalue the humanity of the person providing labor in exchange for the short-term gain of cheaper, more secure, and more efficient provision of services.

Naturally, then, exploitation leads to considering the merits of capitalism and the free market, both of which tell us that the market will correct for any flaws, whether economic or moral.³⁹ Under Marxist usage, exploitation specifically refers to the relationship between workers and the elite capital stakeholders, represented by the inability of the workers to obtain adequate compensation or fair treatment for their labor.⁴⁰ It relates both to the class of workers, as well as an individual worker, and the class of the elite, as well as an individual employer. The notion of exploitation at the macro level acknowledges an imbalance of power, which only unions and the organizations of workers might be capable of adjusting, and then only from time to time and within some societies.

Other types of exploitation refer to different sorts of power differentials, those apparent in personal relationships, for instance. Certain personal relationships, those initiated with a marriage contract, for instance, are also arguably economic. Common to exploitation of all types is the notion that those on the lower end of the economic pole uniformly have less power. And, in a circular fashion, the effect of having less power is felt economically. Still other types of exploitation might include social, caste, educational, and class differences, and any wielding of power by those at the top over those at the bottom. There may also be exploitation of emotional and maturity differences, in that those who are emotionally or psychologically powerless (children, the mentally ill, the severely emotionally distraught—those which the State typically steps in to protect) are particularly susceptible to the manipulation of those who would exploit those vulnerabilities.

Exploitation, particularly when viewed through the lens of law, can also have elements of enticement or seduction.⁴¹ “For an offer to be exploitative,” says John Lawrence Hill, “it must

³⁹ See *infra* Part IV.

⁴⁰ See, e.g., G.A. Cohen, *The Labor Theory of Value and the Concept of Exploitation*, 8 PHIL. & PUB. AFF. 338 (1979); Lawrence Crocker, *Marx's Concept of Exploitation*, 2 SOC. THEORY & PRAC. 201 (1972); see generally ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 253–62 (1974); Hill, *supra* note 1, at 632.

⁴¹ Hill, for instance, offers the examples of 1) a ticket purchaser exploited by a scalper, seduced both by the thought of going to the concert he yearns to see, and at a reasonable price, and 2) the young girl who falls in love with a man who uses her. Writing prior to the modern criminalization of human trafficking (and about organ donors, surrogates, and voluntary experimentation on prisoners), Hill nevertheless argues that “exploitation, although generally over-extended and conflated with a number of other distinct concepts such as coercion, commodification[,] and seduction, has a core meaning that warrants legal recognition.” Hill, *supra* note 1, at 636. He also opines that:

[b]ecause the claim of exploitation [when used as a criminal defense to explain otherwise criminal behavior] typically involves an offer of an additional choice to the offeree, the situation is arguably not “coercive.” Moreover, the offeree may act with full information Nevertheless, we often feel that the victim should be relieved of the consequences of a decision made under exploitative circumstances.

Id. He also offers “exploitation” as a general policy argument to marshal against exploitative practices, *sui generis*. *Id.* at 649. Additionally, the fact that his topic choices (organ donors, surrogates, prisoners, and their potential for exploitation) raised serious concerns in 1994 and are rarely discussed today, perhaps highlights the increasing acceptance of a large underclass of commodified persons, growing larger each year as we become accustomed to thinking that trading money for the body of another is acceptable.

serve to create or to take advantage of some recognized psychological vulnerability which, in turn, disturbs the offeree's ability to reason effectively."⁴² Although speaking here of the use of exploitation as a criminal defense (e.g., "I am less responsible for my actions because I was exploited"), Hill nevertheless offers a useful warning that "[e]xploitation has long been a greatly overused and misused concept, serving to fill the vague conceptual gap between the pre-analytic intuition that there is something wrong with this bargain and the post-analytic determination as to what this something wrong is, exactly."⁴³

What limitations—moral, legal, or economic—exist to restrain the employer or user from the purely economic assessment that it is good business to take advantage of the desperate? Human rights laws, some economic philosophies (if not the actual execution of those philosophies when implemented within a political system),⁴⁴ morality, and some domestic laws which acknowledge that some values trump the pure economic interests of the employer, user, or salesman who takes advantage of the plight of another. Some examples of those laws will be offered below.

On the one hand, it is fairly clear that it is at least socially unacceptable to take advantage of a desperate person. On the other hand, however, societies (at least those which adhere to free market political economy) applaud, for instance, the excellent salesmanship of the man able to sell the most cars, even if he sells them to people who cannot afford to buy them. This type of free market adherence supports a system in which mortgage companies offer no-interest loans to the poor, at least until the same companies begin foreclosing on those loans and the practice can no longer be ignored. The free market accepts the military recruitment of those with no economic or employment alternatives, even offering citizenship in return for military service, thus allowing as a fair exchange the risk of a life for an education or for immigration status.⁴⁵ It accepts that a large and silent underclass of migrants, both documented and undocumented, will serve the desire of the ever-growing middle class for domestic household labor.⁴⁶ It rewards the agricultural businessman for keeping the cost of strawberries down, even if he is able to do so by working his laborers into the ground, secure in the knowledge that they will move on or be deported when growing season is over. It allows us to believe that being able to buy our pants for six dollars is good value, even when it comes at the expense of those who have made them working in a sweatshop, eighteen hours a day, six days a week, for less than minimum wage.⁴⁷

At the same time, most societies, even those which adhere to free market philosophies, express dissatisfaction and even a certain horror with some of the exploitative actions of some business people. We draft and pass certain laws—consumer protection, immigration,

⁴² *Id.* at 637. Hill also sets out theoretical bases of exploitation as: 1) an impediment to free or voluntary acts (but distinguished from coercion in that exploitation usually "offers an alternative," however unappealing) and 2) an impairment of the rational capacity. He rejects the argument that exploitation presents an obstacle to the exercise of free will, proffering instead that it creates an obstacle to rationality, in that "extreme enticement" (e.g., "get rich by working in America!") and the playing on "powerful or even irresistible desires" (e.g., "you will be able to support your children who depend on you") can also result in exploitation. *Id.* at 661 (examples are this author's own).

⁴³ *Id.* at 699.

⁴⁴ *See, e.g., infra* Part IV (discussing China's exploitation of its own citizens who relocate internally to find work).

⁴⁵ *See, e.g.,* 8 U.S.C. §§ 1440–1441 (2006).

⁴⁶ *See, e.g.,* Barbara Ehrenreich, *Maid to Order*, in *GLOBAL WOMAN*, *supra* note 8, at 85.

⁴⁷ *See, e.g.,* JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005).

international and domestic iterations of laws protecting persons who have been smuggled or trafficked, laws protecting rights of workers to unionize—to correct for the imbalance; which is not to say that we also implement or enforce those laws, or that those laws are accessible to noncitizens. Admittedly, these types of laws are among the most difficult to access, use, and apply. Why? In part because, as previously noted, exploitation most often takes place hidden away within the private sphere, and those who are exploited are often ashamed to admit it. In part, too, though, those laws are not enforced because of the mixed feelings free-market-adhering societies have about exploitation. We feel that it is “wrong” to exploit people, and so we pass laws to punish the wrongdoers and to protect their victims. But we rarely apply the laws,⁴⁸ rarely advertise their existence to those in need,⁴⁹ and sometimes criminalize those who attempt to access them.⁵⁰

The world, and the United States along with it, has indeed acknowledged the existence of exploitation, and even the rise of exploitation.⁵¹ The United States has legislated against exploitation and in support of protecting those who are exploited time and again—with the Trafficking Victims Protection Act,⁵² laws prohibiting smuggling, laws to protect unskilled laborers⁵³—and yet each time one of these laws is passed, ostensibly for the benefit of protecting the victims of exploitation, something gets lost, something mutates in the implementation and execution of those laws.⁵⁴ When a law purporting to protect victims of exploitation butts up against a cry of “floodgates opening” or “terrorism,” the fear of floodgates and terrorism wins.

A. The Exploited

⁴⁸ See, e.g., DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007), in which Kanstroom identifies many reasons why the U.S. failed to punish employers for hiring undocumented workers, even when it was illegal to do so. Only in 2007, after years of non-enforcement, has the U.S. government issued new regulations requiring employers to check the immigration status of their employees. See U.S. CITIZENSHIP AND IMMIGR. SERVS., *E-VERIFY USER MANUAL* (2007), available at http://www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf.

For years, although hiring employees without work authorization was a violation of the law, it was not enforced. In both of these scenarios, however, the emphasis is on ensuring that only persons authorized to work are allowed to work, not on ensuring that those working conditions are not exploitative; however, tangentially, those who qualify for work authorization are also entitled to more legal protections, including those that protect workers from exploitation.

⁴⁹ See *State v. Shack*, 277 A.2d 369 (N.J. 1971) (discussing instances of legal aid workers being chased off agricultural land when there to inform workers of their rights). See also Haynes, (*Not*) *Found*, *supra* note 14, at 343–44 (identifying the infrequency with which T-visas are even sought, indicating that their existence is not largely known or understood).

⁵⁰ Haynes, (*Not*) *Found*, *supra* note 14 (discussing the criminalization of trafficking victims). See also *Hoffman Plastics Compounds, Inc., v. NLRB*, 535 U.S. 137 (2002).

⁵¹ Haynes, (*Not*) *Found*, *supra* note 14 (discussing how the legislative history of the Trafficking Victims Protection Act acknowledges that exploitation is something to which we, as a society, are opposed, but the emphasis is on sexual exploitation).

⁵² 22 U.S.C. § 7101.

⁵³ See, e.g., William Wilberforce Trafficking Victims Protection Reauthorization Act 2008 (*signed into law* Dec. 23, 2008).

⁵⁴ See, e.g., Haynes, (*Not*) *Found*, *supra* note 14 (discussing the misinterpretation of the TVPA by DHS, inappropriately placing the burden on the victim to prove the intent of her trafficker and setting the burden at “conclusive” proof).

Which people are exploited, why those people and not others, and how is it done? Researchers studying human trafficking have found that foreign women, and in particular women from the Southern and Eastern hemispheres, are most often the victims of trafficking, which is one extreme form of exploitation.⁵⁵ There are a multitude of reasons that could account for this. These women are seeking to migrate to improve their economic situations and secure jobs elsewhere. They are particularly sought after and targeted by traffickers who perceive them as more easily exploited, especially because they cannot speak a language of the new country and do not understand, or have access to, the legal or social mechanisms available to them.⁵⁶ Traffickers presume, too, that such women are more compliant and less likely to flee because of the foregoing, as well as desperate to improve their economic situation.⁵⁷ They are also sought after by potential users of brothels and by “employers” who also view them as more submissive and compliant because of their lack of understanding of their rights. Some employers view foreign women as compliant, submissive, and sexualized.⁵⁸

Interesting research on the demand side of trafficking suggests that some users of prostitutes and sex workers (who may or may not also be trafficked) view migrant sex workers as *less desirable* for these very same reasons. When they do not share the user’s language, when they may have been forced into the work or have no other choice, they may be perceived by some users as being the “cheap end of the market” and therein less desirable.⁵⁹ “Desirability,” therefore, is probably culturally bound, or even a matter of individual taste on the part of the user. It may also be specific to the “use,” in that those qualities perceived as desirable to one using a person for domestic service (subsistence, for example) may be undesirable to one using a person for sex. However, the same research also supports the conclusion that racism, prejudice, and “othering” allow users of persons trafficked for domestic labor or sex to convince themselves that such practices are justified because the occupants of the position in question are the “‘natural’ . . . occupants of the lowliest positions.”⁶⁰ Lack of power is a common characteristic, and one that is generally desirable to the exploiter and the user.

Push factors for migration, the factors that drive or compel people to migrate in the first place and then to get coerced or defrauded into accepting exploitative jobs, are complex and differ depending upon the region, culture, gender, and socio-economic status of the person in question. Push factors for families whose children are thrust into exploitative work include

⁵⁵ See Bridget Anderson & Julia O’Connell Davidson, *Is Trafficking in Human Beings Demand Driven?: A Multi-Country Pilot Study* (IOM Migration Research Series No. 15) (2003) [hereinafter Anderson & O’Connell Davidson, IOM Report].

⁵⁶ *Id.* The authors of a study looking at the demand side of trafficking quoted a twenty-one-year-old Indian businessman commenting that Nepali girls who had been sold into brothels “are especially nice when they are new to the area. They don’t talk too much and are more helpful to the client. You can control them.” *Id.* at 25. Countering this view, however, they quote a Thai police officer who had paid for sex work who stated, “It’s hard to have sex without talking, because if you can’t talk, you lose the feeling.” *Id.* at 22.

⁵⁷ See *id.* Anderson and O’Connell Davidson found some empirical support for these opinions. Among men who admitted buying sex from foreign sex workers, a “substantial number” believed that migrant prostitutes were “cheaper and more malleable than local women.” *Id.* at 21.

⁵⁸ See *id.* at 25. Anderson and O’Connell Davidson offer the explanation of one interviewee, a married man from India, who valued the qualities of unhappiness and isolation in unfree or trafficked sex workers, because it might make them seek warmth, support, and care from their clients.

⁵⁹ *Id.*

⁶⁰ Parreñas, *supra* note 33, at 39, 41.

extreme poverty, such that the few dollars required to outfit a child for school are impossible to come by, thus making it seem necessary for the child to leave school and enter the workforce.⁶¹ Push factors for women often include the need to support their children and send them to school, forcing the women to accept employment in another country to send money home to children living with family members.⁶² Other push factors for women and children include the view of family members that a woman or a child's labor is a commodity to be sold for the benefit of the family.⁶³ Push factors for men are similarly the need to provide for families back home for whom they cannot provide in their home country where work is scarce or unavailable.⁶⁴

Although some of these factors considered desirable in an "employee" identify specifically what users and traffickers look for, the factors also identify how the people who hold the listed attributes and qualities are correspondingly more likely to be vulnerable to exploitation. In other words, there are qualities that render some people more susceptible to trafficking, and those are the very same qualities that traffickers seek: vulnerability and powerlessness.

Criminal law deals with exploitation by asking whether a person can be excused from criminal actions by using exploitation as a defense or mitigating factor. International and domestic human rights laws allegedly look not at the criminal acts of the exploited person, but at the criminal acts of the exploiter.⁶⁵ Do the same principles apply when the exploited person is not committing a criminal offense, or when the criminal offense in question is the direct consequence of the exploitation (such as entering the country illegally, overstaying a visa, or paying a smuggler)? In other words, could the law be put to work to protect people who are exploited, rather than simply considering the exploitation as a mitigating factor in charging that person with a crime? Certainly in some areas, the law already serves such a purpose in limited circumstances.⁶⁶

⁶¹ Ernest Harsch, *Child Labor Rooted in Africa's Poverty*, AFRICA RECOVERY, Oct. 2001, at 14. See also *Kyrgyzstan: Children Labour to Pay School Fees*, ASIA CHILD RTS. WKLY. NEWSL., July 28, 2004, available at <http://acr.hrschool.org/mainfile.php/0188/340/>.

⁶² 230,000 women from Indonesia to Saudi Arabia work as domestics. The Rural Foundation Report (1992). 640,000 women from Sri Lanka to the Middle East work as domestics. See GENDER, MIGRATION, AND DOMESTIC SERVICE, *supra* note 32. More and more, women in particular are deciding to migrate to escape family and cultural expectations—that she marry, that she care for her elderly relatives, that she defer to her male relatives or acquiesce to her mother-in-law in all things.

⁶³ For example, a Filipina nanny in California described how her then-husband, whose business had failed due to overseas competition, encouraged her to go to Japan to be a lap dancer to make money so he could restart the business. See Arlie Hochschild, *Love and Gold*, in GLOBAL WOMAN, *supra* note 8, at 15, 21.

⁶⁴ Remittances sustain 34–54% of the Filipino population, and constituted the economy's largest source of foreign currency, almost \$7 billion in 1999. Parreñas, *supra* note 33, at 39, 41.

⁶⁵ See, e.g., Trafficking Victims Protection Act of 2000 (TVPA), §§ 106 (a) and (b), Pub. L. No. 106-386, Div. A, 22 U.S.C. § 7101 et seq. (allowing prosecutors to charge with human trafficking any person who receives, harbors, transports, provides, or obtains (or attempts to do any of the foregoing) a person through means of force, fraud, or coercion (including threatening to use the law to deport them, for instance), for the purpose of either commercial sex or labor or services); see also Haynes, (*Not*) Found, *supra* note 14 (arguing that too often law enforcement criminalize the acts of the victim (prostitution, unauthorized employment, fraudulent use of a passport), rather than the trafficker).

⁶⁶ See Part III *infra* for a discussion about the extent to which the TVPA achieves this purpose.

Describing the potential for using exploitation as a criminal defense, Hill points out that “exploitation is the result of a cognitive, rather than a volitional, impairment.”⁶⁷ This means that a person who acts criminally on account of having been exploited might be excused from that behavior on a sort of “impairment” defense. If Hill’s hypothesis is correct, however, then even when we are not considering the *culpability* of an exploited person, but looking instead at whether someone is a victim of exploitation, we can still describe what transpired as a sort of “volitional impairment” on the part of the exploited person. The exploited person has been rendered incapable of exercising judgment or acting in favor of his or her own dignity, due to the action of the exploiter, or perhaps, due to the interaction between the exploiter and the person exploited. If Hill’s assessment is accurate, then lawmakers may be wasting their time in trying to distinguish, as a matter of law, whether a person has *consented* to a particular act—such as being trafficked, being smuggled, or paying over one’s salary to the company store—when determining the culpability of the person who encouraged those actions. If exploitation is “volitional impairment,” then perhaps consent is irrelevant.

1. Consent

The question of consent arises whenever exploitation is discussed. The extent to which an exploited person has consented, or even whether she has the real option of consenting, has been subject to much debate. In the context of human trafficking, the debates over consent raged during the drafting of the Protocol, and the final law was ultimately guided by strong feelings among advocates regarding prostitution and consent.⁶⁸ One argument, essentially, is that “[i]f the values and behavior of women, the poor, and other traditionally alienated groups have been socially conditioned by environmental contingencies established by the dominant group, then their consent is, in an important sense, superficial.”⁶⁹ Similarly, commenting on “guestworker” programs which allow agricultural workers to temporarily enter and work in the United States, critics have observed that “[a] frequent justification of guestworker programs is that the participants in such programs freely choose to be part of them.”⁷⁰

Commenting on guestworker exploitation, Garcia, like feminist legal theorists before him, points out that “[t]he consent of desperate workers in the global economy should be closely interrogated.”⁷¹ The issue of consent, specifically whether it can meaningfully be given, exists for all groups of persons who are marginalized, and, not coincidentally, it is marginalized groups who are the most susceptible to exploitation.

⁶⁷ Hill, *supra* note 1, at 636.

⁶⁸ See, e.g., Dina Francesca Haynes, *Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221 (2004) [hereinafter Haynes, *Used, Abused*]. See also Janie Chuang, *Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Concerns*, 11 HARV. HUM. RTS. J. 65, 80–107 (1998).

⁶⁹ Hill, *supra* note 1, at 668.

⁷⁰ Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 54 (2006) (citing Joseph H. Carens, *Citizenship and Civil Society: What Rights for Residents?*, in DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN EUROPE AND THE U.S.: THE REINVENTION OF CITIZENSHIP 106 (Randall Hanson & Patrick Weil eds., 2002)).

⁷¹ *Id.*

What value does consent have when it is born of desperation? Even if a man could be said to have consented to “the work,” which is arguable, is he also consenting to all of the exploitative and wrong actions that attach to or result from the work? For instance, an agricultural laborer recruited by Manpower of the Americas for an H-2A visa might be said to have consented to the work he was hired to do.⁷² But when he was warned not to talk to legal aid workers about his medical problems that resulted from handling pesticides daily, and was then blacklisted from future seasonal H-2A work by the recruiter for deigning to seek medical and legal assistance,⁷³ he cannot be said to be consenting to either the prohibition to seek assistance or the blacklisting from future employment, regardless of whether he “consented” to the work. Neither can it be said of the victim of human trafficking who “consents” to go work illegally in Italy as a hostess or even as a sex worker that she also consents to being beaten, drugged, and robbed of her earnings once she is doing that job.⁷⁴

2. Feminist Theory on Exploitation

While we are arguably still in the nascent phase of educating law enforcement and government officials about how to identify and properly treat a victim of human trafficking, post-modernist critics of human rights advocacy have already come full circle and called upon human rights advocates and activists to avoid re-victimizing persons who have been trafficked by focusing solely on the “victim” aspect of the story.⁷⁵ As discussed earlier, trafficking victims and exploited guestworkers alike are not solely victims but also migrants, individuals with the intention and strong will to change their life trajectories. As Hill and others suggest, people who have been exploited are not always totally unwilling participants who have been “duped,” but rather people with the intention of participating in at least part of the migration process (moving, finding a job, seeking a different life, and perhaps even resorting to illegal migration to accomplish it), whose very goals are then exploited and transformed into a coercive situation.

Why are women most often victims of trafficking?⁷⁶ In many parts of the world (arguably in all parts of the world) women exist in or are relegated to the “private sphere,” where it is also easier to be bought, sold, and manipulated without anyone noticing.⁷⁷ Sex work and domestic service exist almost wholly within the private sphere, and in a sense, the U.S.

⁷² David Bacon, *Be Our Guests*, THE NATION, Sept. 27, 2004, at 22.

⁷³ *Id.*

⁷⁴ See Haynes, *(Not) Found*, *supra* note 14, for more on consent in the human trafficking context.

⁷⁵ Haynes, *Used, Abused*, *supra* note 68, at 355–58. See also Haynes, *Client-Centered*, *supra* note 15.

⁷⁶ In multiple ways, women are more vulnerable to trafficking and exploitation. Women make up two-thirds of the 2.5 billion poor living on less than U.S. \$2 a day, UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), 2005 HUMAN DEVELOPMENT REPORT (New York, 2005); women comprise the majority of the world’s illiterate at sixty-six percent and girls represent the majority of illiterate among the 121 million school age children globally, UNITED NATIONS CHILDREN’S FUND (UNICEF), THE STATE OF THE WORLD’S CHILDREN 2004, at 31 (New York, 2004); women comprise an inordinately low number among those in managerial and administrative occupations at between thirteen and thirty-three percent depending on geography, STATISTICS DIVISION, STATISTICS AND INDICATORS ON WOMEN AND MEN (2005). The contribution of women to the world’s economy, although estimated at U.S. \$11 trillion, one-third of the world’s economy, remains largely invisible and unrecognised as private sphere labor. UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), 1995 HUMAN DEVELOPMENT REPORT (New York, 1995).

⁷⁷ For a distillation of the “private sphere” in feminist jurisprudence, see Tracey E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847 (2000).

government has relegated agricultural and sweat shop work to the private sphere as well. For some private sphere problems, protective laws are passed (prohibiting prostitution, compelling that the Social Security tax be paid for domestic workers, requiring employers to hire only noncitizens authorized to work), but even these are notoriously under-enforced. While employers are required by law to hire documented workers with work authorization, for instance, the U.S. government has taken a “don’t ask, don’t tell” type of approach for years, conspiring to further the U.S. economy through the sweat of these virtually invisible people.⁷⁸ Only now is the government passing new regulations (rather than committing to enforcing the old) that will require employers to comply more stringently with the law.⁷⁹

When it comes to discussing trafficking, the lines of feminism split. One branch, comprised of what I will call “free will feminists” and multiculturalists, emphasizes that women are neither less nor more likely to be “victims” due to their gender.⁸⁰ They argue that women can and do consent to sex work (this view is prevalent where legalized prostitution presents a picture of sex work as a viable economic alternative and choice), but would conclude that even women who gave their consent to some part of the process should be considered eligible to receive the benefits available to those who have been trafficked if they were coerced or did not give consent *at any point* in the process.⁸¹ A woman may well have give consent to some part of the venture that resulted in her trafficking yet not be willing to be exploited or enslaved, for instance.

The so-called “radical feminists,” on the other hand, argue that all prostitution is non-consensual and always will be until women are no longer economically, politically, and socially marginalized.⁸² In other words, until and unless a woman has a choice among reasonable and available jobs—that is, until she can select among Sex Worker or Teacher or Policewoman rather than choosing among Sex Worker or Unpaid Laborer or Unemployed Person—she effectively has no choice. She is unable to give any real consent because she has no viable economic alternative. The same could be said of any work in the global economy. Third-world women are not kidnapped and forced to work as nannies in the First World; rather they choose it because their economic situation all but forces them to do so. They exercise a personal choice to move, but that choice is severely limited by the lack of alternatives, and one does not have to feel exploited in order to be exploited.⁸³

⁷⁸ See, e.g., KANSTROOM, *supra* note 48.

⁷⁹ See discussion *infra* Part II.C.

⁸⁰ For more on feminist positions on human trafficking, see Chuang, *supra* note 68; see also Haynes, *Used, Abused*, *supra* note 68.

⁸¹ Chuang, *supra* note 68; Haynes, *Used, Abused*, *supra* note 68.

⁸² See generally MACKINNON, *supra* note 1.

⁸³ Linda May Rivas makes this argument, as well, in the context of the invisibility of personal caregivers:

[T]he transfer of authorship [for the care from the caregiver to the consumer of the care] is a negative phenomenon even for those who consciously work to make it happen. To be made invisible is the first step toward being considered nonhuman, which is why making another person invisible often precedes treating them inhumanely.

Some feminists and multi-culturalists have argued that being labeled a victim is worse than being denied any benefits that may come with such a label,⁸⁴ and that it is imperative that no one stereotypes all women or all people from a particular culture as inherently more likely to be a victim.⁸⁵ This position can of course be supported. But not when, if taken to its furthest conclusion, it implies that in order to eradicate the unsavory notion that “women and people from culture X are more vulnerable to exploitation,” it must also be argued that “anyone can reasonably consent or fail to give consent; it’s her choice.” The exploited person might have a set of circumstances or even, as Hill suggests, a “volitional impairment” which renders consent ineffective. Furthermore, even if it is unsavory to have to make a woman declare herself, and even reduce herself, to the state of victim, she may wish to do so if it serves her particular interests.⁸⁶ The law recognizes time and again that impaired persons cannot legally “consent” to particular actions (e.g., statutory rape, contracts signed by impaired persons, decisions made under duress), and so an exploited person cannot be deemed to have consented such that it mitigates the action of the exploiter.

3. Invisible People and Invisible Labor

Migration itself takes place within the private sphere, between countries and sovereign protection mechanisms, where people move from a known culture, a known language, and a known social and legal system, to one that is unknown in most respects. Through the act of migration alone, then, migrants are already less visible, existing on the fringes of society until they begin to integrate and find their bearings. The work that migrants do, though, is also most often “invisible work.”

Those newly arrived, with the rare exception of those few who arrive as skilled laborers with work visas,⁸⁷ have three primary options available to them: domestic service (primarily available to women), agricultural work (primarily available to men), and day labor (primarily available to men; in fact many women would consider it dangerous and foolhardy to stand out waiting to be picked up as day laborers, fearing sexual and other violence). Domestic service activities range from housekeeping and childcare to elder care, pet care, and yard care. Some migrants are able to obtain visas before departure to provide more specialized in-home work, such as being a nurse or personal attendant. Even for those able to obtain visas, the work that they do is arguably “invisible labor,” as is the case for the vast majority of migrants who do such work without an accompanying work visa.⁸⁸

Although it is perhaps easier to recognize work done in the home as “private sphere labor,” agricultural labor is also largely invisible, despite court decisions which limit the ability of private property owners to restrict legal aid and workers’ rights activists from entering private

⁸⁴ See Haynes, *Client-Centered*, *supra* note 15 (describing arguments of various postmodernists).

⁸⁵ *Id.*

⁸⁶ *Id.* (citing examples of clients applying for asylum).

⁸⁷ In 2003, for instance, 360,498 people were admitted to the United States with “specialty occupations,” under H-1B visas. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 101 (2004).

⁸⁸ See Rivas, *supra* note 8.

land in order to talk to agricultural workers about their rights and working conditions.⁸⁹ By and large, agricultural laborers are seasonal, and in moving they seldom develop ties to the local community. The farms they work on are geographically distant from towns, and many include “company stores” and housing to encourage insular behavior and discourage interaction with the outside world.⁹⁰ Day laborers—who spend their mornings trying not to be picked up by “la migra,” and their days, if they are lucky, toiling inside a house or a construction site—also perform invisible labor.

The lack of knowledge about the language, laws, and society in which they work, when combined with the isolating and invisible type of work they actually do (if they are fortunate enough to get work) make migrants, whether documented or not, among the least visible people in the world. Those not lucky enough to obtain other work, and who elect or who are forced to engage in sex work, are even less visible since their work takes place outside of accepted social and labor norms, in the bedroom and often with coercion and shame further isolating the individual. Additionally, employers of all of the foregoing may contribute to making the labor even more invisible by paying off the books,⁹¹ “paying” through a system of indentured servitude, or refusing to pay at all.

B. The Exploiter

Just as there are push factors that compel some people to move, social scientists and advocates studying the demand side of human trafficking have also identified so-called “pull factors,” which include: 1) the growing middle-class demand for cheaper domestic labor and child care as women in the first and second worlds enter the work force to support their own two-income families;⁹² 2) globalization in general, in which it is possible and often easier for users to find some silent person from elsewhere to work, rather than a local who knows and may demand his or her rights; and 3) in some instances the particular presence of internationals and expatriates which creates a new market for exploited labor through enhanced economic disparity between the haves and the have-nots.⁹³ The factors, though identified by those working in human trafficking, apply not only to trafficked persons, but to all migrants likely to wind up in an exploited form of employment. Only laws make the distinction between human trafficking and “mere” exploitation. Victims of both feel the shame, pain, dislocation, lack of freedom, anger, and humiliation in equal or lesser amounts relative to their personal character and circumstances, more than to any level of gravity that laws ascribe to the terms “exploitation” and “human trafficking.”

⁸⁹ See, e.g., *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971) (“[A m]igrant farm worker must be allowed to receive visitors at his living quarters of his own choice, so long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them.”).

⁹⁰ See also *infra* Part II.C.2(a)(4) (discussing the ways in which agricultural employers punish laborers for contacting people from the outside, even priests, medical doctors, and OSHA).

⁹¹ For example, only ten percent of Americans who employ a household cleaner report it to the IRS. Barbara Ehrenreich, *Maid to Order*, *supra* note 46, at 91.

⁹² For instance, in New York City alone, there are 400,000 children under the age of thirteen and fewer than 100,000 places in after-school and day-care programs. Susan Cheever, *The Nanny Dilemma*, in *GLOBAL WOMAN*, *supra* note 8, at 31, 32; Arlie Hochschild, *The Culture of Politics: Traditional, Postmodern, Cold-modern, and Warm-modern Ideals of Care*, 2 *SOC. POL.* 331 (1995) (explaining that as demand for care has increased, its supply has dwindled, resulting in a care deficit).

⁹³ Haynes, *Used, Abused*, *supra* note 68, at 236–37.

Who are these people doing the pulling? When we talk of human trafficking, we might mean either the trafficker or the user of that trafficked person, which usually is not the same person. Sometimes professional recruiters, part of the trafficking or hiring rings, target persons in rural or poor urban areas to work in larger cities. Other victims are recruited by relatives, neighbors, and family friends, who are in turn hired as “agents” for labor agencies.⁹⁴ In other instances agents promise victims that they will go to school, be able to send money home, or gain proper workforce skills, which in turn play on the push factor vulnerabilities: inability to continue education, lack of job opportunities, and/or lack of a strong family or social base on which to rely.

Traffickers treat the humans in which they traffic as commodities, whom they buy, sell, and resell. In fact, trafficking in humans initially was done by the same organizations who had previously trafficked in drugs and weapons.⁹⁵ Once the route was established, it did not matter whether the commodity trafficked was a human or a weapon or drugs. Ultimately, traffickers realized humans were the more lucrative commodity because they are reusable; they can be sold and then sold again.⁹⁶

Coercive tactics of recruiters include deception (e.g., “you will have a job as a nanny in a nice house”), fraud (e.g., “you will travel legally; just use this passport I’m giving you”), intimidation (e.g., “if you try to escape I will beat your mother”), isolation, threats, and use of physical force. The difference between the trafficker and the users are their motives and means. The trafficker may be manipulating both the trafficked person and the user, convincing the latter that he or she is an agent of a legitimate employer, and simultaneously threatening the trafficking victim not to reveal the exploitative and coercive nature of the arrangement.

Some users do not object to using trafficked persons. Some actually prefer it. Studies of users reveal a shocking lack of empathy, and almost complete acceptance of the commodification of human beings.⁹⁷ While most users likely do not specifically look for someone who has already been exploited, neither are they always concerned with avoiding hiring someone who has already been exploited. Some users, in fact, unabashedly consider the extra vulnerability an asset in a worker.⁹⁸

⁹⁴ Mikel Flamm, *Exploited, Not Educated*, U.N. CHRON. ONLINE, June–Aug. 2003, <http://www.un.org/Pubs/chronicle/2003/issue2/0203p34.html>.

⁹⁵ Haynes, *Used, Abused*, *supra* note 68, at 226–27.

⁹⁶ Traffickers can earn an estimated \$250,000 per person trafficked, and they prefer humans to goods as humans are reusable commodities. *See id.* at 223, 227.

⁹⁷ *See generally* Anderson & O’Connell Davidson, IOM Report, *supra* note 55, at 30 (quoting a user who stated that “[m]igrants [are better help than locals because they] don’t question the kind of work they are expected to perform”).

⁹⁸ *Id.* at 30 (quoting one user who stated that “[in Singapore] the system is wonderfully organized from an employer’s perspective. The employer holds the Filipino maid’s passport, and the maid has to pay to leave. The employer pays the government, it’s all official, but the maid is totally dependent on the employer . . . they can’t just quit.”); *id.* at 32 (quoting a British employer who stated that “[t]hey are foreign and they’re illegal and they’re scared and timid, and so they’re not going to take up space. They’re going to be very, very small, and that is generally easier to live with than someone who feels that this is their home. They’re in really bad situations . . . they’re terrified.”).

Other users convince themselves that given the cultural and socio-economic disparity between themselves and those they use, they are helping rather than exploiting those in their employ.⁹⁹ One writer characterizes that impulse thusly:

Human beings have always found naked force or coercion a rather messy, if not downright ugly business, however necessary. Most have therefore sought ways in which to clothe the “beastliness” of power, to popularize a set of ideas which make coercive power “immediately palatable to those who exercise it.”¹⁰⁰

Human beings will go to great lengths to rationalize exploitation of others, labeling it “natural” or “right” or even “helpful” to those whom they exploit. For instance, employers, and sometimes even the legislators who draft support for such exploitation, will assert that the exploited person is better off than they would be without the job. **What is not stated, and perhaps not even considered, is that the laborer would also be better off with a non-exploitative job.**

From the perspective of attempting to assign criminal culpability to the exploiter, attempts have been made to define just what is wrong with exploiting another person. One writer states that:

the offeror intend[s] to take advantage of some psychological weakness or vulnerability on the part of the offeree or that the offeror act[s] in reckless disregard of the offeree’s probable condition. . . . [w]hen the offeror has good reason to know about the condition of the offeree. This is what makes exploitative offers morally wrong—the fact that the offeror seeks to undermine or take advantage of the offeree’s vulnerable condition. . . . [The] offeror intend[s] to take advantage of some human weakness or vulnerability which is recognized as such by modern psychology. “Vulnerability” means a disposition of personality or circumstance of life that serves to hamper the rational-emotive process, such as severe depression, grief, guilt, fear or physiological addiction. . . . [T]he theory of exploitation propounded here does not require that the offeree’s position be worsened, subjectively or objectively, as a result of the exploitative offer. Indeed, some exploitative offers may leave the party in a better position.¹⁰¹

Users of domestic labor, in particular, often use cultural stereotypes in selecting their “employees,” and those stereotypes are centered in the extent to which the employee’s race and status as a migrant render them more or less exploitable.¹⁰² Because of their vulnerability and perceived need, migrants are valued by potential employers of domestic servants for being “more flexible” about both the amount of hours they will work and the fees they will demand.¹⁰³ The

⁹⁹ *Id.* at 29 (quoting a Dutchman living in Bangkok who said that “[i]n Indonesia you have the whole family living with you. You hire more people than you need . . . to take care of people. So we have a disproportionate number of staff.”).

¹⁰⁰ *Id.* at 37 (quoting ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 18 (1982)).

¹⁰¹ Hill, *supra* note 1, at 684–85, 690.

¹⁰² Of the 792,000 legal domestic workers in the United States, for instance, forty percent are foreign-born. Hochschild, *Love and Gold*, *supra* note 63, at 16.

¹⁰³ Anderson & O’Connell Davidson, IOM Report, *supra* note 55, at 30 (noting that local employees were also perceived as being spoiled or demanding, while migrants were perceived as grateful and enthusiastic).

private-sphere nature of domestic labor plays into this. Some employers specifically seek out the “otherness” of a migrant worker in order to resolve the discomfort of having someone sharing their house. Such employers acknowledge that they feel more comfortable having someone from an entirely different race working in the house because it makes the gap between servant and employer less embarrassing and more manageable.¹⁰⁴ Still, other employers appreciate the power they have over their employees precisely because of the power dynamic inherent in employing someone without immigration status.¹⁰⁵ The vulnerability and “otherness” work to render the laborer more desirable because they are both more invisible and more exploitable. As one author writes:

They’re foreign and they’re illegal and they’re scared and timid, and so they’re not going to take up space. They’re going to be very, very small, and that is generally easier to live with than someone who feels that this is their home. They’re in a really bad situation . . . they’re terrified.¹⁰⁶

Employers who hire someone to work in their home prefer a servant who is virtually invisible, and they can find that legal and cultural invisibility in a migrant.

The global market for agricultural labor also has middlemen and users. In this case, however, the middlemen are not usually called traffickers, although they may well be.¹⁰⁷ Rather, these middlemen are businessmen who work with American companies and who maintain lists to determine which Latin American migrants will be recommended for work within the United States. For instance, the middlemen might recommend migrants to work in the United States on much sought-after agricultural worker visas.

In the unskilled labor context, these middlemen exploit and threaten laborers by refusing to keep on the list any “troublemakers,” such as those who attempt to negotiate for better pay and hours, who speak with unions, or who seek medical care at a hospital after being injured on the job.¹⁰⁸ The middlemen keep lists for future employment, and only those who cooperate will be on the list for consideration in the next round of seasonal labor visas. The middlemen make their profit by linking employers with employees and withholding a certain percentage or fee as compensation for having recommended someone to the list or for a job. The users, such as some American businesspersons who employ agricultural workers, often demand that their laborers work long hours,¹⁰⁹ without time off,¹¹⁰ without breaks to use the restroom or eat,¹¹¹ and with no

¹⁰⁴ *Id.* at 31 (quoting a Filipina’s British employer who stated that “[i]t’s difficult having someone working for you from the same race because we have this idea of social class in our minds, don’t we? And that would be uncomfortable in your house. Whereas when it’s somebody from a different country, you don’t have all that baggage . . . There’s none of that middle-class, upper-class thing, . . . it’s just a different race.”).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 32 (quoting Esther Bott, *Too Close for Comfort? “Race” and the Management of Proximity, Guilt and Other Anxieties in Paid Domestic Labour*, SOC. RES. ONLINE, Sept. 30, 2003, <http://www.socresonline.org.uk/10/3/bott.html> (quoting a British female employer of domestic labor in London)).

¹⁰⁷ See, e.g., MORRISTOWN: IN THE AIR AND SUN (Appalshop 2007) (discussing the owner of a labor agency who was prosecuted for trafficking after “providing” laborers to factories and taking an exorbitant percentage from the employees).

¹⁰⁸ Bacon, *supra* note 72.

¹⁰⁹ *Id.* at 24–26.

¹¹⁰ *Id.*

access to outside influences.¹¹² These employers also sometimes demand that their laborers purchase their bare necessities from the company store. The employer holds the power and controls not only whether the laborer has a job and is therefore able to send money back home to his family who depend upon him, but also whether he will be able to remain in the United States where his family may be residing.

C. The Laws that Address Exploitation

When lawyers think of exploitation, they most often think of it as a ground for mitigating the culpability of a criminal. In determining just what should constitute the legal notion of exploitation, Hill, for instance, reasonably asks whether both the offeree and the offeror must be aware of the exploitative nature of the offer.¹¹³ On the other hand, refugee law, which is derived from international human rights law, has determined that it makes no sense for the victim to have to prove that the persecutor intended to persecute him or her for a particular reason.¹¹⁴ Asylum law recognizes that the asylum-seeking migrant will be practically unlikely to be able to provide that evidence (having fled with few belongings), and psychologically unlikely to be able to articulate the rationale of the persecutor (because of the victim's traumatized state). Asylum law further provides that it simply makes no sense to expect one person to reach inside the mind of another, particularly one's persecutor, then to ascribe a motive to them, and then prove that motive.¹¹⁵

Nevertheless, trafficking victims have been denied the protections and benefits that come with being identified as a "victim" of trafficking. The Department of Homeland Security has required victims to "conclusively prove," with direct evidence, that the intent of their traffickers was to exploit them. The Department of Homeland Security has thus denied T-visas even when the victim could prove the trafficker's subjective intent by using circumstantial evidence.¹¹⁶ Hill answers the question as to whose mindset counts by stating that "exploitation is a psychological, rather than a social or economic concept,"¹¹⁷ and it is the psychological state of the exploited which matters.

1. Domestic Laws Protecting Victims of Human Trafficking

The Trafficking Victims Protection Act was passed in 2000 with the goal of eradicating human trafficking through, roughly, a three-pronged approach: 1) prosecuting traffickers; 2) protecting victims by offering them an opportunity to remain in the United States on a T-visa in exchange for cooperating with law enforcement in securing a prosecution; and 3) encouraging other countries to adopt rigorous anti-trafficking laws and procedures.¹¹⁸

¹¹¹ MORRISTOWN: IN THE AIR AND SUN, *supra* note 107.

¹¹² See *infra* Part II.C.2(a)(4) (discussing the case of an employee who was fired for talking to lawyers and doctors).

¹¹³ Hill, *supra* note 1, at 637.

¹¹⁴ INS v. Elias-Zacharias, 502 U.S. 478 (1992).

¹¹⁵ Id.

¹¹⁶ Haynes, (*Not*) Found, *supra* note 14, at 360–61.

¹¹⁷ Hill, *supra* note 1, at 637.

¹¹⁸ TVPA, *supra* note 65.

That laws are not necessarily well-suited to address the ways in which people are really exploited, or even to recognize the exploitation of a person as a crime, goes some way towards explaining why the so-called “victim protection measures,” like those inserted into the TVPA to protect victims, and the “labor exploitation measures,” like those inserted into the 2007 TVPA Re-Authorization, are rarely enforced and their benefits rarely offered.¹¹⁹ This factor, in combination with our “Savior” orientation compelling us to focus on law enforcement measures to punish the perpetrators of the crimes, might also explain why law enforcement—which only reluctantly grants legal benefits and protections due to victims of trafficking and labor exploitation—is much more likely to parse out these benefits, in however stingy a manner, to victims who have been “rescued” by them.¹²⁰

2. Domestic Laws Regulating and Protecting Laborers

Workers enter the United States in one of three ways: as immigrants, as nonimmigrants, or without inspection and without immigrant status. Each of these categories has different sets of criteria and rights which attach. Certain employees are prioritized for entering as immigrants, eligible for lawful permanent residence, if they are exceptional or extraordinary in their capabilities (e.g., major athletes, artists, and scientists) or particularly sought after by the U.S. for their skills to fill a shortage (e.g., nurses).¹²¹

Nonimmigrants are permitted to enter in order to fill short term needs as identified by Congress and the Department of Labor, and among those are agricultural workers.¹²² Some people who end up working in the United States, particularly in unskilled jobs or the service industry, enter without inspection and have neither immigration status nor work authorization.

a) Laws that Regulate Laborers

1) Guestworkers

“We sought workers, and human beings came.”
—Max Frisch

Between 2004 and 2008, members of Congress and the United States executive branch have made more than four attempts to “overhaul immigration.”¹²³ By this they mean trying to capture the necessary labor workforce needed to sustain the economy, while simultaneously limiting the rights and longevity of those same laborers in the United States. The first set of draft

¹¹⁹ See Haynes, *(Not) Found*, *supra* note 14, at 343–45 (discussing statistics on how infrequently T-visas are granted).

¹²⁰ *Id.* at 347 (stating that a survey of human trafficking advocates revealed that of twenty-nine trafficking victims, the only one who received the “certification” from a law enforcement official towards a T-visa was the one who had been rescued by police officers in a raid). See also *infra* Part III.A.

¹²¹ Immigration and Nationality Act. See discussion *infra* Part III.A.

¹²² For example, in the year 2003, 14,094 agricultural workers were admitted on H-2A visas. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 101 (2004).

¹²³ See discussion *infra* Part II.

bills clashed around the issue of whether persons already in the United States “illegally” working in our fields and homes could be eligible to adjust their status to that of lawful permanent resident and remain. The second set of draft bills clashed around whether to focus on admission of low-skilled workers at all, or whether to focus, instead, on more skilled laborers.¹²⁴

As indicated by the wording itself, “guestworker” programs are premised on the idea that workers will come for a period of time to satisfy our labor needs, but then leave when we no longer need them. The problems with this notion are multifold. First, over time, even temporary workers develop ties, form relationships, and establish roots in the United States. Ripping up those roots is cruel and unworkable. Secondly, we generate a large workforce with few, if any, rights. This is problematic, in that guestworker programs “[widen] the democracy deficit,”¹²⁵ meaning they create a large class of people who are relegated to the commodified role of laborer, with no voting rights or political voice. When this workforce totals millions of people within one country, it weakens the notion of democracy.¹²⁶

2) Braceros

From time to time the United States recognizes a particular need for additional agricultural and other labor and through treaty, statute, or executive order will create an immigration program to meet those needs. The first “guestworker program” was known as the Bracero Program, and was in effect during World Wars I and II, as the United States attempted to fill its wartime agricultural labor shortages by bringing in temporary workers from Mexico. The program was negotiated directly between the governments of the United States and Mexico, with each State focused on interests of the State economies, not the workers.¹²⁷ Many of these workers remained in the United States for decades under the program, building strong ties and establishing families and lives here. When the program ended, the workers were expected to leave, despite those ties. Between 1942 and 1964, the program was reinstated from time to time, as it became clear that Americans could not, or would not, work as farm laborers.¹²⁸ Eventually, the United States enacted various temporary guestworker programs, intended to bolster the United States economy by allowing Americans to become more and more skilled, while filling the unskilled jobs with persons who will not be granted citizenship, status, or a voice.¹²⁹

3) Labor Certification

For noncitizens to be eligible to work in the United States, by and large, they must not only be approved by the Department of Homeland Security and issued visas by the Department of State, but their prospective employer must petition the Department of Labor for certification. The policy goals inherent in requiring this certification are: 1) to protect the U.S. businessperson

¹²⁴ See discussion *infra* Part II.C.1(a)(6).

¹²⁵ Garcia, *supra* note 69, at 28.

¹²⁶ See *infra* Part IV for a discussion of commodification and the role of democracy in exploitation.

¹²⁷ Shannon Leigh Vivian, *Be Our Guest: A Review of the Legal and Regulatory History of U.S. Immigration Policy Toward Mexico and Recommendations for Combating Employer Exploitation of Nonimmigrant and Undocumented Workers*, 30 SETON HALL LEGIS. J. 189 (2005).

¹²⁸ Garcia, *supra* note 69.

¹²⁹ *Id.*

who would otherwise be unable to fill the position with a qualified American worker, thereby bolstering the economy; and 2) to protect the U.S. worker from competition for jobs they would otherwise take.¹³⁰ These policy considerations do not consider the exploitation of the migrant workers.

Immigrant visas are frequently available for jobs for which there is a particular need in America (for instance, nurses and providers of elder and personal care).¹³¹ Twenty percent of U.S. jobs are now in the “care sector,”¹³² and many of these are jobs which Americans do not want to fill. Those able to fill these needs are eligible not only for temporary visas, but also for lawful permanent residence on the basis of those skills.¹³³ Occasionally, sending countries experience a severe problem with entire generations becoming skilled in those two areas and leaving their home country, creating brain drain.¹³⁴ But whereas one hand of immigration law is concerned with not contributing to a brain drain,¹³⁵ the other hand is squarely concerned with improving resources in the United States, and not at all with what it does to the sending country.¹³⁶

4) Employment Visas: H-2As and More

Visas are available for some workers to come to the United States. For those with “specialty occupations,” H-1B visas might be available, if the prospective employer files a “labor conditions application” attesting that it is paying a prevailing wage, that the working conditions of similarly situated American workers will not be adversely impacted, that it is not attempting to sidestep a strike or lockout, and that the employer has notified other American workers so that they might object.¹³⁷ In order to receive a nonimmigrant visa and be hired through the H-2A federal guestworker program, one must be requested by an employer, who obtains a certification from the Labor Department, attesting that he cannot find sufficient American workers and that the nonimmigrant’s employment will not “adversely affect the wages and working conditions” of American workers.¹³⁸ The number of H-1B visas per year is capped, and in 2005, by way of example, the cap was reached in the first day of the fiscal year.¹³⁹ The priority is clearly to protect the American worker from being sidelined.

¹³⁰ *Id.*

¹³¹ Third preference visas are available for immigrants capable of performing certain “skilled labor” for which qualified U.S. workers are not available. 8 U.S.C. § 1153(b)(3)(B).

¹³² Hochschild, *Love and Gold*, *supra* note 63, at 20 (quoting NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* (2001)).

¹³³ INA, 8 U.S.C. § 1153.

¹³⁴ *See, e.g.*, Hochschild, *Love and Gold*, *supra* note 63, at 26.

¹³⁵ J visas, for instance, are granted to those who come to receive training in the United States, but the recipients are required to return to their home countries for at least two years before returning to the United States. 8 U.S.C. § 1101(a)(15)(j).

¹³⁶ Government officials in the Philippines have blamed the female heads of house who migrate seeking employment for causing Filipino family structures to deteriorate. Parreñas, *supra* note 33, at 39.

¹³⁷ 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n).

¹³⁸ 8 U.S.C. § 1188(a).

¹³⁹ Press Release, U.S. Citizenship and Immigration Servs., USCIS Announces New H-1B Procedures—Reaches Cap (Oct. 1, 2004), *available at* http://www.uscis.gov/files/pressrelease/H1B_05fnl100104.pdf.

H-2A visas are available to those willing to “perform agricultural labor or services” of “a temporary or seasonal nature,”¹⁴⁰ and employers must also obtain a certification from the Labor Department, although more abbreviated: that sufficient American workers cannot be found and that the employment will not adversely affect the wages and working conditions of American workers.¹⁴¹ H-2B visas are available for temporary, non-agricultural workers.¹⁴² Again, the priorities are the U.S. economy and the potentially displaced American worker, not the foreign employee or his protection from exploitation.

A multitude of companies have sprung up and prospered, serving as middlemen who broker these employee/employer relationships. Not all of them are above exploitation. One such company, Manpower of the Americas (MoA), was sued by a laborer, working in the U.S. on an H visa, who sought legal advice for medical problems related to working in fields covered in pesticides. To punish him for leaving the private sphere of the field and going out into public to discuss his medical problems, MoA blacklisted him. After Mr. Guerrero, the laborer, returned to Mexico at the end of the growing season and found he was blacklisted from future jobs, as MoA kept the all-important list, he sued MoA, the recruiter company that had been hired by North Carolina Growers Association to “coordinate” their labor force. A legal aid lawyer intervened and he was allowed back on the list, but again Mr. Guerrero was threatened by employers and blacklisted for complaining about poor working conditions to OSHA. Finally, Legal Aid of North Carolina filed a racketeering suit against the growers association for maintaining a blacklist.¹⁴³

Workers legally in the United States on nonimmigrant H-2A visas, who attempt to access the few laws available for their protection or who attempt to organize or seek legal advice or even medical care, find themselves blacklisted from future seasonal work. Even seeking solace from the church or refusing to buy goods from the company store can result in blacklisting.¹⁴⁴ The middleman-coordinated list and the blacklisting are known to the Department of Labor, but are referred to as “a record of eligibility” from which workers with contract violations are suspended.¹⁴⁵ From the Department of Labor’s perspective, the only people on the list are contract violators, not persons who sought legal advice or medical attention or spoke with union organizers to try to push back against exploitative conditions. The Department of Labor’s concern is that American workers are not displaced and that businesses have a satisfactory labor force.¹⁴⁶ Department of Homeland Security is concerned with the legal status of those employees. No agency or laws are squarely attuned to the exploitative conditions of the laborers, unless they can be viewed as human trafficking cases.¹⁴⁷

Holding a visa in and of itself does not provide protection to the employee. What it does provide is protection to the American worker who might otherwise be displaced, meeting the

¹⁴⁰ 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

¹⁴¹ *Id.* § 1188(a).

¹⁴² *Id.* § 1101(a)(15)(H)(2)(a).

¹⁴³ Bacon, *supra* note 72, at 22–26.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ INA, *supra* note 133.

¹⁴⁷ MORRISTOWN: IN THE AIR AND SUN, *supra* note 107 (describing unscrupulous and exploitative “middleman” prosecuted in Morristown, TN for trafficking).

second priority of labor certification. In fact, NGOs and pro bono attorneys who work with the exploited and trafficked have a multitude of stories based upon clients whose presence in the U.S. (because of A-3 and G-5 visas, for example) allowed diplomats and employees of international organizations to bring their own household help with them to the United States. Once in the U.S., their passports are taken from them, they are paid no wages, and they become prisoners in the homes of their employers.¹⁴⁸ Others enter on B-1 visas and are similarly attached to their employers, and are therefore at risk of exploitation by the unscrupulous.¹⁴⁹ *Au pairs*, who are admitted on J-1 visas through the formal au pair programs, tend to fare better, as the companies regulate the programs and encourage regular communication among au pairs. The companies also provide counseling sessions in which the au pairs are encouraged to discuss any difficult dynamics within the household.¹⁵⁰ With A-3 and G-5 visas, the employers typically have diplomatic status, and are therefore immune to prosecution.¹⁵¹ Until recently, the U.S. government had been turning a blind eye to allegations of exploitation or enslavement, preferring instead to find the visa holder deportable as out-of-status or criminal (for instance, when an employer defends an exploitation claim by accusing the employee of theft).¹⁵²

5) The Undocumented

While migrants “with papers”—meaning those who enter the country with permission (as refugees, or with a visa) or who thereafter gain status (as asylees, by obtaining a visa, or by otherwise adjusting their status to “documented”)—have trouble, those without documents fare even worse. Not only are the undocumented more likely to be desperate for work in order to survive (because they do not have work authorization), they are also likely to depend upon their employers for more than a paycheck. The employer is often the link for a person with status to retaining that status (for instance, those who obtained labor certification or visas for their labor), achieving that status (for instance, when work is rewarded not just with pay, but with promises to attempt to secure immigration status through the continued good work), or for not reporting the undocumented nature of the work.

Although it has been illegal for decades for employers to hire undocumented persons or any person without work authorization, employers have understood that these laws were not enforced.¹⁵³ As long as the economy was booming, the government would turn a blind eye to securing necessary labor through hiring undocumented persons to carry it out, considering it “a victimless crime.” In 2002, this began to change after 9/11, with the increasing fear of migrants, and the new understanding that “immigration overhaul” was necessary to navigate the simultaneous but competing interests of protecting the borders and bolstering the economy.

¹⁴⁸ Joy Zarembka, *America’s Dirty Work: Migrant Maids and Modern Day Slavery*, in *GLOBAL WOMAN*, *supra* note 8, at 142 (describing cases of enslaved domestic servants).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* See also § 203 of the 2008 Reauthorization, *supra* note 53, specifically addressing immunity and problems with these visas.

¹⁵² Zarembka, *supra* note 148, at 142–53 (describing an employee who was imprisoned in the employer’s home, worked without pay, and was sexually assaulted, only to find herself jailed for child endangerment and theft).

¹⁵³ KANSTROOM, *supra* note 48.

A first round of raids conducted in 2002 and 2003 was directly tied to national security. “Operation Safe Sky,” for instance, was conducted at Denver International Airport in which scores of undocumented persons were rounded up and deported as national security risks, for using “altered” work documents (fake Social Security numbers or cards) to work in fast food restaurants within the airport. The employers were not charged.¹⁵⁴ This first round of raids directly preceded the first round of immigration reform draft bills.

The second round in 2006, “Operation Return to Sender,” preceded the second round of immigration reform draft bills, but this round of raids allegedly targeted identity theft by undocumented persons stealing Social Security numbers and duping unsuspecting employers.¹⁵⁵ DHS would raid a workplace, arrest those working illegally within and immediately deport them for working with falsified documents. In this round, too, employers were not arrested. Raids under “Operation Return to Sender” came in two phases, the first preceding the second round of immigration reform bills,¹⁵⁶ and the second coming a few months before new legislation was adopted that would require employers to send in Social Security numbers.¹⁵⁷ In the rare instances in which employers were charged as well, the employers in question were charged with providing the false Social Security numbers.¹⁵⁸ Invariably, the employers were released on bond, while the employees were deported. One such raid, which took place in New Bedford, Massachusetts, was justified on grounds of both national security (the manufacturer in question was using undocumented persons to fill a Department of Defense contract to manufacture leather garments for soldiers) and identity theft (although in this case the employer and his family members were themselves accused of supplying the false documents).¹⁵⁹

Actions like these serve to expand the ability for exploitation to occur. Employees know that employers hold the key to their ability to remain in the United States, and know that they must behave and acquiesce to all demands in order to remain both employed and able to remain.

¹⁵⁴ Mike Patty & Hector Gutierrez, *DIA Vows Changes After Security Raid: Airport Says Checks of Workers Will Look at Immigration Status*, National Air Transportation Association Compliance Services (Sept. 19, 2002), http://www.natacs.aero/news_dia.asp.

¹⁵⁵ Bruce Finley & Tom McGhee, *Raids at Swift Plants Target Identity Theft*, DENVER POST, Dec. 13, 2006, at A1, available at <http://www.sabew.org/contest/2006/brnews/L3479BR/20061213-SWIFT.pdf>.

¹⁵⁶ For the Senate Immigration Draft Bill of 2007, see Nat’l Immigration Forum, *Questions and Answers About the Senate Immigration Bill (The Secure Borders, Economic Opportunity, and Immigration Reform Act of 2007)*, <http://immigrationforum.org/documents/PolicyWire/Legislation/110/SenateBillQ&A.pdf>. The House Draft Bill came earlier in 2006. See Nat’l Immigration Forum, *The Sensenbrenner-King Bill’s “Greatest Misses,”* <http://immigrationforum.org/documents/PolicyWire/Legislation/SenseKingGlance.pdf>.

¹⁵⁷ Department of Homeland Security Proposed Rules: Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34281–85 (June 14, 2006). TRO Issued to Halt Action, Federal Regulators’ Authority Questioned (N.D. Cal.), 171:A-2 (Sept. 5, 2007); DHS Sues to Block Ill. Law Limiting Use of E-Verify (Formerly Basic Pilot) (C.D. Ill.), Photo Screening Tool Released, 187:A-1 (Sept. 27, 2007).

¹⁵⁸ Press Release, U.S. Dep’t of Justice, *New Bedford Manufacturer and Managers Arrested on Charges of Conspiring to Encourage Illegal Aliens to Reside in U.S. Through Hiring, ICE to Process Hundreds for Removal* (Mar. 6, 2007), http://www.usdoj.gov/criminal/npftf/pr/press_releases/2007/mar/03-06-07mbi-complaint.pdf.

¹⁵⁹ *Id.* Of some importance is the fact that the employer in question was also an immigrant. The Secretary went on to defend the raid as necessary to protect the workers against exploitation, even though that protection came in the form of arrest and deportation.

They also raise a serious question about the nature of our immigration policies: the extent to which U.S. immigration policy should become a labor supply system for corporations.¹⁶⁰

6) Immigration Reform

From 2001 until 2005, immigration reform in the United States was geared towards limiting immigration in favor of bolstering national security.¹⁶¹ Each of these reforms was passed, many as riders to other bills and with few if any objections.

In late 2005, all sides agreed that the U.S.' immigration system was "badly broken," but disagreed about how to fix it. The sticking points related to whether or not to "reward" the hard work and help of undocumented laborers by granting them the ability to become lawful permanent residents,¹⁶² or punish them for the crime of having worked without authorization by deporting them, but perhaps allowing them to then apply to return as temporary guestworkers.¹⁶³ These attempts at reform failed.

The third wave of attempted reforms began the next year, with a new Democrat-led Congress; however, these attempts also failed.¹⁶⁴ The title of the draft bill summed up its priorities. The bill was titled The Secure Borders, Immigration Reform and Economic Security Act of 2007, as we wanted it all—to fix the "broken immigration system" without disrupting our economic prosperity or jeopardizing our national security. Under the Republican-sponsored drafts, all persons who entered or worked without authorization would be barred from ever working legally in the United States, regardless of their ties to the U.S. or the equities of their particular case. The Democrats split over proposals which would have, for the first time in a century, limited family-based immigration, and the migration of unskilled guestworkers (agricultural laborers) in favor of a points system whereby points would be given to would-be immigrants based on their skills and desirability, not on their prior work history or family connections in the United States.

Most recently, the Department of Homeland Security issued a new rule, proposing modifications to the H-2A process for hiring temporary and seasonal agricultural workers. As a rulemaking process, it is much more likely than the foregoing proposed Acts to pass through Congress and become effective law. The proposed rules purport to have the goal of "streamlining" the hiring process, in order to "provide an efficient and secure program for farmers to legally fulfill their need for agricultural workers within the law rather than outside the law."¹⁶⁵ By "outside the law," of course, DHS means the hiring of undocumented workers, not the exploitation and abuse of those workers. The proposal is intended to maximize the extent to which American farmers can access labor, and it offers no new protections for workers. In fact, it implies that protections for workers are already in place, going on to state that this "common-

¹⁶⁰ David Bacon, TruthOut, Who Killed the Immigration Bill, and Who Wants it to Come Back? (June 11, 2007), http://www.truthout.org/docs_2006/061107T.shtml.

¹⁶¹ See, e.g., REAL ID Act of 2005, H.R. 418, 109th Cong. (2005).

¹⁶² Secure America and Orderly Immigration Act of 2005, S. 1033, 109th Cong. (2005).

¹⁶³ Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438, 109th Cong. (2005). For analysis of each of the proposed bills and amendments, see the Nat'l Immigration Forum, <http://immigrationforum.org/PrintFriendly.aspx?tabid=904>.

¹⁶⁴ The Secure Borders, Economic Opportunity and Immigration Reform and Economic Security Act of 2007, S. 1348, 110th Cong. (2007).

¹⁶⁵ 73 Fed. Reg. 8230–47 (Feb. 13, 2008) (proposed rules to 8 C.F.R. §§ 214, 215, 274(a), available at wais.access.gpo.gov).

sense simplification of the H-2A will provide farm employers with a more orderly and timely flow of legal workers, *while continuing to protect the rights of laborers* and promoting legal and secure methods for determining who is coming into the country.”¹⁶⁶

In order to allow employers to secure legal workers, the new streamlined process would 1) “reduce the current limitations and certain delays faced by U.S. employers and relax their ability to petition for multiple, unnamed agricultural workers,” 2) extend from ten to thirty days the time a temporary agricultural worker may remain in the U.S. after the end of employment, and 3) reduce from six to three months the time a temporary agricultural worker must wait outside the U.S. before he or she is eligible to re-enter. It also would allow workers who are changing employers within the visa period to do so before the change is approved by USCIS, as long as the new employer participates in “USCIS E-Verify,” the program designed, in the aftermath of the aforementioned raids, to require employers to verify the work eligibility of the employee.¹⁶⁷ With the exception of the last proposal, which is an excellent one and might actually give the employees some power and control over their own labor by enabling them to move among employers once they enter with a visa, the other aspects of the rule are all designed solely to promote the economic capacity of the U.S. business, and add no protections for workers. In fact, by indicating that these proposed rules simply piggyback onto the legal protections already in place, DHS reveals how little it values preventing worker exploitation.

Reading further, however, DHS hints at recognition of the problem of U.S. businesspersons exploiting workers. In order to “ensure the integrity of the program,” the proposed rule would also: 1) require an employer attestation regarding the scope of the H-2A and, most importantly, the *use of recruiters to locate H-2A workers*; 2) eliminate the ability to file an H-2A petition without approved labor certification (by DOL); and 3) prohibit the approval of petitions from countries which refuse or delay repatriation. The first of these elements, earmarked as ensuring the integrity of the system, does focus on the exploitative nature of the employee/employer relationship and seems to recognize the potential for employers to work their employees unreasonably hard. It also suggests that DHS would like to quash the power of the recruiters over the H-2A visa system. Read in conjunction with the new TVPA Reauthorization,¹⁶⁸ however, the focus on recruiters is directed towards foreign recruiters acting as smugglers or traffickers, rather than at U.S. businesses such as Manpower of the Americas, who currently control and manipulate the visa process.¹⁶⁹ With these proposed rules, DHS is opening the door to more squarely facing the issue of labor exploitation by U.S. businesses, but still heavily emphasizes the promotion of business opportunities for American businesses over the prevention of worker exploitation.

A careful reading of the proposed rules does reveal a recognition on the part of the U.S. government that exploitation is taking place, to such an extent that the agency tasked with controlling immigration cannot fail to address it. Nevertheless, that agency has not stated how it will protect those workers. It still presumes that others laws exist and are sufficient to protect

¹⁶⁶ *Id.* (emphasis added).

¹⁶⁷ U.S. CITIZENSHIP AND IMMIGR. SERVS., E-VERIFY USER MANUAL (2007), available at http://www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf.

¹⁶⁸ See discussion *infra* Part III.D.3.

¹⁶⁹ See discussion *supra* note 143 and accompanying text.

migrant workers, and that U.S. businesspersons will adhere to the rules. The U.S. government continues to view the exploitation of workers as secondary at best to the priorities of protecting U.S. businesspersons in order to support the economy and protect U.S. workers against competition. Until the U.S. government perceives all three as equally important priorities, and, more importantly, until it understands that protection of migrant workers need not jeopardize the U.S. economy, migrant workers will be exploited. The business “bottom line” will prevail.

b. Laws that Protect Noncitizen Laborers

Few laws exist to protect noncitizens from exploitation. When workers try to defend themselves by forming unions, employers use fear and intimidation to stop them. “U.S. law does little to protect workers who try to organize. Enforcement efforts drag on for years, and even decisions that favor workers are usually too little, too late.”¹⁷⁰

The National Labor Relations Act (NLRA), administered by the National Labor Relations Board (NLRB), provides most employees the right to organize, bargain collectively, and engage in peaceful strikes and picketing.¹⁷¹ The NLRA also prohibits unfair labor practices, such as employer discrimination against employees for union organizing activities and employee secondary boycotts.¹⁷² One of the NLRB’s main functions is to review allegations of unfair labor practices and institute remedial measures available under the NLRA. These remedial measures include posting notices of unfair labor practices at worksites, obtaining employer commitments not to violate the NLRA in the future, reinstating unlawfully discharged employees, and distributing back pay to such employees.¹⁷³ Unfortunately, supervisors and managers, independent contractors, employees of certain small businesses, domestic service workers, agricultural workers, and public-sector employees are exempt from protection under the NLRA.¹⁷⁴

Noncitizen workers who attempt to organize or otherwise improve their working conditions are regularly punished by their employers. Employees of Smithfield Foods, for example, almost entirely migrants and many of them undocumented, were fired in 1997 for attempting to organize at their pork-processing plant. The company stationed police at plant gates to intimidate workers.¹⁷⁵ The National Labor Relations Board stepped in to order a new election, indicating that the de jure right to organize, at least, does exist, but Smithfield immediately appealed and then created an internal company security force with “special police agency” status under North Carolina law that enables company security officers to exercise

¹⁷⁰ See HUMAN RIGHTS WATCH, BLOOD, SWEAT AND FEAR: WORKERS’ RIGHTS IN U.S. MEAT AND POULTRY PLANTS 111 (2004), available at <http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear> [hereinafter HRW REPORT] (“They have us under threat all the time. They know most of us are undocumented—probably two-thirds. All they care about is getting bodies into the plant. My supervisor said they say they’ll call the INS if we make trouble.”). See also Human Rights Watch, Abuses Against Workers Taint U.S. Meat and Poultry (Jan. 25, 2005), <http://hrw.org/english/docs/2005/01/25/usdom10052.htm>.

¹⁷¹ National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000).

¹⁷² See *id.* § 158(a).

¹⁷³ See *id.* § 160(c).

¹⁷⁴ See *id.* § 152(3) (defining who is an “employee” for purposes of the NLRA).

¹⁷⁵ HRW REPORT, *supra* note 170, at 114–15.

public police powers.¹⁷⁶ The company then used trumped-up charges created by those same “special police” to arrest workers who were active union supporters.¹⁷⁷

c. Laws That Protect Undocumented Laborers

The Supreme Court case *Hoffman Plastics Compounds, Inc. v. NLRB* has been read by workers’ rights activists to essentially quash the labor rights of undocumented persons.¹⁷⁸ Effectively, this means that undocumented persons who are exploited on the job have no legal recourse, and, perhaps more importantly, creates a chilling effect on any future complaints of exploitation.

The case made its way to the Supreme Court after Hoffman Plastic Compounds illegally discharged several employees, one of whom was an undocumented worker from Mexico, because the employees supported unionization.¹⁷⁹ At the NLRB level, the Board reasoned that the most effective way to further U.S. immigration policies would be to provide the protections and remedies of the NLRA to undocumented workers whose employers commit unfair labor practices.¹⁸⁰ That would be to assume that the policy priority in the U.S. was, in fact, providing protections and remedies to all workers, documented or undocumented, in order to prevent exploitation by employers.

Clearly this is not the case, and the Supreme Court’s decision, reversing the NLRB, identified the actual policy priority. In fact, the Supreme Court stated that the NLRB decision undermined other federal statutes and policies outside the scope of the NLRA, such as the Immigration Reform and Control Act (IRCA),¹⁸¹ which prohibited employees from submitting fraudulent identification documents to secure work.¹⁸² The IRCA also prohibits employers from knowingly hiring undocumented workers, but the Supreme Court made little reference to this breach of law. Although the Court affirmed its earlier rulings that undocumented workers are employees covered under the NLRA,¹⁸³ the Court found that allowing undocumented workers to receive back pay would encourage workers’ evasion of immigration authorities, condone prior violations of the immigration laws, and encourage future violations.¹⁸⁴ Finally, the Court found that the NLRB’s position focused too heavily on employer misconduct, while discounting the misconduct of employees.¹⁸⁵

Generally speaking, after the reforms of 1996,¹⁸⁶ those who entered the country without inspection have few rights, and can be deported whenever they are found, for the crime of having entered without inspection. This knowledge is power for the employers, who understand that an

¹⁷⁶ *Id.* at 96.

¹⁷⁷ *Id.* “The company has armed police walking around the plant to intimidate us,” a Smithfield worker who came to the United States from El Salvador told Human Rights Watch. “It’s especially frightening for those of us from Central America. Where we come from, the police shoot trade unionists.” *Id.* at 99.

¹⁷⁸ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

¹⁷⁹ *Id.* at 140.

¹⁸⁰ *Id.* at 141.

¹⁸¹ 8 U.S.C. §§ 1324–65.

¹⁸² *Hoffman Plastic*, 535 U.S. at 148–50.

¹⁸³ *Id.* at 144.

¹⁸⁴ *Id.* at 138.

¹⁸⁵ *Id.* at 149–50.

¹⁸⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (1996).

undocumented person's primary goal is to keep his head down, make no waves, and remain under the radar of all but the person who pays him his wages.

The type of work done also seems to play a role in how employers treat and mistreat their employees. The more tucked away in the private sphere, the fewer protections available, and undocumented persons tend to gravitate to, and are hired to perform, private-sphere work. Employers of domestic laborers (nannies and housekeepers), for instance, often fire the laborers on the spot, with no notice, for perceived personal affronts or disloyalty.¹⁸⁷ The particular closeness and private-sphere nature of the relationship leaves the employer feeling simultaneously resentful of the person's presence in the household while feeling that the person is close, "like family."¹⁸⁸ Employers in the private sphere, too, often blur the lines between paid work and unpaid "favors." For both of these reasons, the employers are apparently more likely to perceive real or imagined acts of disloyalty when the employee makes it clear that this is a job, like any other, and to punish that disloyalty with immediate termination, often without notice. The employer believes it is justified, so as not to have an ominous presence in the household weeks after giving notice of termination, and also because to the employer, "the domestic worker is the employer's chattel."¹⁸⁹

Unfortunately for the domestic workers, the law also treats them as little more than chattel. At best, a documented "legal" domestic worker is hired "at will," meaning that the employers can fire or hire whomever they want, so long as they do not use discriminatory criteria.¹⁹⁰ They can also be fired without notice. Of course, the at-will contract also allows the employee to quit without notice, but she is unlikely to be able to recoup any unpaid wages if she does, and many migrants depend on all of the wages they receive just to secure their own survival and that of their families. The laws on "at will" contracts are based on the economic notion that the "playing field is level" in that the employee may also quit at will, and without notice. But the supposed level playing field does not take into account the private-sphere nature of the work, whereby the power differential is more extreme, due to the fact that the employee is working in the employer's home, is more dependent on the money the employer offers, and is socially isolated. Furthermore, the notion of the level playing field does not consider that the loss of employment may well include the emotional loss of losing contact with, for instance, the children she has helped to raise and grown to love.¹⁹¹ Thus, the playing field is not at all level.

III. The Problem(s) With Attempting to Address Exploitation With Law

¹⁸⁷ Pierrette Hondagneu-Sotelo, *Blowups and Other Unhappy Endings*, in *GLOBAL WOMAN*, *supra* note 8, at 55, 62–63.

¹⁸⁸ Anderson & O'Connell Davidson, *Trafficking—A Demand Led Problem?*, *supra* note 36. *See also* Hondagneu-Sotelo, *supra* note 187, at 67 ("[D]omestic work, especially when it involves childcare, produces relationships that fall somewhere between family and employment yet are often regarded as neither.").

¹⁸⁹ Hondagneu-Sotelo, *supra* note 187, at 62–63 (quoting a labor lawyer, who frequently hears from domestic workers who erroneously believe that they might have some labor rights in the United States, and who said that, "[the employer] paid for the worker, the employer is getting a life. When the domestic worker shows that she has her own life, her own problems, her own health, and her own kids to attend to, it's threatening. Suddenly it's clear that the worker has concerns that are more important than taking care of some employer's house or kids.").

¹⁹⁰ *See, e.g.*, *Kassem v. Wash. Hosp. Ctr.*, 513 F.3d 251, 254 (D.C. Cir. 2008).

¹⁹¹ Cheever, *supra* note 92, at 35 ("When you leave the children, the children can be devastated—and it can break your heart too.").

One law shall there be, the same for those who are home-born and for the sojourners among you.
—Exodus 12:49

The world, including the United States, made a moral, philosophical, and legal leap when it began to address exploitation, first with the Protocol to the Crime Convention on Human Trafficking and then, domestically, with the ratification of the Trafficking Victims Protection Act (TVPA).¹⁹² The leap was not in recognizing and criminalizing trafficking (although that was also a leap), but rather in moving away from criminalizing the victim. Heretofore, the victim had been criminalized because she was in the country illegally, engaging in work illegally, using false documents, and was therefore deemed a lawbreaker. These new laws asked us instead to consider the ways in which she was being horribly exploited, and to consider, if not mandate, the exercise of prosecutorial discretion. As a nation we elected to recognize trafficked persons as victims who should be protected, not criminals to be prosecuted.

But between the drafting and passage of both the Protocol and the TVPA, the primary intent of the drafters was subverted. Filtered through the concerns of sovereignty, and the political and legal processes of drafting and passing the laws, the drafters' original intent to prioritize the protection of the victims of human trafficking mutated into one that focused on crime prevention.¹⁹³ The focus turned away from the exploitation and the exploited, and turned towards the exploiter. For a victim of human trafficking to be recognized at all as such, there were now conditions: she has to regard herself as a victim, she has to prove that she is one, and most importantly, she has to take on the role of assisting with the prosecution of her trafficker.¹⁹⁴ If she does not, she is not considered a victim of human trafficking as a matter of law.¹⁹⁵ At the point at which she makes a claim that she is a victim, the abuse she suffered is no longer seen as a human rights issue—focused on the exploitation and the loss of human dignity—but rather as evidence of a crime, which can be used in support of securing a prosecution of her traffickers.

Still, for all its flaws, the TVPA is a step up from anything available to address exploitation of agricultural workers and other exploited workers, who fall short of being recognizable as trafficked. For instance, the labor certification process,¹⁹⁶ the three-agency process by which,¹⁹⁷ for example, an employer who wishes to hire a domestic laborer to live in her home, take care of her children, cook the meals, clean the house, and entertain guests, is focused exclusively on balancing the two policy concerns of ensuring that American business persons are able to meet their business needs by hiring noncitizens when necessary, and ensuring

¹⁹² 22 U.S.C. § 7105. For Protocol and TVPA definitions of trafficking, which include exploitation, *see* discussion *infra*.

¹⁹³ Haynes, *Used, Abused, supra* note 68, at 338–45; Haynes, *(Not) Found, supra* note 14, at 345–46.

¹⁹⁴ 22 U.S.C. § 7105(e).

¹⁹⁵ The exception being children. Persons under the age of fifteen are exempt from the requirement of assisting with the prosecution. *Id.* § 7105.

¹⁹⁶ 8 U.S.C. §§ 1152(a)(5)(A), 1152(a)(5)(C), 1152(a)(5)(D) (describing the labor certification process); 8 U.S.C. §§ 1153(b)(2), 1153(b)(3) (describing second and third preference employment-based visas).

¹⁹⁷ The beneficiary of labor certification has to deal with DHS to apply for admission, with DOS to obtain the visa, and with the Department of Labor to obtain the labor certification.

that American workers are not deprived of jobs that they would otherwise take.¹⁹⁸ Nowhere in this process is there a policy concern for whether the laborer in question is being sought to be overworked and exploited.¹⁹⁹

Through drafting and passing international and domestic laws prohibiting and criminalizing human trafficking, the world acknowledges its aversion to treating human beings like commodities—buying, selling, forcing, coercing, and using people for purposes other than the free and consensual will of the person whose body is involved. At the same time, however, in the context of seasonal unskilled guestworkers (agricultural and factory workers), U.S. policymakers toy with and draft laws that may actually enhance the ability of the users to exploit their laborers, by tying the immigration status of the employee to the employer.²⁰⁰

Why is there a legal difference between trafficking victims and exploited agricultural workers? Is it that we perceive the former to be “victims,” while the latter are “willing”? If so, our perception is inaccurate. Is it that trafficking has been historically linked to forced sex work, and so even though the majority of trafficking cases do not involve sex work,²⁰¹ the perception that trafficked persons are “more victimized” remains? Is it because in our role as saviors²⁰² we are more comfortable carving out a set of benefits for the “real victims” of exploitation than we are for other types of exploitation? Are gender and race involved, in that our stereotype of the trafficking victim is a young woman from Asia and Eastern Europe trafficked into sex work, while our stereotype of the exploited agricultural worker is the Mexican man who came to the United States seeking economic opportunities? Does the exploitation of the Mexican man seeking opportunities deserve any less legal attention and protection than the exploitation of the young Asian girl trafficked into sex work, assuming the stereotypes hold true? The available laws indicate that we think he does deserve less protection.

The anti-trafficking legislation attempts to counter, among other goals, the practice of using human beings as commodities. To the extent it succeeds, it does so because the Act comes at the issue from the dual purpose of both prosecuting the traffickers and protecting the victims. The draft agricultural bills and other legislation used in the past to regulate the entry and status of agricultural workers, on the other hand, support the notion of humans as commodities, because they all approach the issue from the perspective of the U.S. economy and the American businessman. To the minimal extent that the noncitizen worker might be entitled to protection

¹⁹⁸ See 8 U.S.C. § 1182(a)(5)(1).

¹⁹⁹ Save for a minimal requirement, created for the benefit of the U.S. workforce, not for the non-citizen laborer, that a standard wage be offered.

²⁰⁰ For a discussion on various draft bills and attendant legislation, see *supra* Part II. See also Haynes, (*Not*) *Found*, *supra* note 14 (arguing that the standards applied by law enforcement, or which law enforcement fails to apply, make it easier for traffickers to exploit trafficked persons).

²⁰¹ *Id.* at 348.

²⁰² See Makau Mutua, *Savages, Victims, Saviors: The Metaphor of Human Rights*, 45 HARV. INT’L L.J. 201 (2001) for more on the “saviors, victims, savages” dynamic.

from exploitation, that protection exists in other laws,²⁰³ far outside of the current legislation or the draft bills²⁰⁴ which would permit and regulate the entry of agricultural workers.

The trafficking law is founded on the paternalistic notion that we, the state, must protect the victims in our nation, and our nation itself, from criminals. The agricultural worker bills are premised on a false assumption that business is politically neutral. The voices which count are those that belong to people who can vote and who have a political voice in the United States. The employers can vote and the migrant employees cannot. Both perspectives set up a weak paradigm for anyone to actually know what to look for to find either a victim of human trafficking or an exploited guestworker, or to know whether a crime has been committed or a victim is in need of protection.

A. Unwilling or Unable to Recognize Exploited Persons When Encountered

Law enforcement officers, in addition to rescuing victims and arresting traffickers, are tasked with “certifying” victims of human trafficking.²⁰⁵ First and foremost, carrying out this responsibility requires that those officers be skilled at recognizing a victim of human trafficking when they see one. However, they are not. Unless an officer finds a woman in a raid of a brothel, for instance, he is often unable to recognize her as a trafficking victim.²⁰⁶ As the vast majority of human trafficking victims are neither sex slaves,²⁰⁷ nor freed from trafficking when they are rescued in a raid,²⁰⁸ this narrow perception of who is a victim of human trafficking works to the detriment of both victims and law enforcement who hope to put an end to trafficking.

In fact, many victims of human trafficking look quite like exploited agricultural laborers and factory workers,²⁰⁹ and in fact they are often one and the same. The insistence on trying to categorize what types of people are *really* likely to be “exploited persons” and which are simply

²⁰³ See *infra* Part II for a discussion on laws that protect noncitizen workers.

²⁰⁴ See *infra* Part II for a discussion of draft bills and other reforms.

²⁰⁵ 22 U.S.C. § 7105.

²⁰⁶ See Haynes, *(Not) Found*, *supra* note 14, at 347 (discussing survey of NGOs and attorneys representing trafficking victims in T-visa applications).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See Cheryl Dahle, *Human Trafficking: The Big Picture* (Mar. 2005), <http://proxied.changemakers.net/journal/300503/dahle.cfm> (

In the United States in 2002, brothers Juan and Ramiro Ramos, along with their cousin Jose Luis Ramos, were cumulatively sentenced to 34 years in prison for transporting Mexicans to Florida to work as enslaved fruit pickers. At least 700 workers were held in the well-guarded camps operated by the Ramos family in and around the small town of Lake Placid. . . . Their workers lived in debt bondage, picking oranges for a handful of change each day. They were forced to return these meager earnings to the brothers in exchange for their original transport to the camps, housing in squalid conditions, and food purchased at inflated prices from the brothers’ own grocery store. The laborers, who were pistol-whipped and beaten for any insubordination, were often told the story of one ill-fated laborer who tried to escape: Crew bosses caught him, busted his kneecaps with a hammer, and then threw his body from a speeding car. *Id.*

). The Coalition of Immokalee Workers estimates that 10% of U.S. farm laborers are enslaved. *Id.*

here “trying to exploit our immigration system” is not that helpful a distinction if the goal is working to prevent severe exploitation.

Ironically, the Department of Justice (DOJ), the agency whose officers (FBI) and attorneys (AUSAs) are tasked with finding victims and prosecuting traffickers, recognize that the migration issues contribute to the private-sphere nature of the crime. When it lists aspects of the crime it thinks exacerbate the problem, DOJ includes: “linguistic and social isolation,” fear or threat of exposure and shame, threat of reprisals against loved ones, and the “special set of circumstances” that keep “immigrant” victims in particular “living in the shadows of our immigrant communities.”²¹⁰ These are of course precisely the factors likely to contribute to the difficulty in identifying the crime or its victims, but also which allow the traffickers to more easily exploit the victims. The “special set of circumstances” acknowledged by the DOJ that keep “immigrant victims” “living in the shadows” is a wild understatement in that the vast majority of victims are also illegal immigrants, at least until differently labeled as “victims” and eligible for T-visas. These trafficked immigrant victims are exploited all the more easily by traffickers *because* they are without immigration status in this country, *because* they know that it is illegal to be without immigration status, and *because* the threat of deportation and criminalization is real.

Traffickers and victims alike know that victims are routinely arrested, jailed, detained, and deported because of “crimes” that attach directly to the fact that they *are* victims of human trafficking. This knowledge drives the victims to further heightened states of fear which the traffickers are happy to further exploit.

The first stated goal of the DOJ, to “remove the victim from the abusive setting,”²¹¹ provides further insight into the role that DOJ has assigned to itself—that of rescuer. The government assumes that “real” victims of human trafficking will be found when they are liberated from their exploitation by law enforcement officials. It is a noble goal of DOJ to prioritize removing victims from abusive settings, but most victims, unfortunately, will not be “removed” from those abusive settings by DOJ agents.²¹² Most will find their way out on their own, or through helpful neighbors or taxi drivers or telemarketers²¹³ who take them to the police.

Presenting this rescue scenario as their first goal in this manner also highlights one of the ways in which the government links its “victim-centered approach” directly to the outcome of

²¹⁰ CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, REPORT OF ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001–2005, at 12 (2006), http://www.usdoj.gov/crt/crim/trafficking_report_2006.pdf [hereinafter DOJ REPORT].

²¹¹ *Id.* But see Haynes, (*Not*) *Found*, *supra* note 14, at 347 (referencing survey which found that of twenty-nine victims, only one was “rescued” by law enforcement. Five others were found by law enforcement during raids, but were then arrested themselves for violating immigration laws.).

²¹² Haynes, (*Not*) *Found*, *supra* note 14, at 347.

²¹³ The first FBI agent who contacted this author did so asking for her assistance in representing said telemarketers against deportation. It seems that a telemarketer had called a home one day and the person who answered told him she was being held against her will, enslaved in the home as a domestic servant and sex slave. The telemarketer went to free the woman, and took her to police, who then realized that he, the telemarketer, was not documented and contacted DHS, who put him into deportation proceedings. The FBI agent who used the telemarketer’s testimony in prosecuting the women’s trafficker employees wanted to help him avoid deportation.

prosecution.²¹⁴ Advocates for victims of human trafficking are beginning to see that those who are “rescued” by U.S. government officials (typically the FBI or DHS ICE officers) have a significantly better chance of being “pre-certified” by those same officials as potential victims of human trafficking (and therefore eligible for immediate shelter and protection assistance) than do those who in essence rescue themselves by fleeing their abusive situation and then seeking assistance.²¹⁵

In other words, the practice of the DOJ and DHS demonstrates their belief that a victim of human trafficking somehow is more legitimately a victim (or at least more likely to be perceived as a victim by them) if she was lucky enough to have been rescued by U.S. government officials. If she never receives the benefit of being rescued, and few victims do, but rather manages to free herself and then seek assistance, she is more likely to be perceived by law enforcement as not a victim (not “certifiable” to seek a T-visa) and is sometimes even susceptible to being viewed as a criminal herself: a “simple” illegal immigrant trying to avoid deportation.

The laws themselves also make it difficult for law enforcement officers to recognize when a crime is being committed. Just how severe must exploitation be in order for law enforcement to prosecute it or to protect those subjected to it? Judges and immigration personnel still fail to understand the nature of trafficking and the often fine distinctions between trafficking and smuggling, let alone to acknowledge that concepts such as “exploitation,” “coercion,” and “consent” are subtle and may be culturally bound, or at least not universal in the black-and-white sense that adjudicators require.

To invoke the “benefits” available to trafficked persons, the person requesting the benefit must describe herself as a “victim” and tell the victim story. For instance, a trafficked person who wishes to secure a T-visa in the United States (or temporary residence in Europe) must prove that she was a *victim* of trafficking and must tell that story to law enforcement officials.²¹⁶ T-visas require that the trafficked person prove that she was the victim of a *severe* form of trafficking, and she must cooperate with prosecutors in telling that story of victimization. To secure the benefit she seeks, she must prove up the victimhood nature of her situation—the exploitation, coercion, and force. The law itself forces the victim to offer herself up as an easily identifiable “victim subject,” without the clutter and complication of a story in which the “victim” also had some agency in her decision. Where a police officer might understand that a victim of domestic violence does not become any less a victim by virtue of having married the abuser in the first place, or even for having stayed with him or refused to report the abuse, there

²¹⁴ In fact, elsewhere in their Report, the DOJ clarifies that it is “victim-centered *prosecutions*” that are essential to their agenda, not being victim-centered generally. DOJ REPORT, *supra* note 210.

²¹⁵ Haynes, (*Not*) *Found*, *supra* note 14, at 347 (discussing how only one of twenty-nine victims discussed was “rescued” and then certified by the FBI).

²¹⁶ Similarly, a woman wishing to seek asylum on the basis of FGM or domestic violence must prove, among other things, that she was persecuted or will be persecuted and that she fears returning to her home country. 8 U.S.C. § 1158. The law is not only not interested in her “survivor” story, the story about the strength and fortitude it required of her to leave her country and seek immigration relief, but presenting the survivor story can work against her, as she will then be perceived as an economic migrant with a choice in the matter, not a victim of persecution or abuse without choice.

is little corresponding understanding when it comes to victims of human trafficking or exploitation.

These myths about the nature of “victims” versus “criminals,” of “trafficked persons” versus “economic migrants,” and the assumptions that being one precludes being the other, obscure the true nature of the exploitation of migrants. We would be in a better position to assess the reasons why and the ways in which people become susceptible to exploitation if those who fell victim to it were permitted and even encouraged to tell their stories—to express all of the reasons they were vulnerable to it, including their economic motivations or any criminal acts they may have been party to along the way, such as working without authorization.

By focusing wholly on the victim aspect of the crime, as required to receive any benefits or protections that come with the label “victim,” we miss the opportunity to identify what might actually be driving the cycle of exploitation. As a matter of law, statutory interpretation, and practice, we must acknowledge that the desire to improve one’s life, a desire born of human nature, and a human characteristic lauded in other arenas, leads people to migrate. We must confront that fact head on, not mask it behind a rhetoric that suggests that agency and exploitation are mutually exclusive.

B. False Dichotomy Between Victims and the Willing; The Fine Line Between Trafficking and Other Types of Labor Exploitation

The line between human trafficking and other types of labor exploitation is often so fine that it took many legal experts many years to pin down exactly what legally differentiates trafficking from other types of exploitative relationships. Let us consider some hypothetical migrants, whose stories parallel those of many.

1. Autello

Autello crosses the border from Mexico with a coyote. He passes through the hands of four or five men, the first of whom takes his identification documents “for safe keeping” and the third of whom, mid-trip, informs him that the fee for taking him across the border has gone up. The \$4,000 he already paid is not enough, so he will have to pay back his smugglers for the transportation costs, but it’s not a problem, the coyote says. His cousin will set Autello up with a job and he can work off the debt on his arrival. After crossing the border, the fifth man takes him to a house outside of La Jolla, where he is given a bed and told that he will go out the next morning with the other day laborers, and his earnings will be paid directly to the keeper of the house. He won’t see any earnings until he has paid back the transportation costs, but they don’t tell him how much the transportation costs are. Eventually, he finds a seasonal job picking strawberries, but the farm owner agrees to pay Autello’s wages back to the middlemen who “contracted” his labor to the farm until his debt to them is paid off. First Autello’s wages go directly to his smugglers, or so he is told, but eventually Autello is told that they are paid off. His employer now says he will pay Autello, but has to deduct rent for the shack Autello lives in with seven other men, and for the food he has brought to the fields each day for his workers. Autello winds up with \$50 in his pocket at the end of each month. He feels trapped, as he

doesn't have enough money to leave, doesn't know where his documents are, and knows that it is unlikely he will find other work, since he has no work papers.

2. Beti

Beti also crosses the border from Mexico, with the help of a coyote, and also has her identification documents taken, but has been promised a job as a nanny by one of the smugglers who says his cousin needs help in their household. She is given back her travel documents after she crosses, and taken to Atlanta, where she meets the smuggler's cousin. She is offered a job as a live-in domestic, and begins what will be her daily routine of waking at five to prepare breakfast and get the kids ready for school, making the family meals, washing the clothes, cleaning the house, preparing for the family to return, feeding the children and putting them to bed, feeding the adults and cleaning up after them. She works six and a half days a week and sixteen hours a day. The wife says she is keeping Beti's earnings safe for her, and will give them to her when she is ready to leave. Beti is discouraged from leaving the house, and in any event needs the entire day to do all of her work. When she fails to do all of the tasks expected of her, her employers alternately verbally abuse and berate her or become emotional, insisting that the children love her so much they couldn't live without her. The husband has begun brushing up against her in the kitchen, and Beti fears that he will either try to have sex with her, or that the wife will notice and physically abuse her, acting out on her jealousy. Beti feels trapped, as she has no money, no travel documents, and wouldn't know where to go even if she could leave.

Which is a victim of trafficking and which simply fell victim to an unscrupulous smuggler? The logical or moral answer might describe both as potentially in peril, and both as exploited. The legal answer, however, is that either could be a victim of human trafficking or a smuggled person, depending upon a number of things over which Autello and Beti have no control. The first is whether a law enforcement agent whom they find, if they do find one, decides to try to prosecute the exploiter or the smugglers for trafficking. If they do, then either case is worthy of certifying the victims as potential T-visa recipients. If they do not, then either victim is likely to be deemed simply an undocumented laborer who ran afoul of smugglers who knew they could hand off their smugglees to "employers," likely for a fee, and then deported. Clearly, from the perspective of Autello and Beti, both are motivated by a desire or necessity to leave their homes and try their luck in the United States. They each run into similar people on their route, people willing to exploit their vulnerability.

The second difference over which they have no control is the extent to which the law is interpreted to say that Beti has somehow been more exploited than Autello. It could be that she has, but it is equally likely that we view women, particularly those who have been or risk being sexually exploited, as more of a "victim" than victims of other types of exploitation. Indeed, the TVPA tells us they are more entitled to consideration for the benefits available to trafficking victims.²¹⁷

Third, our economy depends upon the labor of Autello and people like him. If Autello complains about his treatment to his boss, he will be fired, and if he complains about his treatment to authorities, he will be deported. Our economy may also depend upon the labor of

²¹⁷ 22 U.S.C. § 7104(8)(A).

Beti, but, as it takes place in the private sphere, and the work she is doing (domestic labor) tends always to be devalued no matter who is doing it, her labor is less recognizable as labor of value to the thriving U.S. economy.

Fourth, Beti seems more trapped because she is working in a house, not out in an open field, within the public economy of agriculture. Both Autello and Beti feel equally trapped, not by their physical surroundings, but by their circumstances, their inability to leave their situation, their lack of immigration status, their poverty, and their lack of understanding of the laws, culture, or systems that might offer help. So, while it is far from clear that either would ever be recognized by the law as deserving of a T-visa, Beti may be perceived to be “more like” a victim of human trafficking.

Finally, our society tends to recognize in law (through lack of protections) or in fact (by our actions), that some work is “real work,” while other labor is a form of “helping.”²¹⁸ Because Beti’s labor is less likely to be defined as “work,” she is more readily observable as a “victim,” worthy of TVPA protection. Autello’s work, however, is perceived as “real” labor and is slotted into our economic pre-occupation with supporting the U.S. businessperson. The “realness” and necessity of Autello’s labor makes it less likely for us to view him as a victim for TVPA purposes. We are more likely to build a narrative around him which says that he has improved his lot in the United States by being able to work here; whatever exploitation he might face here, he would face a worse form back home.

There is a large conceptual problem with both of these narratives: governments fail to acknowledge that all trafficking is a byproduct of labor and migration. Victims of human trafficking are people who determined to improve their lives but had that desire exploited. Only the very rare few have been literally snatched or kidnapped by traffickers.

C. Laws Target Crime, Policy Targets Economy—Neither Supports Victims

The law is best at criminalizing particular behavior. While strong moral feelings about the “rightness” of protecting victims often prompts legislation—to wit, the Trafficking Victims Protection Act was initiated with the goal of protecting victims—the resulting laws are squarely focused on prosecuting the criminals who victimized. Laws may touch on protecting the victims of exploitation, but that protection is conditioned upon its usefulness in rendering the victim a fit and proper witness to secure prosecution of the criminal.²¹⁹

There are many aspects of this paradigm which work to the disadvantage of exploited migrants. One troubling aspect of laws geared towards protecting victims of trafficking is that when these laws are invoked to secure “benefits” for trafficked persons, the trafficked person must present herself as a victim, rather than a survivor. To secure the benefit she seeks, she must prove up the victimhood nature of her situation. The law itself forces the victim to offer herself up as an easily identifiable “victim subject,” without the clutter and complication of a story in

²¹⁸ This is particularly true of domestic labor. See, e.g., Alejandro Portes, *When More Can be Less: Labor Standards, Development, and the Informal Economy*, in *CONTRAPUNTO: THE INFORMAL SECTOR DEBATE IN LATIN AMERICA* 113 (Cathy A. Rakowski ed., 1994).

²¹⁹ See Haynes, *Used, Abused*, *supra* note 68, at 241.

which the “victim” also had some agency in her decision. Victims found not to have been “exploited enough” are denied the status of victim and the benefits which attach to that status.²²⁰

Another critique of current approaches to human trafficking is that offering up this type of “victim subject” works to the detriment of securing social and economic rights for the same groups of people who are choosing to migrate. Instead of thinking broadly about the lacking economic, cultural, and social rights in the countries of origin, which if repaired could serve to significantly reduce migration, we focus on the lurid, sexualized aspects of the crime of trafficking. Stories of forced sex and abuse are generated for the mass media, rather than the more broadly applicable, but more subtle stories about lacking economic rights and equality and dignity. Stories we hear on television, in movies, and in books, after all, are most often about sexualized forms of exploitation—sex slavery, forced marriage, and child pornography—and are seldom about agricultural workers forced into indentured servitude to repay their traffickers and in debt to the “company store” for their daily food and shelter. In other words, a story about forced prostitution reaches the mass media, while a story about an agricultural worker in debt peonage does not. Sex sells, even if the fix is rooted in rectifying the economic injustices that drove both to migrate in the first place.

Another example of this odd disparity could present itself within a single instance of human trafficking. If a woman who is thought possibly to be a victim of human trafficking wishes to apply for a T-visa, which would allow her to remain in the United States, she is relatively able to do so (with all of the caveats mentioned above), assuming she finds someone to help her with the application and a law enforcement official willing to certify her. In seeking a T-visa she is asking for the benefit of remaining in the United States as a sort of compensation for her suffering, if you will. If, however, she wants to forego filing for the T-visa, and instead bring a civil suit against her former exploitative employer (even if he is the same human trafficker) for back wages, unpaid wages, or duress, she will have much more difficulty. First, she would have to find an attorney willing to take the case, no small feat considering how few cases have been brought successfully. Second, she would not be entitled to a stay of deportation while the suit is pending, and so, unless she is independently entitled to some other immigrant status, she is likely to be deported in the meantime. Third, assuming she, for instance, escaped from her abusive employer’s household, she will have no place to stay for even the first night, let alone during the duration of the lawsuit, nor will she be authorized to work. It is as if allowing her to remain in the United States is the limit to what we are willing to consider, by way of compensating her for her suffering. But asking that she be paid for the work she did while suffering is going too far.²²¹

Not only are real victims of human trafficking shortchanged—the ones not found chained to a bed in a brothel, but rather who toil as indentured servants with no pay and in debt to the “company store”—but this false and “sexified” vision of human trafficking then trumps and obscures the myriad problems surrounding “guestworker” programs. Real victims of human trafficking do not look too different from exploited “guestworkers.” Neither politicians nor the

²²⁰ See, e.g., *id.* at 379 (discussing Carlos’s story).

²²¹ *Id.* (describing the difficulties faced by several clients of NGOs working with exploited domestic workers). It should be noted that the number of civil suits is increasing, as more victims find pro bono attorneys willing to represent them.

media have an interest in pointing that out, however, because both are enamored of the vision of rescuing victims from horrible and sexualized crimes while keeping the economy strong and the borders secure against the tide rising up against the floodgates.

D. Conflicted Interests Yield a Conflicted Approach

Why do we sometimes pass laws to protect victims of exploitation, as with the Trafficking Victims Protection Act, but other times ignore quite similar exploitation? Quite simply, we have two different goals in play, and each is perceived to be implicated in one scenario, but absent from the other. One goal is to protect victims of “severe forms” of exploitation.²²² Another goal is to bolster the U.S. economy and prevent U.S. workers from being deprived of jobs. When those two goals are or appear to be in conflict, the latter policy goals win out. Furthermore, we passed the TVPA with “foreign exploiters” in mind—international organized-crime gangs. When it comes to agricultural and domestic workers, however, the exploiters are American, and the work in question is work that many American citizens, citizens with voting power, need—agricultural laborers, factory workers, childcare providers, and housekeepers. Existing stereotypes of “victims” (female, young, and vulnerable) and “exploiters” (foreign organized criminals, thugs, and pimps) make it hard to spot a victim or perpetrator of exploitation when he or she does not fit the stereotype.

Our primary goal in passing laws such as the Trafficking Victims Protection Act was not to protect workers. Allegedly it was to protect “victims” who happen to be victimized through their labor.²²³ We have no laws to protect foreign laborers from “simple” exploitation. When exploitation becomes severe, we might cast it as trafficking in order to prosecute the exploiter, but that becomes more unlikely in the face of strong laws protecting the U.S. economy and U.S. businesses. Casting ourselves as either Saviors of the Exploited or Bolsterers of the U.S. economy²²⁴ yields too narrow of a perspective on two issues which are inter-related and not mutually exclusive.

Laws regulating the admission of agricultural workers do not even contain reference to the potential exploitation of those workers.²²⁵ Rather, they deal squarely and narrowly with the extent to which a worker can and will come to the United States only temporarily to work for an American business. Other laws may offer some protection, such as some labor and employment laws and criminal law,²²⁶ but the laws are in place for the benefit of American businesses and the citizens of the United States as beneficiaries of a strong economy.

Whereas paternalism allows us to feel that it is “right” to protect the exploited victim of human trafficking, because the image of the exploited sex worker comports with our notion of the role of the state in protecting the defenseless, no similar laws protect agricultural workers, unless they are also ultimately treated as victims of human trafficking. As detailed above, the

²²² 22 U.S.C. § 7102(8).

²²³ Although arguably it was to prosecute traffickers, rather than protect the victims, an argument presented elsewhere in this article.

²²⁴ Mutua, *supra* note 202 (arguing that casting ourselves as such renders the laws vulnerable to critiques of western imperialism and essentialism).

²²⁵ See discussion *infra* Part II.C.

push factors which compel people to migrate are the same. Some are exploited, and some are not, but if our interests are in protecting those who are severely exploited, as the TVPA indicates, it makes little sense to extract an entire group, perhaps even the majority of the migrants (agricultural workers), and treat them differently as “economic migrants,” regulated through the policy priorities set by concern for the U.S. economy, while the other group (victims of human trafficking) is protected by laws created under a policy priority driven by the desire to eradicate international criminal law.

From the perspective of the person exploited by his employer and trapped in indentured servitude by his own need, it is irrelevant whether the laws that could offer protection are premised on one or the other. The relatively fine line between exploitation designated as human trafficking and that deemed mere smuggling or ill-treatment of an agricultural worker will be discussed further, below.

1. The Protocol Definition of Human Trafficking

The Protocol defines trafficking as the recruitment, transportation, transfer, harboring, or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of deception, of the abuse of power or of 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.²²⁷ Not many trafficking victims, save those literally found chained to a bed in a brothel, will be able to prove their traffickers’ purpose was to exploit them.

2. The TVPA Definition

The U.S. approach is more fragmented, creating special emphasis for two types of victims, children and victims of sex trafficking. Thus, the definition of trafficking is, essentially: a) the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act, or b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

On exploitation, Hill states, “[it] is distinct from the traditional notion of compulsion in two respects. First, the decision to pursue the proffered choice is precisely that—a decision made by the actor. Because it is a decision and not a compelled act, the choice springs from internal motives and is not imposed by forces outside the agent.”²²⁸ Coercion involves the threat of harm (“I will kill your mother if you do not work in this brothel”),²²⁹ while exploitation involves the promise of a benefit (“you will be able to support your children if you come and do this work”).

²²⁷ Trafficking Protocol, *supra* note 10.

²²⁸ Hill, *supra* note 1, at 659. To illustrate the point, Ahn did make a choice to travel with people (whom she did not know were traffickers) in order to escape having already been sold by her own father. When she discovered their intent to traffick her, they used her fear of returning home, as well as threats to hurt her mother, as a means of controlling her.

²²⁹ Hill, *supra* note 1, at 662.

According to Hill's definition, exploitation has to do with the mindset, volition, and vulnerability of the *victim*, not the purpose of the trafficker. The focus on the trafficker's exploitative intent, rather than the victim's mindset, is indicative of the perceived necessity of protecting the sovereign capacity of the states to interpret the extent to which they would allow individuals to be perceived as victims. While Hill may be correct in noting that exploitation depends on the victim's mindset and not the exploiter's, countries ratifying the protocol or adopting domestic laws want to be able to keep those floodgates tightly shut.

In actuality most victims initially go with traffickers because they are exploited (their dreams of migrating to a better life are manipulated and played upon; they are enticed), not because they have been coerced. As Hill writes,

guilt or fear of self-loathing[] interfere with the decision-making process not by compelling an otherwise undesirable action, but by skewing the subtle emotional and cognitive foundation upon which attitudes, beliefs, judgments and goals are built. That is, some offers are exploitative not because they weaken the will but because they prevent clear thinking about the actor's options.²³⁰

Even if the drafters really wanted to attach blame to the exploitative intent of the trafficker, rather than protecting the victim from that exploitation, that exploitative intent would be best proved, according to Hill, by allowing the victim to speak of the guilt and fear (of not being able to support herself or her children, for instance) which led her there in the first place.

In short, trafficking is about the manipulation of the dream of what possibilities migration holds. If the laws were truly intended to protect victims, the drafters would have recognized this. But they are not; laws are created primarily to prosecute the wrongdoers, while protecting state sovereignty, and so both the TVPA and the Protocol definitions steer us wrongly towards the intentions and goals of the trafficker, and away from the real indicators of exploitation—the motives and mindset of the victim.

3. The 2008 Reauthorization of the TVPA²³¹

Beginning in late 2006, Congress began working on the bi-annual Reauthorization of the TVPA, due in the year 2007. Although multiple draft laws were on the table, the Reauthorization was actually not passed until the end of 2008. With the 2007 drafts, Congress made a half-attempt to acknowledge that the line between trafficked persons and those who are exploited is in fact quite fine, and to a large extent, retained those provisions within the final 2008 Reauthorization. A large section of the Reauthorization tasks Congress to make funds available to inform “work-based non-immigrants” (e.g., agricultural laborers, domestic workers, etc.) of their “legal rights and resources.”²³² As their legal rights are few, much of the Reauthorization focuses instead on making the information already available to trafficked

²³⁰ *Id.* at 665.

²³¹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 7311, 110th Cong. (signed by President Bush Dec. 23, 2008), *supra* note 53.

²³² *Id.* § 202.

persons also available to these “work-based non-immigrants.” So, for instance, rather than putting out radio announcements and pamphlets on where to seek help and what help might be had within the targeted community of trafficking victims, the information will now be provided by the consular offices of the Department of State for workers accessing employment based visas.

Although the legal rights actually available to these laborers are few, the Reauthorization takes quite a step in acknowledging the need to inform workers of those, albeit limited, rights. Most importantly, the phrase “worker exploitation” is used throughout the Reauthorization, although Congress essentially relegates the protections against exploitation to a pamphlet which is supposed to advise the employee who attempts to obtain an employment visa about his rights. Still, that Congress is using this phrase in a statute is a watershed moment. Section 202(b) of the Reauthorization reads, in part:

(b) CONTENTS.—The information pamphlet developed under subsection (a) shall include information concerning items such as—

- (1) the nonimmigrant visa application processes, including information about the portability of employment;
- (2) the legal rights of employment or education-based nonimmigrant visa holders under Federal immigration, labor, and employment law;
- (3) the illegality of slavery, peonage, trafficking in persons, sexual assault, extortion, blackmail, and *worker exploitation* in the United States;
- (4) the legal rights of immigrant victims of trafficking in persons and *worker exploitation*, including—
 - (A) the right of access to immigrant and labor rights groups;
 - (B) the right to seek redress in United States courts;
 - (C) the right to report abuse without retaliation;
 - (D) the right of the nonimmigrant to relinquish [sic] possession of his or her passport to his or her employer;
 - (E) the *requirement of an employment contract* between the employer and the nonimmigrant; and
 - (F) an explanation of the rights and protections included in the contract described in subparagraph (E); and
- (5) information about nongovernmental organizations that provide services for victims of trafficking in persons *and worker exploitation*, including—
 - (A) anti-trafficking in persons telephone hotlines operated by the Federal Government;
 - (B) the Operation Rescue and Restore hotline; and
 - (C) a general description of the types of victims services available for individuals subject to trafficking in persons or worker exploitation.²³³

Removed from the 2007 draft bill was a section which differently responded to the problem of “foreign labor contracting,” that is, the middlemen who engage foreign laborers for employment in the United States, but then hold them in debt peonage until the costs associated with bringing

²³³ *Id.* (emphasis added). Presumably, Congress meant, in § 202 (b)(4)(D) the right *not* to have to relinquish one’s passport to one’s employer, as this is a common form of coercion and use of force carried out by employers.

them to the U.S. and securing jobs for them are repaid.²³⁴ The 2008 Reauthorization responds to the problem by amending Chapter 63 of title 18 of the United States Code,²³⁵ adding to it:

Whoever knowingly and with intent to defraud recruits, solicits or hires a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment shall be fined under this title or imprisoned for not more than 5 years, or both.²³⁶

While the provision does not prohibit the practice of “foreign labor contracting” itself, it criminalizes those recruiters who tap a worker outside of the United States “by means of materially false or fraudulent pretenses.” However, this may fail to address the real problem. First, read in conjunction with Sections (b)(4)(E) and (F) of the 2008 Reauthorization, the laws only require the workers to be informed of the parameters of the contract. They do not require either the employer or the recruiter to refrain from offering exploitative contracts in the first place. Nor do the provisions correct the problem of U.S.-based recruiter companies, those sanctioned by the Department of Labor, who “blacklist” employees who attempt to organize or access their rights.²³⁷

The effect, in fact, may be that the new provisions render the contractors and employers less likely to be *accused* of exploitation, because the workers are now aware of the poor conditions in which they are likely to be working, and can be said to have consented. Although the law uses the term “worker exploitation” throughout Section 202, it does not specifically recognize, or protect against, the potentially exploitative nature of the work itself, nor does it criminalize exploitative behavior of employers.

In short, Congress had an opportunity to criminalize worker exploitation under federal law, but failed to take it. While Congress uses the phrase “worker exploitation” for the first time, presumably acknowledging that it does exist, it shifts the focus to one of contractual consent, in that as long as the H-2A worker is in receipt of a contract and has the parameters of the employment explained to him, the employer is safe, regardless of the content of that contract. Nevertheless, it should not be lost on any reader that these “worker exploitation” provisions are contained within the Reauthorization *to the Trafficking Victims Protection Act*, reminding us that even Congress and the President agree that the line between human trafficking and the potential for worker exploitation is so thin as to require a response to worker exploitation within the Act which deals with human trafficking.

IV. Democracy, the Free Market, and Human Rights

²³⁴ *Id.* § 202(g)(1)(b). The provision would have essentially required the registration of any foreign labor contractors, putting more responsibility on the Department of Labor to ensure that those contractors it registers are not unscrupulous.

²³⁵ *See id.* § 222(e).

²³⁶ *Id.*

²³⁷ While instituting legal protection at the federal level for victims of trafficking, Congress leaves the protection of labor rights to the state and other pre-existing, and weak, federal laws such as the Fair Labor Standards Act and accompanying regulations. 29 C.F.R. § 500, 501.

If laws and legislation are not currently well-suited to address a problem like exploitation, a problem which could be described as variously a legal, moral, or economic problem—and if, nevertheless, we determine that we are morally, or legally or economically, opposed to exploitation, then how can we work to redress it?

One answer may lie in re-conceiving exploitation in general as a human rights issue. Yes, borders exist around the world, and yes, those borders are governed by the sovereign nation states embraced by them. But human rights laws allow the world to identify problems as harmful to human beings even when states are not willing or not committed enough to address them successfully through laws to protect against exploitation.

A. Political Economies

Neo-liberalism is a phrase used widely in European and Latin America, but seldom heard in the United States. It connotes the economic policies and principles by which the rich grow richer and the poor grow poorer. Although it fell out of favor in the U.S. in the 1930s, “[t]he capitalist crisis over the last 25 years, with its shrinking profit rates, inspired the corporate elite to revive economic liberalism. That’s what makes it ‘neo’ or new.”²³⁸ Other scholars explain:

The image of ‘neoliberalism’ has been heavily influenced by the protests against it: people think of the violent protests at Seattle and Genoa, and the associated social movements. If you only thought about that, then neoliberalism would be an ideology of the riot police, and that’s not accurate. . . . 20,000 police and soldiers were deployed at the Genoa G8 summit—[by contrast] NATO used 42,500 troops to occupy Kosovo. This show of force was out of all proportion to the political strength of anti-market forces, but it emphasized the legitimacy of the market-democratic *states*.²³⁹

Neo-liberalism derives from Liberalism of the early eighteenth century. Generally speaking, Liberals reject the idea of redistribution of wealth as a goal in itself.²⁴⁰ Neo-liberals take these principles further, emboldened by globalization, and hope to “intensify and expand the market, by increasing the number, frequency, repeatability, and formalisation of transactions.” In a utopian neo-liberal world, everything would be transactionable, twenty-four hours a day and seven days a week. The main problem with the neo-liberal view is that it allows governments from the federal down to the city level, all of which have become neo-liberal entities selling themselves as the perfect location for entrepreneurial activity,²⁴¹ to falsely assert that workers are fine.²⁴²

²³⁸ Elizabeth Martinez & Arnoldo García, Global Exchange, What is NeoLiberalism? (Feb. 26, 2000), <http://www.globalexchange.org/campaigns/econ101/neoliberalDefined.html>.

²³⁹ Paul Treanor, Neoliberalism: Origins, Theory, Definition (Dec. 2, 2005), <http://web.inter.nl.net/users/Paul.Treanor/neoliberalism.html>.

²⁴⁰ *Id.*

²⁴¹ *Id.* (citing examples of cities around the world and their particular marketing campaigns to attract business).

²⁴² *Id.* The neoliberal joke, according to Treanor, goes as follows—Marxist: “The workers have nothing to sell but their labour power;” Neoliberal: “I offer courses on How to Sell Your Labour Power Like A Shark.”

A moral aspect of the problem, as well as an economic aspect, is the extent to which it is legitimate to treat a human being's labor and services as a commodity, or whether it is legitimate at all. The arguments against treating labor as a commodity were examined most fully by Marx, who critiqued the practice, along with capitalism more generally, for reducing everything to an economic transaction, which he called "the fetishism of the commodities."²⁴³ Marx was clear that a commodity was not a human, but "an object outside us, a thing that by its properties satisfies human wants of some sort or another."²⁴⁴ The people whose services are being used, even those not squarely (only marginally) being exploited, are well aware of the problem. Says one such migrant laborer, "When [the couple whose children I care for] act as if my services are their property—property they can lend out whenever [and to whomever] they want—that really makes me feel bought."²⁴⁵ These days, however, there are more arguments made for accepting the commodification of labor, and the focus instead is on the fairness of the transaction.²⁴⁶ The idea of commodification theory as applied to guestworkers is that "as long as guestworkers freely choose to come to the United States, the transaction is substantively not problematic."²⁴⁷

But it is problematic. Not only because the choice is not exactly "free," as argued above, but because the work done by immigrants in the U.S.—whether documented or undocumented—is not valued, is virtually invisible, and is more often subject to exploitation than work done by others. The special combination of invisibility, of existence in the private sphere, and of *being* migrants is what renders migrants more susceptible to exploitation. Being undocumented merely exacerbates the likelihood that the employer will either exploit that particular vulnerability, or that the undocumented person will acquiesce more often and act generally more submissive because she knows she is legally more vulnerable. Writing of immigrant women as personal caregivers, Lynn May Rivas remarks that "when care activities are . . . essentialized, the *work* they entail is effectively erased. Immigrant women are caregivers par excellence because both they and their work are often rendered invisible."²⁴⁸ The nature of migration itself is at the root of the problem.

When we cast things like labor in economic terms, we tend to see them as politically neutral. It becomes math or business, not politics. But only democracies believe labor and the economy is politically neutral. And in this democracy, the United States, the millions of laborers who are not citizens do not get a vote. Clearly, the vast majority of the world has assessed socialism and rejected it. But just as clearly, rejection of that political system does not mean that we must conversely fully embrace the notion of humans as commodities; surely there can be a middle ground.

²⁴³ KARL MARX, 1 DAS KAPITAL [CAPITAL] ch. 1 sec. 4, at 163–177 (Ben Fowkes trans., Penguin Classics 1990) (1867).

²⁴⁴ Karl Marx, *The Two Factors of A Commodity: Use Value and Value* (1867), reprinted in MARX AND MODERNITY: KEY READINGS AND COMMENTARY 105, 105 (Robert Antonio ed., Blackwell Pub. 2008).

²⁴⁵ Cheever, *supra* note 92, at 35.

²⁴⁶ Garcia, *supra* note 69, at 33.

²⁴⁷ *Id.* at 44.

²⁴⁸ Rivas, *supra* note 8, at 76. Also noteworthy are the remarks of personal caregivers and domestic servants about the element of the work which expects the laborer to "want" to do the work. Rivas notes that when the worker wants to do the work, it ceases being labor or being respected as labor.

As capitalism has led to a thriving economy of which the upper and middle classes are largely the beneficiaries, but which also allows even the lowliest migrant to imagine the American Dream, the beneficiaries of capitalism have lulled themselves with the notion that business is neutral. “It’s just business,” says the businessman as he gouges a customer, or even a good friend or relative. Placing anything in the box of being “just business” is supposed to excuse the exploitative behavior.²⁴⁹ Although some have argued in the United States that the Thirteenth and Fourteenth Amendments can serve to protect the laborer, even when the employee has consented and is paid for that labor,²⁵⁰ migrants have found no purchase or solace in the protection of the Constitution. As Garcia rightly points out, “the ability to quit at any time is illusory if it means that you will be deported.”²⁵¹

In arguing against creating new guestworker programs that harkened back to the Bracero program, Garcia argued that the fact that guestworkers (workers here legally, but temporarily) are unable to vote in fact creates a “democracy deficit.”²⁵² Certainly the presence of fourteen million voterless persons in the United States could arguably create a democracy deficit or a fourth class citizenry, in that the persons are not just poor, not just subject to race-based discrimination, not just minimally protected by due process, but have no political voice. Guestworkers, says Garcia, drive up the democracy deficit unlike other types of visitors, such as students, tourists, and other temporary workers, because they remain longer, and because “the State is much more entwined with labor as regulator, employer, and enforcer. . . Guestworkers have limited ability to influence legislation in workplaces that are heavily regulated by the government.”²⁵³

Socialism is not the answer, of course, just as democracy is not the problem. Nor does the problem necessarily involve the crossing of borders. Take, for example, China, led by a communist government, which currently has hundreds of millions of migrant laborers moving from rural to urban areas, who go unpaid, without pensions, without medical care, and who are exploited by their urban Chinese employers. The employers are Chinese companies, but the laborers are still invisible. They work and exist in the private sphere. Why? Because in China, people are registered as residents of their birth community, and their health care and any attendant labor-related benefits attach to that place of residence.²⁵⁴ When they travel to the city to work, they receive no labor protections, no pension, no health care because it is as if they only exist back in the town of residence, where they are not in fact working. China, now experimenting with private ownership, in particular of businesses and recently of real property, but still a communist state, exploits its migrant workers, in this case citizens of China, just as

²⁴⁹ For example, when first encountering a human trafficking claim, an immigration judge expressed confusion at why this mere “contractual matter” between the father (who sold her to another man to pay off his debts) and daughter (who was sold) was not handled in a different court, with jurisdiction over contractual matters. Haynes, (*Not*) *Found*, *supra* note 14, at 339.

²⁵⁰ Alexander Tsesis, *The Thirteenth Amendment’s Revolutionary Aims*, in *PROMISES OF LIBERTY: THIRTEENTH AMENDMENT ABOLITIONISM AND ITS CONTEMPORARY VITALITY* (Alexander Tsesis ed., forthcoming 2009); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 *COLUM. L. REV.* 973, 1047–49 (2002).

²⁵¹ Garcia, *supra* note 69, at 64.

²⁵² *Id.* at 44.

²⁵³ *Id.* at 44–45.

²⁵⁴ Law of the People’s Republic of China on Resident Identity Cards (Order of the President No. 4), June 28, 2003, available at http://www.gov.cn/english/laws/2005-09/06/content_29700.htm.

democratic countries allow business owners to exploit migrant workers, in those cases non-citizens.²⁵⁵ The problem is not a political system; the problem is exploitation—justified and rationalized by devotion to the notion that the market will correct for any problems. But the only way that the market will correct for exploitation is if people understand why their goods are inexpensive, and then reject those goods which are created on the backs of exploited persons.

If the example of China is considered, it is not a democracy deficit that is the problem, although it is a problem. Or perhaps, even socialist China suffers from a socialist deficit, in that its modern epidemic of internal migration goes unrecognized. More likely, it is a rights deficit that is common to both political systems. Regional benefits do not follow internal migrants in China, even though internal migrants drive the gargantuan economy of twenty-first century China, just as transnational migrants drive the U.S. economy. All over the world, governments turn a blind eye to exploitation, no matter the political principles to which they adhere. When the opportunity to “drive the economy” forward comes along, exploitation is implicitly understood as a natural, and therefore acceptable, byproduct. China is projected to have the second largest economy, behind the United States, by 2020.²⁵⁶ If both countries prosper from exploited laborers, whether the laborer be citizen or non-citizen, in a socialist state or in a democracy, what is to stop the world from following suit, if they do not already?

Why do we accept exploitation, when it is people—human beings—who suffer? Is it human nature to expect that there will always be an underclass serving the middle and upper, no matter the political system in place? Why do we permit ourselves to believe that the free market is politically neutral, free of morality, and free of ethical violations? Even within human rights dialogues, economic rights, along with cultural and social, receive short shrift, while political and civil rights reign. In communist China, economic rights are supposed to hold some power, as one of the few places in which collective rights could still hold sway, but they do not.²⁵⁷ Instead, the employer simply defends himself by claiming that the worker was not really working for him when an employee brings suit for unpaid wages.

Essentially, certain sectors of most economies are permitted to operate as a grey market economy—unregulated and unenforced—such that anything goes as long as it does not call too much attention to itself, does not violate too many rights (assuming any rights apply) too egregiously, and continues to bolster a rollicking economy. Ironically, this state of affairs is akin to that in countries that have been designated failed states or have recently undergone massive political and economic overhaul. After the fall of the former Yugoslavia and during and after the war in Bosnia, for instance, business continued even though there was no longer any functioning government. The businessmen who profited did so within a grey market, tucked deep within a private sphere in which organized crime, and not coincidentally human trafficking and exploitation, flourished.²⁵⁸ The businesses that are most skilled in exploitation flourish the most when wage protection for migrant laborers goes unchecked—that is, when those enforcing

²⁵⁵ *To Have and To Have Not: How Will the WTO Change China?* (PBS television broadcast July 18, 2002).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ For a description of the economy during and after the war, see DINA FRANCESCA HAYNES, *DECONSTRUCTING THE RECONSTRUCTION: HUMAN RIGHTS AND THE RULE OF LAW IN POSTWAR BOSNIA AND HERZEGOVINA* (2008) and Haynes, *Lessons From Arizona Market: Exploitation and Abuse as By Products of the Free Market* (forthcoming).

human trafficking are looking for the proverbial girl chained to a bed in a brothel and are therefore missing the farm laborer stuck in debt peonage without a legal or political voice. The businesses skilled at exploiting loopholes and exploiting their workforce are the businesses which thrive in an environment that values cheap goods and a rollicking economy, no questions asked as to how the goods are so cheap and what drives the thriving economy.

If we could reframe the issues so that we talk not about victims and criminals, but about migration and exploitation; if we could switch from a focus on protecting the market and the American worker to understanding how the “American Dream” leads from simple migration to exploitation, then perhaps we could begin addressing the human rights violations inherent in labor exploitation of any sort, whether characterized by domestic law as trafficking or smuggling or unfair wages or simply the cost of being employed in a tough market.

B. Adopt an Economic Rights Perspective in Regards to Labor

Adopting an economic rights perspective means asking, for instance, whether trafficking and exploitation flourishes in large part because the labor of certain individuals, while necessary, is not respected. The labor of migrants, particularly undocumented migrants, is “private sphere” work—work that is hidden away or done in the home or on the margins of society. It is taken for granted and perceived as not being the business of government to aggressively regulate.

The economic rights perspective elucidates the particular vulnerabilities inherent in “private sphere” labor. For instance, some users of live-in migrant domestic labor and migrant or unfree sex workers imagine a personal relationship with their “employee” specifically because the relationship takes place in the private sphere. They allow themselves to take the labor performed by migrants for granted, as if it were done by a member of the household. Because domestic work and sex work is done in the home or in private, users allow themselves to believe that the work done is governed not by the market or economic concerns, but by “mutual dependence and affective relations.”²⁵⁹ Users of migrant domestic servants perceive the workers as “objects of, rather than subjects to, a contract,” thus allowing them to see the “situation” of a trafficked domestic worker as “something quite external to their own role as employer.”²⁶⁰ The tendency of users of domestic labor to objectify their “employees” is exacerbated when domestic labor is engaged through an agency or subcontracted.²⁶¹ Agricultural workers, while not typically in “affective relations” with their employers, are vulnerable by virtue of being physically separated from others, living and working in the fields with foremen to watch over and middlemen to control them through debt peonage, fear of being bumped from the list of future visa holders, or fear of being turned in as undocumented.²⁶²

²⁵⁹ Anderson & O’Connell Davidson, IOM Report, *supra* note 55, at 33.

²⁶⁰ *Id.* at 37. Anderson and O’Connell Davidson provide the example of an Indian woman employing a fourteen-year-old girl who had been forced by her family to work and who cried all the time. Said her employer: “[N]ot only did I have to do all the work, but I had to keep part-time help during that time as well.” *Id.*

²⁶¹ *See id.* at 31 (discussing a Dutch employer employing domestic workers in Singapore and Thailand).

²⁶² Anderson and O’Connell Davidson conclude that there are three factors key to explaining the exploitative conditions inherent in migrant sex work and domestic work: (1) the unregulated nature of those markets; (2) the abundant supply of persons to be exploited; and (3) “the power and malleability of social norms regulating the behavior of employers and clients. *Id.* at 44.

From an economic rights perspective, all humans are complicit in the existence of human trafficking and all forms of exploitation, because supply and demand do not simply exist: they are forces created through action and inaction on the part of state actors and interest groups.²⁶³ Until there is what Anderson and O’Connell Davidson refer to as a fundamental re-visioning²⁶⁴ in society, in which all migrants, sex workers, agricultural workers, and domestic workers truly are fully recognized members of the public sphere with full rights, they will be vulnerable to exploitation, and societies will be complicit in it.

C. Liberalizing Migration

Clearly, American employers and the United States government are already aware of the extent to which our current laws and systems serve to allow for the exploitation of migrants in the name of improving the economy, and have little compunction about it.²⁶⁵ Some American businessmen are skilled at using any means available to exploit their workers, and understand that the laws of the United States are available to them to support them in making a profit, in order to drive the economy. Recent attempts by members of Congress to expand on employment based visa programs only raise the specter of a sanctioned system of exploitation in which employers are permitted by law to control not only the potential for employment, but also the immigration status of the employee. When not only the employee’s job, but also his immigration status is linked to the employer’s satisfaction, the employer has too much control. If the employer is not satisfied, the employee is not only fired, but deported.²⁶⁶

The few laws that exist in the United States to protect victims of exploitation are weak and often simply unenforced. In some other countries, they simply do not exist or on the contrary, the government blatantly props up the exploitation of migrant workers.²⁶⁷ When a Dutch employer in Singapore willingly acknowledges how the exploitative system serves her needs, we in the United States recognize the comment as wrong and exploitative. Nevertheless, in the United States, Congress openly debates the merits of directly tying agricultural workers’ immigration status to their employer, a potentially similarly exploitative situation sanctioned by law, but discuss it only in terms of how this type of laborer/employer relationship serves as the backbone of the thriving U.S. economy. We are holding other countries to standards to which we are not holding ourselves.

In 2006, when an immigration amendment was proposed that would have included enhanced labor protection for guestworkers, the Senate rejected the amendment.²⁶⁸ Unequivocally, the priority is the economy, not human dignity. By 2007, the various bills purporting to overhaul and reform immigration in the United States differed most on the extent

²⁶³ Anderson & O’Connell Davidson, IOM Report, *supra* note 55, at 62–64.

²⁶⁴ *Id.*

²⁶⁵ In the words of one migrant worker, “They think we are animals. The first threat that they always make is that if you don’t like it, you can go back to Mexico.” Bacon, *supra* note 68.

²⁶⁶ Importantly, the 2008 Reauthorization, *supra* note 53, may go some distance towards improving this situation. Section 202(b)(1) requires the recipient of a temporary worker visa to be advised of his rights in regards to the “portability” of his employment, which may mean that he may have the right to move between employers using the same visa, if he feels he is being taken advantage of.

²⁶⁷ E.g., the Singapore government. See Anderson & O’Connell Davidson, IOM Report, *supra* note 55, at 31.

²⁶⁸ 152 Cong. Rec. S4811-01 (2006) (rejecting SA 4066).

to which or whether persons will be prioritized based on their family connections to U.S. citizens and residents, and whether they will be allowed to apply to remain in the United States. Prioritizing only skilled and temporary workers, as was the case with the last versions of draft bills attempting to overhaul immigration, reveals our current view that workers are first and foremost expendable commodities in service to the U.S. economy. That they are human beings is a distant second.

D. Prescription for Change

Until we are willing to bring labor out of the private sphere and into the public discourse, granting all laborers rights and a voice, our nation and the economies of the world will continue to thrive on the backs, sweat, and pain of the exploited. Noncitizen laborers in the United States do not have a right to vote, and do not have a right to many legal protections, which is why human rights laws and instruments must be brought to bear on these issues. Following are some specific suggestions for changing the status quo.

1. Public Information Campaigns—Stigmatizing Exploitation

If laws are not well-suited to address these phenomena, then what is? Perhaps a sweeping change in societal values. Perhaps a clearer understanding of the true cost of “benefiting the U.S. economy” via exploitation of migrant laborers. Or perhaps a stigma that attaches to failing to look behind the cheap goods and services to the people who made them. When it became clear that tobacco smoking killed smokers and those near them, it was not the medical information or even the bans on smoking that swayed people as much as it was the shift of a new mindset that entered with a new generation that “smoking is bad.” Similarly, when countries have undergone massive political and economic transition (for example, the former Yugoslavia after the wars in Bosnia and Kosovo), and a decision is taken, for instance, that it would be good for local lawyers to volunteer a certain number of *pro bono* hours, writing a law requiring *pro bono* service alone will not be effective. Instead, developing a public information campaign targeted at the young who enter the profession, convincing them that volunteering their time in the public interest is good, and repeating that message will change attitudes over time. Similarly, the United States and countries of the Northern and Western Hemispheres which are receiving states for migrant labor, must send out a message that, regardless of the money it may put into your pocket, exploiting people is bad. Of course, a cultural and societal shift in attitude will not affect those persons who are truly criminal traffickers,²⁶⁹ but it may reach those who are not career criminals but have convinced themselves that “it’s just business,” which would at least reduce the pool of criminals that law enforcement must target.

2. Engaging Civil Society

One of the best qualities of a democracy is a healthy civil society, NGOs, and citizen (and non-citizen) groups that question the practices implemented by the government through the voters. Civil society, wielding tools of human rights law, are the best, if not the only, means

²⁶⁹ Use of the term “criminal” does not imply that some persons are only or wholly “criminals.” Rather, the term “criminal” is employed to mean those people who know that their actions are illegal, acknowledge it, and thrive in the private sphere, on the fringes of or outside the law, such as those engaging in organized crime.

available to protect those so used, unless or until countries acknowledge that they are using people, and that using people is wrong and not a win-win. In order for those human rights laws and norms to have any effect, of course, they must be respected, and ideally passed into domestic law. Currently, domestic laws in the United States prioritize most practices that will prop up the local economy. Regional laws, too, best demonstrated by NAFTA and the old Bracero program, do the same, on a multi-lateral or bi-lateral level. Neither takes into account the workers to be exploited. Civil society can operate to convince those with voting rights that eliminating exploitation makes sense.

3. Human Rights Laws Brought to Bear

International human rights laws recognize that exploitation of undocumented and documented temporary workers is wrong. The trouble with human rights laws, as is well known, is that they largely have no enforcement mechanism. Unless a country chooses to adopt the principles contained within the international declarations and conventions, either by re-writing them as domestic laws (as was the case in the United States when the Trafficking Victims Protection Act was drafted subsequent to the Protocol on Human Trafficking) or by incorporating the foregoing into its laws in full (as is the case, for instance, in Bosnia, where the European Convention on Human Rights is incorporated in full into the domestic constitution), the laws have minimal impact. However, even when a country does not ratify a convention or declaration, as is often the case with the United States, the principles contained therein do have a moral effect, and as advocates begin to incorporate the rationale behind these international human rights laws into their briefs and arguments, courts begin to reference them and eventually they begin to take hold.

The international human rights laws which have the most to say, relevant to the matters at hand, are the Convention on the Rights of the Child, which prohibits child labor and requires its ratifying parties to pledge that children should not be separated from their parents against their will, both of which are problems in the context of labor exploitation,²⁷⁰ and perhaps the most important international human rights law, the International Convention on the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention),²⁷¹ which was drafted in 1990 after the Economic and Social Council of the United Nations (ECOSOC) requested that a study be undertaken about the condition of migrant workers in the world. The Migrant Workers Convention provides for: non-discrimination with respect to rights of migrant workers, the assurance of their fundamental human rights, equality of treatment between nationals and migrant workers as to work conditions and pay, the right of migrant workers to participate in trade unions, equal access to Social Security, the right to emergency medical care, and equality of access to public education. State parties to the Convention must additionally ensure respect for workers' cultural identity, and, crucially, inform migrant workers of their rights under the Convention.

²⁷⁰ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁷¹ On December 18, 1990, the General Assembly adopted the International Convention on the Protection of All Migrant Workers and Members of Their Families. G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (1990). The Migrant Workers Convention entered into force on July 1, 2003.

Not surprisingly, only thirty-six countries have ratified the Convention as of 2007,²⁷² and the countries which have ratified it are, exclusively as of 2007, countries that tend to send, rather than receive, migrant workers. Unfortunately this indicates that the United States is not alone among industrialized, first-world countries in believing that there is more to gain in protecting the economy than in protecting the rights of the migrant workers who drive that economy.

4. Reconsidering Immigration Status

In order to truly benefit the victims of trafficking, and to assist the prosecutors in accessing information to prosecute traffickers, all countries need to adopt domestic legislation that allows for at least a temporary residency permit. The permit should allow the trafficked person time to begin recovering from her ordeal, should not be conditioned upon a law enforcement officer's willingness to launch an investigation, and should leave the victim free to consider whether to offer assistance to prosecutors without being coerced to do so. When the option is to testify or be deported, the trafficked person is re-victimized and doubly coerced. An offer that involves soliciting the testimony of the trafficking victim and then deporting her is even worse, and certainly cannot be considered part of a "victim protection" approach to combating trafficking.

Migrants suffer more easily and endure more severe forms of exploitation when their immigration status rests in the hands of their employers, regardless of whether the possibility of deportation is real or only feared. The uncertainty about status and deportation works to the advantage of users and exploiters. The more the user has the potential to wield personal control over the worker, and the less access the worker has to a support system, the higher the potential for and degree of exploitation. It is clear that employers understand that migrant and undocumented employees are cheaper, easier to control, and more exploitable, specifically due to their lack of immigrant status.²⁷³ Expanding opportunities to immigrate and obtain status, ones that do not tie victims' statuses to their "employers," could reduce the propensity of potential users to exploit migrants for domestic or sex work.

Before legislators prepare any new immigration reform bills, they should proceed very cautiously when they edge towards creating immigration visa schemes which would have the effect of tying a migrant employee's immigration status tightly to his or her employer. If legislators are at all concerned about exploitation, indeed if the American business community at large would like to maintain its image as generally non-exploitative, then visas should not be dependent upon a particular employer's level of satisfaction with a particular employee. Doing so will only create more incentive for unscrupulous employers to exploit the particular

²⁷² Ratified by Argentina, Algeria, Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, East Timor, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Honduras, Kyrgyzstan, Lesotho, Libya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Peru, Philippines, Senegal, Seychelles, Sri Lanka, Syria, Tajikistan, Turkey, Uganda, and Uruguay and signed by fourteen additional States—Bangladesh, Comoros, Guinea-Bissau, Paraguay, Sao Tome and Principe, Sierra Leone, Togo, Cambodia, Gabon, Indonesia, Lesotho, Liberia, Serbia and Montenegro, and Peru.

²⁷³ See *supra* Parts II.B, V.A.

vulnerability of migrant laborers, and the more employers drive down wages by exploiting their employees, the more other businesses will feel that “good business practice” compels them to do the same. If American businesses want an incentive to do the right thing by not exploiting their employees, then Congress can assist them by not providing the perfect immigration schemes to tempt exploitative behavior.

E. Acknowledging the Root of the Problem—It’s About Migration

The failure to focus attention on understanding the motivations that drive people to seek a better life is a crucial omission, as the victim’s motivation to migrate contributes to her vulnerability to exploitation. There continues to be a false dichotomy applied to victims of trafficking: that one can either have some agency and will to improve one’s life *or* be exploited and thus be a “victim” of trafficking, but not both.

Law enforcement officials not only fail to see a victim if she also shows signs of having had a motivation to migrate; they also still perceive these exploited persons as criminals. Judges and immigration personnel still fail to understand both the distinctions between trafficking and smuggling or to acknowledge that concepts such as “exploitation,” “coercion,” and “consent” are subtle and may be culturally bound, or at least not universal in the black and white sense that adjudicators require. We must acknowledge that a desire to improve one’s life leads people to attempt to immigrate through both legal and illegal means and confront that fact head on, not mask it behind a rhetoric that suggests that agency and exploitation are mutually exclusive.

Migration, while literally the most visible of actions, in that it involves moving across countries and across borders, is arguably an act relegated to the private sphere. From the perspective of the person moving, the action is migration. But from the perspective of the country to which the persons are moving, the migration can be characterized as legal and permanent (immigration), legal and temporary (visiting or working without hope or opportunity to permanently remain), or illegal (entering or remaining without permission). Illegal migration is certainly a private sphere activity, but at least part of the driving force for all three types of migration is the same: improving one’s circumstances. Whether born of desire or necessity, the compulsion to improve one’s circumstances is a key component of human nature, and criminals (traffickers and smugglers), businessmen, and governments alike have become expert at exploiting that most human characteristic.

Leaving one country, transiting through others, and seeking entrance into a country of destination without a visa or lawful passage involves relying on dangerous, hidden, and likely criminal persons. Having left one’s country, and not having legally arrived in another, the migrant is not practically protected by sovereign legal mechanisms, and must be so protected.

Conclusion

The global economy, although spanning the entire world and visible to all, promotes and fosters the relegation of most migrants to the private sphere, where they toil almost invisibly. Few enforceable laws govern the movement of exploited persons and fewer still the actual exploitation. The global economy allows and even encourages both the poor to move, seeking work from the rich, and the rich to seek that labor from the poor. As wealthy nations become

wealthier, and poor nations become poorer, the one-way flow of people widens the gap further, perpetuating the cycle.²⁷⁴ Human rights law, if combined with a will to apply and enforce it against the problems created by the global free market economy, would seem to be a natural source of laws upon which migrants might rely. Yet, as is well known, human rights laws are lacking in enforcement mechanisms and procedures to have the effect of force of law.

In order for human rights laws to be enforced or enforceable to protect against exploitation, we must first develop a global sense of ethical duty which compels us to recognize the havoc we wreak by allowing exploitation to continue, quietly, privately, tucked away, and in service to the rollicking economy. What are we really gaining from the global economy? We gain the ability to live more comfortably and buy more things. But if confronted with the fact that being able to live more comfortably and buy more things comes at the expense of human suffering and exploitation, would we be so quick to embrace those things? Exploitation must be brought out into the light of day, rather than tucked away and hidden within the private sphere of a public economy, forcing those of us who benefit from the labor of the exploited to determine whether our cheap goods and comfortable lives at the expense of the exploited are worth the exchange.

²⁷⁴ In 1960, nations of the North were twenty times richer than those of the South. By 1980 the North was forty-six times richer. By 1999 sixty countries were worse off than they had been in 1980. Hochschild, *Love and Gold*, *supra* note 63, at 17. It is not only an economic gap that is widening. Sociologists studying the thirty percent of children in the Philippines raised by relatives after at least one parent has moved abroad to find work note that these children grow up with a severe “care and love” deficit. *Id.* at 22. These numbers are likely matched or surpassed by numbers in Sri Lanka, India, and Latin America. *Id.*