

# Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans

Karen E. Bravo\*

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\* Associate Professor of Law, Indiana University School of Law—Indianapolis; LL.M. New York University School of Law; J.D. Columbia University School of Law; B.A. University of the West Indies. I am grateful for the comments from the audience and my co-panelists on the New Voices in Human Rights Panel at the AALS 2008 Annual Meeting, on the New Voices Panel at the American Society of International Law, 102nd Annual Meeting in 2008, and at the Washington University Junior Faculty Regional Workshop, as well as the attendees at the Case Western University School of Law Faculty Exchange Colloquium in Fall 2007 and the Indiana University School of Law—Indianapolis Faculty Colloquium in Spring 2008. I thank Raj Bhala, Andrea Bjorklund, Tomer Broude, Jennifer Chacón, Dan Cole, Hope Lewis, Maria Pabón López, Louise Shelley, and R. George Wright for their helpful and insightful feedback. Rahma Hersi (Indiana University School of Law—Indianapolis LL.M. 2008) and Laura Boren (Indiana University School of Law—Indianapolis J.D. 2010) provided essential research assistance, and Ruth Lilly Law Library Research Librarian, Debra Denslaw, and the Staff of the Ruth Lilly Law Library were invaluable. A short summary of the thesis of this Article was published as part of the Proceedings of the American Society of International Law, 102nd Meeting, 2008.

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*The buying and selling of people is a profitable business because, while globalization has made it easier to move goods and money around the world, people who want to move where jobs are face ever more stringent restrictions on legal migration.<sup>1</sup>*

*[P]erhaps the most profound challenge of all will be faced by citizens and policy-makers in migrant sending and receiving countries. Inhabitants of the latter will have to move beyond the state of denial that so often has characterized their approach to immigration policy to date. They must develop policies that recognize the inevitability of labour flows within a globalized economy characterized by well-established regional networks of trade, production, investment, and communications. Attempts to suppress population flows that are a natural consequence of a nation’s insertion into these economic networks will not be successful, but they will present grave threats to individual rights, civil liberties, and human dignity. . . .<sup>2</sup>*

I. INTRODUCTION

Human trafficking is usually thought of in terms of criminal or human rights violations, rather than in terms of trade liberalization. By applying trade liberalization principles to the problem of human trafficking, this Article brings together the two superficially unrelated areas of law. The purpose of this inquiry is to enhance understanding of modern trafficking in human beings and to identify a mechanism that will undermine its economic foundations. This Article concludes that, through the liberalization of labor, economic and trade liberalization principles and theories can be used to harness the power of the market to combat human trafficking and to further human rights protection as a whole.

The contemporary enslavement of human beings is said to have increased worldwide in the last few decades. The estimated number of people trafficked annually across international borders or enslaved within states range from hundreds of thousands to millions.<sup>3</sup> In response, states have targeted human

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<sup>1</sup> Andrew Cockburn, *21st Century Slaves*, NAT’L GEOGRAPHIC, Sept. 2003, at 2, 8.

<sup>2</sup> DOUGLAS S. MASSEY ET AL., *WORLDS IN MOTION: UNDERSTANDING INTERNATIONAL MIGRATION AT THE END OF THE MILLENNIUM* 293 (1998).

<sup>3</sup> Commentators estimate that up to 4 million or at least 600,000–800,000 individuals are trafficked annually across international borders. See *Women as Chattel: The Emerging Global Market in Trafficking*, 1 GENDER MATTERS Q. 1, 1 (1999) (citing to United Nations 1997

trafficking through the U.N. Convention Against Transnational Organized Crime (“U.N. Transnational Crime Convention”)<sup>4</sup> and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“U.N. Trafficking Protocol”),<sup>5</sup> which supplements the Convention. In the United States, federal legislators enacted the Trafficking Victims Protection Act (“TVPA”), the provisions of which are aimed at both domestic U.S. and international trafficking, and thrice have reauthorized the legislation.<sup>6</sup>

Modern trafficking in humans flourishes within four systemic tensions: (1) the gaps between the rhetoric and reality of trade liberalization undertaken thus far through multilateral and regional international instruments; (2) the gap between the conceptualization of humans as rights-bearing persons and as economic actors—both consumers and labor (an economic input or commodity); (3) the tension between the transnationalization unleashed by trade liberalization and Westphalian concepts of statehood;<sup>7</sup> and (4) the tension between the recognition and enforcement of human rights (and individual personhood) and state sovereignty and control over constituent population and territory.

The solution proposed in this Article addresses the first two of these tensions. To combat human trafficking, this Article contends that the economic nature of humans—their economic roles in the global and economic system—must be recognized more fully. That recognition will require that human labor providers have the right to enter and exit individual domestic

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calculations); U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 6* (2006). *But see* Diana Wong, *The Rumor of Trafficking: Border Controls, Illegal Migration, and the Sovereignty of the Nation-State*, in *ILLICIT FLOWS AND CRIMINAL THINGS: STATES, BORDERS, AND THE OTHER SIDE OF GLOBALIZATION* 69, 76 (Willem van Schendel & Itty Abraham eds., 2005) (“Unverified statistics, such as the figure of US \$5 billion to US \$7 billion a year in commercial profit, have remained a standard feature [of the discussions about human trafficking].”).

<sup>4</sup> U.N. Convention Against Transnational Organized Crime, G.A. Res. 25, Annex I, at 44, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc A/45/49 (Vol.1) (2001) [hereinafter U.N. Transnational Crime Convention].

<sup>5</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, at 60, U.N. GAOR, 55th Sess., Annex 2, Supp. No. 49, U.N. Doc. A/45/49 (2001) [hereinafter U.N. Trafficking Protocol].

<sup>6</sup> Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 2A, 114 Stat. 1464 (2000) (codified as amended at 22 U.S.C.S. §§ 7101–7112 (LexisNexis 2007 & Cum. Supp. 2009)) [hereinafter TVPA]; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457 (H.R. 7311), 122 Stat. 5044 (2008).

<sup>7</sup> I have discussed this tension elsewhere. See Karen E. Bravo, *Regional Trade Arrangements and Labor Liberalization: (Lost) Opportunities for Experimentation?*, 28 ST. LOUIS PUB. L. REV. 71, 113 (2008) [hereinafter Bravo, *Regional Trade Arrangements*] (noting that “[b]y its very nature, as a result of the economic forces it unleashes, trade liberalization constitutes a built-in challenge to state sovereignty and mastery over state territory.”).

labor markets in response to economic stimuli and, therefore, are contrary to the contemporary default operation of barricaded national borders.<sup>8</sup>

In an earlier article, I examined the use of the trans-Atlantic slave trade analogy in the anti-trafficking discourse.<sup>9</sup> That exploration revealed the essential similarity of the two forms of exploitation—fundamentally, they both traffic in human labor.<sup>10</sup> Further, the modern traffic in human beings cannot be separated from the forces of globalization.<sup>11</sup> The contemporary model of trade liberalization and the interaction of that model with restrictive domestic immigration laws create disequilibrium and labor market failures which in turn stimulate migration flows.<sup>12</sup> Human trafficking is embedded within the disequilibrium and labor market failures. As such, an attack against the structural foundations of human trafficking must target the economic bases of the labor and other exploitation from which human trafficking arises.

The failure to liberalize labor, the last classic factor of production not freed from state constraints (other than immobile land),<sup>13</sup> undermines the fundamental underpinnings of the vision of a globalized world that prioritizes competition, efficiency, trade liberalization, and comparative advantage. If

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<sup>8</sup> No longer would the passport be a mechanism for the prevention of entry. Instead, it would revert to its original purpose: identification and easier entry for the national of the issuing political entity. See, e.g., MARTIN LLOYD, *THE PASSPORT: THE HISTORY OF MAN'S MOST TRAVELED DOCUMENT* 30–44 (2003).

<sup>9</sup> See Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207 (2007) [hereinafter Bravo, *Exploring the Analogy*].

<sup>10</sup> See *id.* at 294. See also U.S. DEPT OF STATE, *TRAFFICKING IN PERSONS REPORT 6* (2004) (“[T]he 21st century slave trade feeds a global demand for *cheap* and vulnerable labor.”) (emphasis added).

<sup>11</sup> The term “globalization” signifies the greater integration of individual national economies into a global economy. The increased integration brings with it the transnationalization of laws, economies, and ways of thinking, doing, and living. Multilateral trade liberalization is the principal engine of globalization.

<sup>12</sup> See Bravo, *Regional Trade Agreements*, *supra* note 7 (discussing the failure to liberalize labor as part of the contemporary trade liberalization project and advocating experimentation with labor liberalization within regional trade arrangements). See also discussion *infra* Part II.B. However, conditions in sending states also play a role in fostering human trafficking, e.g., obstruction of domestic economic development and corruption of governmental officials. See Karen E. Bravo, *Follow the Money?: Does the International Fight Against Money Laundering Provide A Model for International Anti-Trafficking Efforts?*, 6 U. ST. THOMAS L.J. 138, 194 (2009).

<sup>13</sup> This is the case despite re-conceptualization of some labor as “human capital” and the increasing commodification of the human body and bodily services. A contemporary example is the burgeoning Indian industry in outsourced fertility work. See, e.g., Jaspreet Nijher, *After Gujarat, Rent-a-womb Biz Booms in Punjab*, TIMES OF INDIA, Jan. 27, 2008, available at [http://timesofindia.indiatimes.com/India/After\\_Gujarat\\_rent-a-womb\\_biz\\_booms\\_in\\_Punjab/articleshow/2735087.cms](http://timesofindia.indiatimes.com/India/After_Gujarat_rent-a-womb_biz_booms_in_Punjab/articleshow/2735087.cms); Editorial, *View: Make It a Safe and Legal Option*, TIMES OF INDIA, Feb. 5, 2008, available at [http://timesofindia.indiatimes.com/Editorial/VIEW\\_Make\\_it\\_a\\_safe\\_and\\_legal\\_option/articleshow/2756865.cms](http://timesofindia.indiatimes.com/Editorial/VIEW_Make_it_a_safe_and_legal_option/articleshow/2756865.cms).

globalization and trade liberalization strive to and have substantially freed capital and products from the constraints of state borders, why should self-actualized, self-owning humanity not be similarly liberalized?

In addition, the failure to liberalize labor creates and increases vulnerability to exploitation for many human labor providers. Individual migrants, who comprise a significant source of trafficked persons, seek to exchange their labor for value—to respond to market forces that promise higher prices for their labor across internal domestic and/or international borders.<sup>14</sup> Those borders are now heavily policed and enforced, and unsanctioned crossing is essentially *verboden*. In seeking to trade their labor and to navigate the state-created barriers (i.e., borders) to transnational labor markets, individuals become more vulnerable to the predations of exploitative middlemen such as traffickers in human beings.

To directly confront and harness the economic and trade-based forces that support the expansion of modern trafficking in humans, this Article proposes using a trade-law inspired lens that encompasses and supplements the four frameworks now utilized in anti-trafficking efforts to interpret and combat human trafficking.<sup>15</sup> To do so, this Article advocates re-conceptualizing modern human trafficking within the framework of the domestic and transnational movement of peoples and migration, both licit and illicit:<sup>16</sup> human trafficking is *not* a purely illegal and aberrational activity taking place outside of legal and legitimate human economic activity and movement.

This Article also proposes the re-conceptualization of labor's role in the international economic system. It uses trade liberalization concepts to argue

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<sup>14</sup> See, e.g., Michael Lewis, *Commie Ball: A Journey to the End of a Revolution*, VANITY FAIR, July 2008 (describing the smuggling of Cuban baseball players to the United States, where the rate of compensation for their labor is substantially higher); Caroline Brothers, *South Asians Taking Risky Route to Europe: Via Africa*, N.Y. TIMES, Feb. 19, 2007, at A3; Seth Mydans, *54 Who Suffocated in Thailand Were Smuggled Workers*, N.Y. TIMES, Apr. 11, 2008, at A12.

<sup>15</sup> For detailed discussions and analyses of these frameworks, see Bravo, *Exploring the Analogy*, *supra* note 9, at 221–38; Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L L. 1 (2004).

<sup>16</sup> The licit/illicit and legal/illegal terminology continues to be useful, despite convincing evidence of the porous barrier between these socially and legally constructed concepts. See, e.g., BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, *IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY* 9 (2003):

[T]he idea that “trafficking” constitutes a subset of illegal migration relies on an over-simplistic distinction between “legal” and “illegal” migration. In practice, even legal migration processes often have illegal elements, while “trafficked” persons frequently enter a state legally. For instance, women may legally enter as wives and then be subjected to forced labour. Meanwhile, deception and exploitation are also features of legal labour migration schemes, both during the process of migration and at the point of destination.

that efforts to combat human trafficking should seek the same status for labor as that of, for example, capital or intellectual property in the international trading system. This proposal challenges free market and trade liberalization advocates to live up to the rhetoric of the free market by extending the same “freedom” to labor as has been extended to capital, goods, ideas, and entrepreneurship.<sup>17</sup> Specifically, this Article calls for a new annex to the Agreement Establishing the World Trade Organization,<sup>18</sup> a General Agreement on Trade in Labor, with co-equal status to, for example, the Agreement on Trade-Related Intellectual Property Rights (“TRIPS”),<sup>19</sup> the Agreement on Trade Related Investment Measures (“TRIMS”)<sup>20</sup> and the General Agreement on Trade in Services (“GATS”),<sup>21</sup> each of which is a multilateral treaty and annex to the World Trade Organization (“WTO”) Agreement and creates mandatory obligations for all members of the WTO.

Part II of this Article briefly discusses modern trafficking in human beings as well as the responses by state and civil society, and finds that there is a connection among the growth of human trafficking, increased trade liberalization and globalization, and contradictory state barriers to the transnational movement of labor in the global economy. Part III asserts that a transnational trade in labor already exists, a trade that is exploited by smugglers, traffickers, capital, and states, while not principally benefiting the humans who perform the labor. Further, Part III explores and critiques proposals that have been proffered to address the disequilibrium in transnational labor markets, including the expansion of national guestworker programs, labor liberalization within regional trade arrangements, and expansion of the Mode 4 provisions of the GATS.<sup>22</sup> Part IV recommends the liberalization of labor through the mechanism of a new multilateral annex to the WTO Agreement, the General Agreement on Trade in Labor. The Conclusion maintains that the liberalization of labor would undermine the economic foundations of the modern traffic in humans and create a variety of other human rights and economic benefits.

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<sup>17</sup> Indeed, many economists support relaxation of the barriers to the movement of labor. See, e.g., Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES MAG., July 9, 2006 (discussing, *inter alia*, the consensus among economists about the positive value of immigration for the U.S. economy). See also *500-Plus Economists Sign Open Letter Reminding President Bush of the Benefits of Immigration*, NEWSROOM (Indep. Inst., Oakland, Cal.), June 19, 2006, [http://www.independent.org/newsroom/news\\_detail.asp?NewsID=74](http://www.independent.org/newsroom/news_detail.asp?NewsID=74).

<sup>18</sup> Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].

<sup>19</sup> WTO Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125 (1994) [hereinafter TRIPS Agreement].

<sup>20</sup> WTO Agreement on Trade Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1125 (1994).

<sup>21</sup> General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125 (1994) [hereinafter GATS].

<sup>22</sup> For a discussion of the four Modes of the GATS, see *infra* Part II.B.1.

## II. CONTEMPORARY TRADE LIBERALIZATION AND THE TRADE IN HUMAN BEINGS

Millions of people are said to be enslaved worldwide.<sup>23</sup> A 1999 CIA Report estimated that trafficking in human beings was the third most profitable illicit industry (after the trade in illicit drugs and weapons), a \$7 to \$12 billion industry,<sup>24</sup> and contradictory estimates are issued that hundreds of thousands are trafficked annually across international borders and within states.<sup>25</sup> Estimates fluctuate so that, at various times, anywhere from a low estimate of 600,000–800,000 to a high estimate of 2 million men, women, and children are said to be trafficked across international borders each year.<sup>26</sup> Approximately 80 percent of those who are trafficked are said to be women, and of that number, as many as 50 percent are minors.<sup>27</sup> A majority of trafficked persons are said to be destined for commercial sexual exploitation, while others are enslaved for purposes of labor exploitation.<sup>28</sup> The numbers discussed above do not reflect the millions of people who are victimized by domestic trafficking and/or slavery within the borders of individual states.<sup>29</sup> Despite the resources expended toward preventing and punishing human trafficking, the traffic appears to continue unabated.<sup>30</sup>

The United States is by no means immune to this form of exploitation. In 1999, the CIA Report estimated that 50,000 individuals were trafficked annually into the United States.<sup>31</sup> That estimate has declined: the U.S. State

<sup>23</sup> Kevin Bales, a well-known anti-slavery activist and author, has posited that 27 million humans are enslaved worldwide. See KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* xii (2004).

<sup>24</sup> See AMY O'NEILL RICHARD, *INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME* iii (1999), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/trafficking.pdf>. This report is now arguably outdated and its methodology has been criticized. See U.S. GOV'T ACCOUNTABILITY OFFICE, *HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTI-TRAFFICKING EFFORTS ABROAD* (2006) [hereinafter 2006 GAO REPORT]. It is cited here because the report provided much of the foundation for the legislative intervention of the U.S. Congress in 2000.

<sup>25</sup> U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 7* (2008) [hereinafter 2008 TIP REPORT]. *But see* Wong, *supra* note 3, at 69, 76.

<sup>26</sup> See 2008 TIP REPORT, *supra* note 25, at 7.

<sup>27</sup> There appears to be little dispute that women and children most often are the ones victimized. See 2006 GAO REPORT, *supra* note 24.

<sup>28</sup> *Id.* at 12 tbl.2 (comparing victim profiles reported by various international agencies).

<sup>29</sup> The International Labor Organization has estimated that 12.3 million people are enslaved in forced labor, bonded labor, forced child labor, sexual servitude and involuntary servitude. PATRICK BELSER, ET AL., INT'L LABOR OFFICE, *MINIMUM ESTIMATE OF FORCED LABOUR IN THE WORLD* 2 tbl.1 (2005), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1006&context=nondiscrim>.

<sup>30</sup> See 2008 TIP REPORT, *supra* note 25, at 52–292 (giving an overview of trafficking in 170 countries).

<sup>31</sup> See O'NEILL RICHARD, *supra* note 24, at iii.



Department subsequently estimated that 14,500 to 17,500 individuals are trafficked annually into the United States.<sup>32</sup> The horrific case of hundreds of Indian guestworkers trafficked to the United States to perform post-Katrina construction work on the Gulf Coast captured some public attention.<sup>33</sup>

The application of a global economic and trade-based analysis to the problem of trafficking clarifies the necessity of devoting more attention, thought, and study to the economic impact on human trafficking by the border enforcement and immigration barriers between labor-rich and labor-poor economies. These barriers force would-be immigrants who are responding to market forces to contract with smuggler-traffickers or corrupt officials in order to make transborder journeys in search of viable economic activity.<sup>34</sup> Labor-rich economies with high unemployment and underemployment rates have high rates of poverty and desperation. These factors can lead to the devaluation of human life and the sale of men, women and children.

#### A. *Overview of Modern Trafficking in Humans*

The U.N. Trafficking Protocol defines trafficking in human beings as:

The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>35</sup>

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<sup>32</sup> 2006 GAO REPORT, *supra* note 24, at 17. The decrease in the estimates of trafficked persons within the United States does not reflect a decrease in the scope and/or size of the traffic. Instead, the changing numbers result from the use of alternate methods of information gathering and analysis. *See id.* for a discussion of methodological challenges to understanding the extent of the modern traffic in humans.

<sup>33</sup> *See, e.g.*, Julia Preston, *Workers on Hunger Strike Say They Were Mised on Visas*, N.Y. TIMES, June 7, 2008, at A9; *Indian Workers in U.S. Suspend Hunger Strike After 29 Days*, HINDUSTAN TIMES, June 12, 2008 [hereinafter *Hunger Strike*]. Although the recruiters may dispute the charges of human trafficking, the experiences of the Indian workers appear to satisfy the definition of human trafficking under U.S. law. *See* Complaint for Plaintiff, David v. Signal Int'l, L.L.C., 2008 WL 4266214 (E.D. La. Sept. 11, 2008), available at <http://www.nowcrj.org/wp-content/uploads/2008/11/complaint-final.pdf>.

<sup>34</sup> *See, e.g.*, Mydans, *supra* note 14; Brothers, *supra* note 14. *See also* Wong, *supra* note 3, at 82–89.

<sup>35</sup> *See* U.N. Trafficking Protocol, *supra* note 5, art. 3(a).

The U.S. Trafficking Victims Protection Act defines sex trafficking as “the purchase, sale, recruitment, harboring, transportation, transfer, or receipt of a person for the purpose of a commercial sex act.”<sup>36</sup> “Severe forms of trafficking” are defined as:

A. sex trafficking in which a commercial sex act is induced by force, fraud, or coercion or in which the person induced to perform such an act has not attained 18 year of age; 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.<sup>37</sup>

The terminology used in anti-trafficking discourse illuminates the conceptual foundations of current thinking about modern trafficking. For example, legal instruments, activists, and scholars speak of the trafficking victim and the trafficker. The discourse is replete with references to “source” (usually developing or transitional countries), “destination” (developed and industrialized, sometimes industrializing), and “transit” countries (all profiles).<sup>38</sup> The terminology includes “push” and “pull” factors, which are usually attributed to the prospect of attractive transborder economic opportunities and political stability that contrasts with the reality of domestic political and economic instability in the trafficked person’s country of origin.<sup>39</sup> The remarkable similarity of some terminology in the anti-trafficking discourse to that used in migration and economic discourse and the fundamental relationships revealed are insufficiently explored. Instead, the anti-trafficking discourse and efforts manifest an overwhelming focus on sex trafficking, with a considerably more limited recognition of labor trafficking.

Both international instruments and U.S. domestic legislation make a fundamental distinction between “human trafficking,” with implications of fraud, coercion, misrepresentation, victimhood, and “human/migrant smuggling,” where the individual may pay or agree to pay another for facilitated transborder movement in contravention of the domestic law of the home and/or the host state.<sup>40</sup> This distinction is flawed, serving to mask the

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<sup>36</sup> See TVPA § 7102(9).

<sup>37</sup> See *id.* § 7102(8).

<sup>38</sup> See, e.g., 2008 TIP REPORT, *supra* note 25, at 12.

<sup>39</sup> For example, the fall of the Soviet Union in the early 1990s, with the explosion in the number of economies in transition from a government-managed to a free market system, and the increase in conflict situations—civil wars, wars between states, insurrections and other types of conflict—are said to have increased the flow of trafficked persons from Eastern European countries. See, e.g., Wong, *supra* note 3, at 76; PETER ANDREAS & ETHAN NADELMAN, POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS 34 (2006).

<sup>40</sup> Compare the definitions of trafficking quoted above with the following definition of human smuggling: “the procurement, in order to obtain, directly or indirectly, a financial or other

often symbiotic relationship between the two types of transborder movement<sup>41</sup> by shrouding migrant smuggling and human trafficking in contrasting types of illegality and vilification, instead of placing them along a continuum of rational and less-to-more exploitative responses to the contradictory international economic and migration systems.

Furthermore, the distinction hides state complicity, drawing attention away from the role played by domestic legal regimes, such as immigration laws, in creating and guiding the flow of the market in humans and their labor. The distinction requires the analyst to determine the status of the individual (Victim or compliant illegal migrant? Trafficker or smuggler? Or both?); it does not invite examination or criticism of the provisions of domestic immigration laws. In addition, the distinction made between human smuggling and human trafficking has been challenged by some scholars, who point out that the distinction serves to increase the power of the state to determine the status of the individual—whether the kidnapped individual is a trafficking victim deserving of assistance or a smuggled migrant complicit in the individual's own forbidden transborder movement.<sup>42</sup>

### 1. Conceptual and Legal Frameworks

Together with other domestic and international mechanisms and instruments utilized to combat trafficking in human beings,<sup>43</sup> the U.N.

material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident." See U.N. Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, *Protocol Against the Smuggling by Land, Sea and Air, Supplementing the U.N. Convention Against Transnational Organized Crime*, Annex III, U.N. Doc. A/55/383, art. 3(a) (2000) [hereinafter the Migrant Smuggling Protocol]. Article 3(b) of the Migrant Smuggling Protocol defines "illegal entry" to "mean crossing borders without complying with the necessary requirements for legal entry into the receiving state." *Id.* art. 3(b).

<sup>41</sup> See ANDERSON & O'CONNELL DAVIDSON, *supra* note 16 and accompanying text.

<sup>42</sup> See Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 1000 (2001):

Implementation of the new distinction between trafficked persons and smuggled migrants is likely to be controversial. The failure of the protocol to provide guidance on the identification issue is a significant, and no doubt deliberate, weakness. The potential problems are as follows: Under the terms of the two protocols, dealing with trafficked persons will be more costly and impose a greater administrative burden on states than dealing with smuggled migrants. States therefore have an *incentive* to ratify one and not both protocols. For the same reasons, border authorities and immigration officials responsible for identifying and categorizing irregular migrants also have an *incentive* to identify such persons as being smuggled rather than as trafficked.

*Id.* (citation omitted). See also Jennifer Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006).

<sup>43</sup> Other regional anti-trafficking instruments include the Council of Europe Convention on Action Against Trafficking in Human Beings *opened for signature* May 16, 2005, C.E.T.S. 197, the South Asian Association for Regional Cooperation's Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Jan. 5, 2002, *available at* <http://>

Transnational Crime Convention, the U.N. Trafficking Protocol, and the TVPA fall within four commonly utilized conceptual frameworks deployed both to foster understanding of the modern traffic in human beings and to combat it—the human rights, women’s rights, labor rights, and law enforcement frameworks.<sup>44</sup> Of these, the law enforcement framework is predominant both internationally and in the U.S. domestic system.<sup>45</sup>

### a. Law Enforcement

Both the U.N. Transnational Crime Convention and the accompanying U.N. Trafficking Protocol, as well as the U.S. TVPA, exemplify the law enforcement perspective. Pursuant to this perspective, the component activities of trafficking in humans are criminalized, the trafficker is punished through prosecution and imprisonment,<sup>46</sup> and prevention is pursued through education of both vulnerable groups and the source societies.<sup>47</sup> Also included in this perspective are attempts to protect the trafficked individual by refraining from prosecuting him/her for violation of, for example, immigration and/or anti-prostitution laws, as well as initiatives to rehabilitate and repatriate the trafficked person.<sup>48</sup> States party to the U.N. Transnational Crime Convention and the Trafficking Protocol commit to international

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[www.december18.net/traffickingconventionsSAARC2002.pdf](http://www.december18.net/traffickingconventionsSAARC2002.pdf), and the Organization of American States’ American Convention on Human Rights, “Pact of San Jose, Costa Rica,” Nov. 22, 1969, at 1144, Organization of American States, at OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), available at <http://www.oas.org/juridico/english/treaties/b-32.html>, and 1994 Inter-American Convention on International Traffic in Minors, Mar. 18, 1994, 79 O.A.S. T.S., 33 I.L.M. 721, available at <http://www.oas.org/juridico/english/Treaties/b-57.html>.

<sup>44</sup> For more detailed discussion and critique of the dominant frameworks, see Bravo, *Exploring the Analogy*, *supra* note 9, at 221–43; Bruch, *supra* note 15, at 1.

<sup>45</sup> Bravo, *Exploring the Analogy*, *supra* note 9, at 27.

<sup>46</sup> See U.N. Transnational Crime Convention, G.A. Res 55/254, arts. 2(b), 3, U.N. Doc. A/Res/55/25 (Jan. 8, 2001) (outlining the scope of application of the Convention and the range of punishment applicable to covered crimes).

<sup>47</sup> Section 106 of the TVPA (Prevention of Trafficking), codified at 22 U.S.C. § 7104, requires the implementation of public awareness and information programs as well as economic programs such as “microcredit lending schemes” and “programs to promote women’s participation in economic decision-making.” See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). The U.N. Trafficking Protocol provides that “States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.” U.N. Trafficking Protocol, *supra* note 5, art. 9, ¶ 2.

<sup>48</sup> For example, the U.S. TVPA provides for the creation of special visas to be granted to trafficked persons who cooperate with law enforcement, including testifying against their traffickers. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000), § 107(e) (amending the Immigration and Nationality Act to create T visas). In order for the trafficked persons to qualify for the visa, law enforcement must certify that individual’s cooperation in prosecuting the trafficker. See 8 C.F.R. § 214.11(f)(1), (h)(1) (2006). For a critique of the impact of the certification requirement, see Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 85 B.U. L. REV. 151, 179–84 (2007).

cooperation and information exchange efforts aimed at combating trafficking in humans.<sup>49</sup>

### b. *Human Rights*

The second most influential of the frameworks is the human rights framework, which focuses on the violation of internationally recognized and enforceable individual legal rights against enslavement, exploitation, and the right to protection of bodily integrity, among other rights. Some international legal instruments applicable to this framework include the Universal Declaration of Human Rights (“UDHR”),<sup>50</sup> the International Covenant on Civil and Political Rights (“ICCPR”),<sup>51</sup> the International Covenant on Economic Social and Cultural Rights (“ICESCR”),<sup>52</sup> and various anti-slavery conventions.<sup>53</sup>

### c. *Labor Rights*

The labor rights, women’s rights, and children’s rights frameworks all focus on specialized categories of human rights. The labor rights perspective centers on the quality of the work experience, i.e., the violation of the legally mandated minimum protection standards applicable to work and the workplace. Some relevant international instruments include the following International Labour Organization (“ILO”) conventions: the 1930 Forced Labor Convention,<sup>54</sup> the 1948 Convention on Protection of Wages,<sup>55</sup> and the 1957 Convention Concerning the Abolition of Forced Labor.<sup>56</sup> A relatively new international treaty that falls within the labor rights perspective is the International Convention on the Protection of the Rights of All Migrant

<sup>49</sup> U.N. Transnational Crime Convention, *supra* note 4, arts. 18–21, 26, 27.

<sup>50</sup> G.A. Res. 217A (III), U.N. Doc. A1810 (Dec. 10, 1948).

<sup>51</sup> International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, 999 U.N.T.S. 171 (1966) (ICCPR) (prohibiting slavery, servitude, and forced or compulsory labor).

<sup>52</sup> International Covenant on Economic, Social and Cultural Rights art. 7, Dec. 16, 1966, 993 U.N.T.S. 3 (1966) (ICESCR) (recognizing rights to just and favorable conditions of work and fair wages).

<sup>53</sup> *See, e.g.*, Slavery Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, U.S. No. 778, 60 L.N.T.S. 253; 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, entered into force Apr. 30, 1957, 266 U.N.T.S. 40. *See A. Yasmine Rassam, International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN. ST. L. REV. 809, 809–10 (2005).

<sup>54</sup> Convention (ILO No. 29) Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55 (1930).

<sup>55</sup> Convention (ILO No. 95) on Protection of Wages, Jan. 1949 (entered into force Sept. 24, 1952) (partially revised by ILO Convention No. 173).

<sup>56</sup> Convention (ILO No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 29 (1957).

Workers and Members of Their Families,<sup>57</sup> which entered into force in July 2003<sup>58</sup> and recognizes the rights of migrant workers and the obligations of states parties to such workers.

*d. Women's and Children's Rights*

The women's and children's rights framework attempts to combat human trafficking by focusing on the specialized rights of women and children that are recognized and agreed to by states in international instruments. The relevant instruments are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>59</sup> which specifically prohibits trafficking and sexual exploitation<sup>60</sup> and delineates other rights and obligations agreed to by states, and the Convention on the Rights of the Child<sup>61</sup> with its two protocols,<sup>62</sup> which impose on signatory states the obligations to protect children from various forms of exploitation. Pursuant to the Convention on the Rights of the Child and its protocols, the exploitation of children is forbidden, and member states recognize obligations to protect the development of children, as well as their physical, moral, and spiritual health.<sup>63</sup>

2. Critiques of the Frameworks: Too Little, Too Narrow, and Not Enough!

This Article acknowledges the validity and necessity of these dominant perspectives in generating understanding of modern human trafficking and in attempting to combat it.<sup>64</sup> The vitality of these frameworks will be essential to the success of the solution proposed in Part IV. Political, social, and economic transformations create vulnerabilities in certain populations;

<sup>57</sup> G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990). The Convention's broad definition of migrant worker appears to extend the protections of the Convention to trafficked persons. Article 2.1 provides, "The term 'migrant worker' refers to a person who is to be engaged, is engaged or has engaged in a remunerated activity in a State of which he or she is not a national." *Id.* art. 2.1.

<sup>58</sup> Press Release, Convention on Protection of Rights of Migrant Workers to Enter Into Force Next July, U.N. Doc. L/T/4371 (Mar. 19, 2003), available at <http://www.un.org/News/Press/docs/2003/LT4371.doc.htm>.

<sup>59</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (1979).

<sup>60</sup> *Id.* art 6.

<sup>61</sup> Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3 (1989) [hereinafter CRC].

<sup>62</sup> The two protocols are the Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts, and the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, GA Res. 54/263, U.N. Doc. A/54/49 (May 25, 2000). For further discussion, see Bravo, *Exploring the Analogy*, *supra* note 9, at 232–36.

<sup>63</sup> See, e.g., CRC, *supra* note 61, arts. 32, 34, 36.

<sup>64</sup> This Article does not reject the four existing anti-trafficking frameworks, but instead seeks to supplement and strengthen their effectiveness.

exploiters must be sought out and punished; and the rights of trafficked persons must be vindicated.

However, the perspectives gained through these frameworks are incomplete. They fail to take into account fundamental economic principles and forces, such as supply and demand, and their effects on both licit and illicit traffic and trade. Specifically, if human beings need jobs and those jobs are unavailable in their domestic markets, they will attempt to access transborder markets where jobs are available. Moreover, if the demand for labor cannot be satisfied by legitimate distribution networks, then unauthorized networks will emerge to supply the labor market. Furthermore, the existing frameworks lack the tools necessary to effectively combat the traffic in humans. The foreseeable consequence of the foregoing legal and conceptual frameworks is the prospect of continuous prosecutions and rights vindications in response to an unending stream of violations and criminal activity.<sup>65</sup>

The law enforcement/criminal violation framework is excessively prosecution-focused, with only token prevention initiatives.<sup>66</sup> Furthermore, the effectiveness of this framework in anti-human trafficking efforts is undermined by the creation of the image, pursuit, rescue, and vindication of the “innocent,” pure, and sexually exploited victim who has played neither a voluntary nor an active role in her unsanctioned transnational movement.<sup>67</sup> In addition, the human rights frameworks—here, encompassing the broader human rights framework as well as the more specialized labor, women’s and children’s rights frameworks—are not capable of creating a complete picture of the human trafficking phenomenon. This undermines their potential effectiveness in eliminating and/or successfully combating the traffic in

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<sup>65</sup> The institutional and conceptual investments currently undertaken with respect to human trafficking are all too reminiscent of the institutional and other investments in the “War on Drugs.” We are all too familiar with the successes of that particular “War.” See, e.g., ANDREAS & NADELMAN, *supra* note 39, at 251–52.

<sup>66</sup> See, e.g., Bravo, *Exploring the Analogy*, *supra* note 9, at 240 n.173. See also Chacón, *supra* note 42.

<sup>67</sup> See generally Srikantiah, *supra* note 48 (claiming that domestic anti-trafficking efforts are undermined by both the legal construction of “perfect” victims and the search for them). Andrijasevic’s analysis of the trafficking of Eastern European Women in Italy provides a useful example:

[T]he current legal conceptualization of trafficking not only disqualifies women’s agency by establishing a normative narrative grounded in forced migration, coercion into prostitution and economic exploitation, but also penalizes those women who fall out of the established norm. By being refused access to [the definition of trafficked victim under Italian law], they are unable to legalize their status, and might be deported.

Rutvica Andrijasevic, *The Difference Borders Make: (Il)legality, Migration and Trafficking in Italy Among Eastern European Women in Prostitution*, in UPROOTINGS/REGROUNDINGS: QUESTIONS OF HOME AND MIGRATION 251, 264 (Sara Ahmed et al. eds., 2003).

human beings.<sup>68</sup> The central question is: “Where are the teeth?” I.e., do the international human rights instruments confer the power to impose effective and enforceable punitive and preventive sanctions? The relevant instruments, such as the CEDAW, UDHR, ICCPR, and IESCR, recognize and demand the protection of beautifully enunciated rights of the individual human being. Yet, these instruments accomplish very little for the trafficked person as a violated rights-bearer. Each of these instruments suffers from the flaws of limited enforcement and the applicable monitoring bodies’ constrained ability to assess or impose meaningful sanctions against violators or grant relief to trafficked persons.<sup>69</sup>

The U.N. Trafficking Protocol includes some provisions that address economic issues, such as the exhortations regarding the need for economic stimulus of source countries.<sup>70</sup> However, all four of the dominant frameworks are flawed by their failure to systematically consider economic theories and principles and take them to their logical conclusion.<sup>71</sup> An economics and trade-based lens, applied from a global perspective, gives rise to the insight that the flows of trafficked persons and entrepreneurial traffickers stem from fundamental economic disparities and distortions. These disparities and distortions are integrally intertwined with contemporary trade liberalization

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<sup>68</sup> Anderson and O’Connell Davidson explain:

When “trafficking” is construed principally as a phenomenon experienced by women and girls forced into prostitution, eliding customer demand for sexual services and employer demand for cheap labour, measures to suppress demand may superficially appear to represent an effective way forward. However, applied to the many other sectors where large numbers of migrants, internal and international, are grossly abused and exploited to produce cheap good and services, the idea of clamping down on consumer demand seems a rather less obvious approach.

See ANDERSON & O’CONNELL DAVIDSON, *supra* note 16, at 43.

<sup>69</sup> See Bravo, *Exploring the Analogy*, *supra* note 9, at 233–34; see also Frank Emmert, *Labor, Environmental Standards and World Trade Law*, 10 U.C. DAVIS J. INT’L L. & POL’Y 75, 80–90 (2003) (discussing the difficulty of enforcing the human rights provisions of even the UDHR, the ICCPR, and the IESCR, the three foundational instruments of modern human rights law). Some states in the global South have attempted to give greater teeth to the domestic implementation of international human rights through, for example, constitutionalizing the rights and/or judicial activism. Examples include South Africa and India. See JEANNE WOODS & HOPE LEWIS, *HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL AND CULTURAL DIMENSIONS* 653–780 (2005) (discussing the approaches of South Africa and India). However, such domestic approaches do not create *global* implementation or enforcement.

<sup>70</sup> The U.N. Trafficking Protocol provides that “States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.” U.N. Trafficking Protocol, *supra* note 5, art. 9.4. The U.S. TVPA also requires the establishment of some economic mechanisms to combat human trafficking. See TVPA § 106(a).

<sup>71</sup> The U.S. TVPA does provide for a new private right of action to trafficked persons that will allow such trafficked persons to recover compensation/unjust profits from the trafficker. The Trafficking Victims Reauthorization Act of 2003 provides this new remedy. See 18 U.S.C. § 1595 (2005).



and globalization efforts, and the contradictory domestic immigration laws of individual states.

The causes of modern trafficking in humans are profoundly economic. Human trafficking simultaneously violates human rights, state borders, and criminal laws, and is a profit-making industry that is transnational in scope. Application of an economics and trade-based perspective creates greater structural understanding of human trafficking, and confers insight about human trafficking's links to—and integration into—"legitimate" global and domestic economies. To confront human trafficking head-on, it is necessary to examine the phenomenon in all its manifestations—both *labor-* and *sex-*trafficking.

Therefore, this Article proposes the addition of greater nuance to the understanding of human trafficking. Trafficking rings are not merely criminal enterprises; they are also, foremost and fundamentally, profit-seeking and generating enterprises.<sup>72</sup> The human beings that are the subject of their economic activity are both exploitable human capital *and* exploitable natural resources, such as timber or minerals.<sup>73</sup> The traffickers in human beings are both criminal exploiters and the means of transborder transit for their victims, who are moved from countries of underemployment or unemployment to countries that offer employment opportunities.<sup>74</sup> That enriched understanding leads to re-characterization of the terminology: the "source" country becomes the "labor-rich" country; the "destination" country becomes "labor-poor." With this understanding, the relationships among international migration, international trade, and human trafficking regimes become clearer.

### B. *Trade Liberalization Disequilibrium: "Liberalizing" Trade and Disrupting the Transnational Labor Market*

*Globalization in its present form and shape is the outcome of a political project aiming at universalizing global capitalism and neo-liberal principles. Economic globalization . . . does contribute to contemporary forms of slavery by increasing*

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<sup>72</sup> Traffic in human beings is reported to be the third largest illicit industry. See O'NEILL RICHARD, *supra* note 24, and accompanying text.

<sup>73</sup> See generally Louise Shelley, *Trafficking in Women: The Business Model Approach*, 10 BROWN J. WORLD AFF. 119 (2003) (describing different profit seeking and operational models of traffickers from different states and geographic regions).

<sup>74</sup> See, e.g., Andrijasevic, *supra* note 67, at 265 (reporting that "the migrant women's narratives suggest that for them, making use of the trafficking networks became one of the few available means of informal labour migration"). See also *id.* at 259 ("Contrary to the idea that women are always forced or coerced by traffickers into illegal migration, some respondents tell of how they were only able to realize their plans to leave . . . with the help of traffickers.").

*poverty and therefore vulnerability for specific groups of people.*<sup>75</sup>

Human smuggling and trafficking—the illegal and forced transnational movement of labor—are not aberrations; they evidence the functioning of a distorted market and are entirely and logically responsive to contemporary global market forces. The transnational labor market in which they are embedded continues to be disrupted by the collision of the flawed contemporary trade liberalization project (embodied in both the GATT/WTO system<sup>76</sup> and the majority of regional trade arrangements) with increased enforcement of domestic immigration laws and militarization of national borders.<sup>77</sup> On the one hand, the contemporary trade liberalization project refuses to recognize and give status to labor, both as a factor of production and as an autonomously mobile economic unit. On the other hand, both in the transnational economy and under domestic immigration laws, labor is treated as a fungible economic unit and input. Labor is viewed as an economic threat under immigration law, and mobile capital travels the globe to determine where it can most cheaply and efficiently input labor into its production activities.<sup>78</sup>

The economic disequilibrium is fostered by an even deeper disjuncture in perspective: the gap between the economic globalization enterprise, supported by states and capital interests, and the refusal of those same states and interests to recognize the integrative effects of economic integration on even noneconomic aspects of human life. As a result of this shortsighted perspective, states pursue and preserve constitutive borders, laws, and national self interests; they simultaneously pursue and profit from trade liberalization and economic globalization while fruitlessly attempting to constrain the effects of those forces to a subset of economic areas.

The emphasis on cheapness and efficiency, and on increasing returns and cheaper inputs may have led, at the extremes, to the commoditization of humans, in their capacities as providers of labor, as trade objects or goods. The preconditions for human trafficking may spring, as well, from within the

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<sup>75</sup> Christien van den Anker, *Contemporary Slavery, Global Justice and Globalization*, in *THE POLITICAL ECONOMY OF NEW SLAVERY* 22 (Christien van den Anker ed., 2004).

<sup>76</sup> The GATT/WTO system refers to the legal and institutional frameworks by the GATT 1947 and the WTO Agreement and its Annexes created to regulate multilateral trade liberalization.

<sup>77</sup> For in-depth critique of the flawed trade liberalization model, see Bravo, *Regional Trade Arrangements*, *supra* note 7, at 79–83 (arguing that the omission of labor liberalization from contemporary multilateral and regional trade liberalization endeavors is a serious flaw). The contemporary model rests upon a belief in the benefits of increased transborder competition, but eschews implementation of mechanisms that would allow labor to participate in transnational labor markets. Instead, labor may suffer the transitional costs of trade liberalization with little prospect of capturing the benefits of that increased “competition.”

<sup>78</sup> See discussion *infra* Part III.A.4 and note 244.

intersection of the conceptualization of labor as purely a commodity<sup>79</sup> and belief that capital owes very little to labor.<sup>80</sup> Yet, that commoditization is limited by the would-be immobilization of transborder labor movement through application of legal prohibitions.

### 1. Incomplete Liberalization

Trafficking in human beings cannot be separated from trade liberalization and the form of globalization it stimulates. Human trafficking is embedded within the migration flows stimulated by the disequilibrium caused by the contemporary model of trade liberalization,<sup>81</sup> a model that betrays both trade liberalization theory and free market principles.<sup>82</sup> Growing transnational migration flows and trafficking in human beings stem from the disjuncture between trade liberalization as currently undertaken and the economic and trade liberalization theories on which the model is purportedly based.

The contemporary trade liberalization project prioritizes the removal of barriers to the transborder movement of capital, goods, services, legal systems, and entrepreneurship among member states of trade liberalization arrangements. Of the classical factors of production,<sup>83</sup> labor alone is not a

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<sup>79</sup> This is evidenced by, for example, references to “human capital” that is an asset deployed in production activities according to the demands of states and the owners of capital.

<sup>80</sup> This is evidenced by the movement away from pension plans, toward mass layoffs, and away from health care plans for retirees.

<sup>81</sup> For example, with respect to the effects of the mode of trade liberalization embodied in NAFTA, Andrew Cockburn has reported:

Many economists argue that the North American Free Trade Agreement has made its own contribution to the flood of people trying to move north, maintaining that cheap U.S. corn imported into Mexico has effectively driven millions of Mexican peasant corn farmers out of business and off the land. They suggest that for every ton of corn imported into Mexico, two Mexicans migrate to the U.S.

Cockburn, *supra* note 1, at 2, 10.

<sup>82</sup> See THERESA HAYTER, *OPEN BORDERS: THE CASE AGAINST IMMIGRATION CONTROLS* 3 (2d ed. 2004). Hayter states:

But the logic of economic liberalization has not been applied to the movement of people. According to this logic, economic liberalization should of course include the free movement of labour as well as goods and capital, and this in turn, according to market theory, should lead to an equalisation of wage levels internationally. . . . The aim of immigration controls is that there is no such possibility [of liberalization of movement of labor]. They are a market imperfection of an extreme variety, and one more demonstration that the so-called free market does not in reality exist.

*Id.*

<sup>83</sup> The other factors of production are capital and land. Some states further control the form of potential participation of land in transborder economic activity through limits on the purchase of land by non-nationals. Multilateral and bilateral investment treaties, which remove limits on the

subject of this liberalization. Pursuant to the contemporary model of trade liberalization, labor remains constrained by state borders and by its treatment as a passive immobile input into the production of goods, services, and ideas. Trade liberalization has been pursued multilaterally, through the 1947 General Agreement on Tariffs and Trade ("GATT 1947") and the agreements resulting from the Uruguay Round negotiations, the World Trade Organization Agreement, and its Annexes (including multilateral and plurilateral agreements).<sup>84</sup> In addition, with the exception of the European Union, which has liberalized the movement of citizens of EU Member States,<sup>85</sup> the majority of regional trade liberalization arrangements worldwide has followed a similar model of trade liberalization.

As discussed in more detail elsewhere,<sup>86</sup> the WTO Agreement and its Annexes together constituted a great leap forward with respect to the depth of trade liberalization and the breadth of coverage of trade goods and economic areas.<sup>87</sup> Furthermore, the majority of the world's states are now members of the WTO, thus spreading the discipline of trade liberalization to regions undreamed of during the depths of the Cold War.<sup>88</sup>

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movement of capital, frequently require the removal of such restrictions. *See, e.g.*, ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 474–75 (2002) (describing some typical provisions in bilateral investment treaties ("BITs") that prohibit the imposition of restrictions on capital import and export).

<sup>84</sup> *See* WTO Agreement and its Annexes, *supra* notes 18–21, and accompanying text.

<sup>85</sup> The European Union has removed more restraints and barriers to the movement of Member State nationals within EU borders than has any other regional trade arrangement. *See, e.g.*, GEORGE BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 575–79; 630–64 (2d ed. 2002). However, limits continue even here, as some Member States have not permitted wholesale free movement, or have delayed its implementation. Some such limitations include the limits imposed during specified transition periods for nationals of newly acceding Member States. For example, the April 16, 2003 Accession Treaty setting the framework for the May 1, 2004 accession of ten new Member States included two-year transition periods for the movement of the new Member States' nationals to some existing Member States. *See European Commission Report Says Free Movement of Workers Since the 2004 Enlargement Had a Positive Impact; 2.8 % of the Irish Workforce non-E.U. Nationals*, FINFACTS, Feb. 8, 2006, [http://www.finfacts.com/irelandbusinessnews/publish/article\\_10004812.shtml](http://www.finfacts.com/irelandbusinessnews/publish/article_10004812.shtml) (outlining the restrictions, if any, imposed by each existing EU Member State).

<sup>86</sup> *See generally* Bravo, *Regional Trade Arrangements*, *supra* note 7.

<sup>87</sup> The multilateral and plurilateral agreements that are the Annexes to the WTO Agreement cover subjects ranging from the recognition and enforcement of intellectual property rights, tariffs on goods, agriculture, technical barriers to trade, rules of origin, and sanitary and phytosanitary measures, among others. *See* WTO Agreement and its Annexes, *supra* notes 18–21.

<sup>88</sup> With the recent accession of Ukraine on May 16, 2008, 153 countries are now members of the WTO. *See* WTO, *Understanding the WTO: The Organization, Members and Observers*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited May 10, 2009). Cold War tensions had prevented the creation of the International Trade Organization, which had been intended as the trade analog to the International Monetary Fund and the World Bank for Reconstruction and Development. *See* RAJ BHALA & KEVIN KENNEDY, *WORLD TRADE LAW* 1–3 (1998) (describing U.S. reluctance to create the International Trade Organization and resulting reliance on GATT 1947, which had been intended as a provisional multilateral trade liberalization instrument). The WTO membership now includes China, Vietnam, Ukraine, and

Annex 1B to the WTO Agreement, the GATS, has been described as “the only multilateral legal instrument of potential global applicability governing the mobility of labor.”<sup>89</sup> Although indeed “applicable” to the liberalization of labor, that applicability is limited.<sup>90</sup> The GATS provides, somewhat indirectly, for some liberalization of labor. Under Mode 4 of the GATS, a service supplier from State A may supply service in State B through the presence of natural persons, i.e., the presence of the human labor provider necessary for the delivery of that service.<sup>91</sup> (The other three Modes of the GATS provide for the cross-border supply of a service from one member state to another,<sup>92</sup> the transborder consumption of a service,<sup>93</sup> and the transborder supply of service through establishment of a commercial presence.<sup>94</sup>) However, the GATS Annex on Movement of Natural Persons, while referring to temporary admission of foreign nationals into the territory of another WTO member state as part of the business of supplying services abroad, expressly excludes and disclaims an intent to affect individual member states’ domestic immigration laws or to create rights to access the labor market of individual member states.<sup>95</sup> Further, to the extent that WTO member states have made

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other formerly closed economies. See WTO, Understanding the WTO: The Organization, Members and Observers, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited May 10, 2009).

<sup>89</sup> See Michele Klein Solomon, *GATS Mode 4 and the Mobility of Labour*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 107, 107 (Ryszard Cholewinski et al. eds., 2007).

<sup>90</sup> As stated by Solomon, the GATS Mode 4 covers only “a subset of a subset of a subset” of the transnational labor market. *Id.* at 111.

<sup>91</sup> Pursuant to Article 1.2(d) of the GATS, *supra* note 21, trade in services is defined so as to include the supply of a service “by a service supplier of one Member, through commercial presence of natural persons of a Member in the territory of any other Member.” The definitions of “person” and “natural person” included in Article XXVIII(j) and (k) of the GATS make clear that a “natural person” is a human being. *Id.* art. XXVIII(j)–(k). The covered natural persons are nationals of a member state or persons holding a reasonably analogous status (such as lawful permanent residence) pursuant to the domestic laws of another member state.

<sup>92</sup> With respect to Mode 1, the GATS provides for “The supply of a service from the territory of one Member into the territory of any other Member.” *Id.* art. 1.2(a). Examples include banking services offered in one country and accessible in another country via the Internet.

<sup>93</sup> With respect to Mode 2, the GATS provides for “the supply of a service in the territory of one member to the service consumer of any other member.” *Id.* art. 1.2(b). Examples include the travel abroad of a national of one member to utilize education and tourism services in the territory of another member state.

<sup>94</sup> With respect to Mode 3, the GATS provides for “the supply of a service by a service supplier of one Member through commercial presence in the territory of any other Member.” *Id.* art. 1.2(c). Examples include the establishment of a banking or insurance subsidiary of the juridical entity of one member in the territory of another.

<sup>95</sup> The GATS Annex on Movement of Natural Persons Supplying Services Under the Agreement provides that the GATS does not apply “to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.” See GATS Annex on Movement of Natural Persons Supplying Services Under the Agreement ¶ 2. Pursuant to GATS Article XXIX, the Annexes are “an integral part of the [GATS].” *Id.*

commitments under the GATS, and those limited commitments have been implemented, liberalization of labor is restricted to highly skilled individuals who serve the labor delivery interests of corporate entities.<sup>96</sup>

In addition, Mode 4 addresses only the *temporary* movement of natural persons, making the liberalization of human labor providers an even more neglected aspect of trade liberalization. The liberalization and commitments made under Mode 4 “[are] by far the smallest mode of service delivery in terms of both trade flows and volume of scheduled concessions.”<sup>97</sup> Furthermore, the concessions made thus far by the WTO member states “refer almost exclusively to higher-level personnel, especially to intra-corporate transferees, whose mobility is also related to Mode 3.”<sup>98</sup> Moreover, the comparison of the WTO obligations and commitments made with respect to services (including the labor of natural persons), capital, and intellectual property, makes clear that the services, obligations, and commitments are by far the least extensive.<sup>99</sup> In addition to the requirements regarding high-skilled intra-company transfers,<sup>100</sup> the commitments that have been made

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<sup>96</sup> See Solomon, *supra* note 89, at 112 (“[T]o date the commitments of nearly all WTO Members under [Mode 4] are limited to the highly skilled, and within that group most often to intra-corporate transferees, managers and executives.”). See also Steve Charnovitz, *Trade Law Norms on International Migration*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 241, 248 (T. Alexander Aleinikoff & Alexander Chetail eds., 2003).

<sup>97</sup> See L. Alan Winters et al., *Liberalising Temporary Movement of Natural Persons: An Agenda for the Development Round*, 26 *WORLD ECON.* 1137, 1137 (2003).

<sup>98</sup> *Id.* Winters et al. go on to note that the commitments to date have limited advantages for developing countries whose comparative advantage is with respect to unskilled and semi-skilled human labor providers. *Id.* See also Charnovitz, *supra* note 96, at 274 (“As compared to other services, the obligations on Mode 4 are shallower because they apply only to transient movements.”). That is, only the temporary movement of natural persons is addressed. See also NAT’L FOREIGN TRADE COUNCIL, *THE DOHA DEVELOPMENT AGENDA AND GATS MODE 4: RECOMMENDATIONS FOR IMPROVED RULES ON TEMPORARY GLOBAL MOBILITY 3* (2005) (“[D]espite the increasing importance of global mobility, it remains the least developed aspect of trade in services under the [GATS].”).

<sup>99</sup> See Charnovitz, *supra* note 96, at 246–47 (comparing WTO obligations and commitments with respect to technical barriers, sanitary and phytosanitary measures, services, capital, and intellectual property). The preference for liberalizing capital over liberalization of labor is probably based on a misconception of the neutrality of capital. See Bravo, *Regional Trade Arrangements*, *supra* note 7, at 97 (discussing this perception and offering a critique). Yet the movement of capital has potentially more detrimental effects on individual domestic economies. See Ryan Walters, *Managing Global Mobility: Free Trade in Services in the Age of Terror*, 6 *U.C. DAVIS BUS. L.J.* 92, 100 (2006):

Capital can flow in and out of a country overnight, increasing the risk premium associated with investment in developing countries. Conversely, labor mobility, due to the relative reluctance of people to leave their homes, serves as a moderating force on the otherwise rapid effects of globalization while simultaneously providing market discipline.

*Id.* (notes omitted).

<sup>100</sup> See, e.g., Joy Kategekwa, *Extension of Mode 4 Commitments to Include Unskilled Workers in the WTO: A Win-Win Situation, Especially for LDCs*, Presentation at WTO Public Forum 2006,

are hedged by extensive prerequisites such as pre-employment authorization prior to application, and validity with respect to a single employer or industry, among others.<sup>101</sup>

In sum, in complete contradiction of labor's role in economic production and in the transnational markets, the current model of trade liberalization does not liberalize individual movement of labor. In other areas of economic practice the aggregated demands of individual consumers, producers, importers, and exporters are perceived as the voice of "the market." Labor providers should be treated in the same way.<sup>102</sup> The autonomy of the individual should trump protectionist nation state constraints on movement. In the case of intellectual property, for example, substantial transborder rights are recognized in individual owners.<sup>103</sup> By contrast, with respect to labor, a human labor provider's access to transborder markets is contingent on national origin and/or the corporate or other capital exporting enterprise that has the ability to act on its own initiative to take advantage of nation state trade liberalization commitments.

The timidity of the Mode 4 commitments contrasts with the rejection of nation state regulation that characterizes the rest of the WTO regime and other aspects of international economic law.<sup>104</sup> The contrast may stem from the nature of labor's limited access to the legislative and political process, which differs from the greater access and influence that capital interests may enjoy. The disfavor with which organized labor is regarded makes the

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at 3 (Sept. 25–26, 2006), [http://www.wto.org/english/forums\\_e/public\\_forum\\_e/session\\_26\\_num24\\_e.htm](http://www.wto.org/english/forums_e/public_forum_e/session_26_num24_e.htm):

Most of the Mode 4 commitments in Member's [sic] schedules to date pertain almost totally to highly skilled personnel, in particular intra-corporate transferees who move within the framework of juridical persons typically large multi-national companies. Such commitments have limited utility for [Least Developed Countries] because their "comparative advantage" lies in low and medium-skilled services.

*Id.*

<sup>101</sup> Charnovitz, *supra* note 96, at 247–49.

<sup>102</sup> The GATS obligation with respect to the movement of natural persons is so weak that it does not even require adherence to and enforcement of the fundamental human right to freedom of movement. Pursuant to existing human rights obligations, individuals have freedom to move within their country of origin and to leave their country of origin, but not to enter another country. The GATS does not require member state adherence to the right of departure. See Charnovitz, *supra* note 96, at 246 ("It should be noted that Mode 4 does not include any obligations for the country of origin to allow an individual to exit.")

<sup>103</sup> See TRIPS Agreement, *supra* note 19, arts. 1–4 (making multilateral WTO member state obligations to recognize and enforce intellectual property rights granted in another member state).

<sup>104</sup> A telling example is the extensive liberalization of capital imposed by BITs. For a discussion and analysis of the spread of BITs and of their effects on less developed countries, see Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265 (2008); Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

collective expression of labor's will more difficult, while individual labor providers are unable to exert analogous pressure.

Mode 4 maintains the status quo, leaving to states the initiative to provide content to non-defined terms and conditioning human (labor) movement on the provision of services by enterprises. As a consequence, it facilitates the movement of skilled workers, but ignores the movement of the unskilled, whose labor is in demand in labor-poor countries. This betrayal of trade liberalization and economics theories and principles, in conjunction with domestic immigration laws that view and treat labor as an economic unit, provide the economic pillars of human trafficking. The failure to liberalize labor creates and increases the vulnerability to exploitation of individual labor providers seeking to trade their labor across borders. The movement of individual human labor providers responding to transborder market forces is too often deemed illegal by the interposition of domestic immigration law.<sup>105</sup> Human trafficking, like human smuggling, is the seamy underside of the imposition of illegality by state authorities.<sup>106</sup>

In denying legal transborder mobility to the majority of human labor providers, nation states seek to have it both ways. They employ both the rhetoric of globalization and integration, as well as the contradictory rhetoric of exclusion. At the same time, their migration policies are policies of exclusion characterized by incomplete trade liberalization and draconian immigration laws. This toxic stew of contradiction is further poisoned by inadequate enforcement of domestic immigration laws interacting with legal temporary labor programs, both of which are unable to anticipate and satisfy the domestic demand for labor and are inadequately monitored to avoid exploitation of the temporary workers.<sup>107</sup>

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<sup>105</sup> Van den Anker explains:

Another link between trafficking and the globalization of capitalism is that the increasingly free flow of capital is not accompanied by the free flow of people. On the contrary, immigration rules are becoming more and more restrictive, so poor people hardly ever have the option of becoming legal economic migrants.

Van den Anker, *supra* note 75, at 22.

<sup>106</sup> Andrijasevic notes that, in the case of the European Union:

[D]ata suggests that E.U. borders, visa-regimes and restrictive immigration regulations that aim at suppressing trafficking and hampering the illegal movements of people work in favour of the third parties who organize trafficking, whether individuals and agencies, because they become a kind of *supplementary migration system* or even an alternative to the E.U. regulated migration.

See, e.g., Andrijasevic, *supra* note 67, at 262 (emphasis added).

<sup>107</sup> See discussion *infra* Parts III.A.1.a, III.A.1.b.



## 2. Restrictions on Human Mobility: Historical Anomaly

The widespread barriers imposed by political entities against the movement of people and their labor are a relatively new development in world history. In order to satisfy the labor demands of their domestic economies and the economies of their overseas territories, the predecessor empires to today's economically developed states—such as Great Britain, Portugal, and Spain—funded, supported, and protected the migration of Europeans to other continents and markets.<sup>108</sup> These predecessor empires also funded and supported trans-Atlantic slavery and other forms of coerced labor movements and labor extraction.<sup>109</sup> During the time of dislocations caused by industrialization (rapid and transformative economic development), European political entities had a ready outlet for their “excess” human labor providers who sought out transborder economic opportunities. The labor market was liberalized: individual labor providers faced logistical difficulties (and xenophobic policies and attitudes once they reached their destinations), but movement was facilitated by the lack of barriers and by the fact that the colonial outposts were part of the empire. This era of liberalized human movement was replete with human rights abuses and forms of exploitation such as slavery and indentured servitude. Further, migrants often were “welcomed” with xenophobic reactions by the host populations.<sup>110</sup>

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<sup>108</sup> See According to Massey et al.:

Prior to the Second World War, world migration flows were dominated by Europeans. Mass emigration began in the British Isles with the Industrial Revolution and moved south and east across the Continent as industrialism spread. The vast majority of emigrants went to one of five frontier societies that were themselves in the throes of rapid economic development: the USA, Canada, Argentina, Brazil, or Australia. The massive out-migration of Europeans ended during the Great Depression of the 1930s and a revival of significant international movement was largely precluded during the 1940s by the hostilities of the Second World War.

MASSEY ET AL., *supra* note 2, at 275.

<sup>109</sup> For example, according to Theresa Hayter:

This lack of freedom of movement may be one of the reasons why vast international inequalities of wealth persist and are growing. The wealth of Europe and other industrialized countries was built, from the sixteenth century onwards, through the exploitation of the natural resources and people of the rest of the world. Europeans used the labour of conquered peoples to produce raw materials and primary products for consumption in Europe, and they destroyed the industries of the more advanced civilizations they encountered in their imperial expansion. They then embarked on their own industrialization and they protected their new industries through quotas, tariffs and prohibitions. Once they had established their dominance, they advocated free trade.

HAYTER, *supra* note 82, at 2. Arguably, movement within empires in the mercantilist colonial era primarily took place within the borders of particular empires and was not primarily international.

<sup>110</sup> Examples include the reactions to Chinese and Japanese migrant laborers in the United States, as well as the reactions to mass migrations to the United States by Eastern Europeans.

However, human labor providers were not dependent on visas and other mechanisms of political control and could move to other regions so long as they could afford to do so.

The growth of the nation state and the concomitant increase in legislative and other barriers to the movement of people has driven and continues to drive underground the movement of human labor providers. Systematic barriers to labor movement arose with the nation state and became entrenched during the Cold War. States turned to the widespread use of passports for security and population control reasons in the aftermath of World War I, and passports have been increasingly securitized since then.<sup>111</sup> Even as recently as the immediate post-World War II era, the transnational movement of labor from labor-rich to labor-starved regions and political entities was liberalized in order to respond to the demands of the individual domestic markets.<sup>112</sup> New migration flows emerged to tap economic opportunities in newly industrializing and wealthy locations.<sup>113</sup>

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*See, e.g.*, KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 52–58 (2007).

<sup>111</sup> *See* MARK B. SALTER, RIGHTS OF PASSAGE: THE PASSPORT IN INTERNATIONAL RELATIONS 79–84 (2003). Salter describes the use of the passport after World War I to both facilitate and control movement, in particular the movement of refugees and other “marginal and dangerous elements of society[.]” *Id.* at 81.

<sup>112</sup> Massey et al. explain:

New origin and destination countries emerged after 1950 to yield entirely new international migration systems. Canada and the USA formed the core of a new North American system that attracted migrants not from Europe, but from Asia, Latin America, and the Caribbean. Europe, meanwhile, gradually shifted from the exportation to the importation of labour, a transformation that began in Britain and Germany shortly after 1950 and ended in Spain, Italy, and Portugal during the mid-1970s, yielding a well-defined system structure that by the 1990s connected Western Europe to source countries in Eastern Europe, the Middle East, Africa, and Asia.

MASSEY ET AL., *supra* note 2, at 275.

<sup>113</sup> Massey et al. provide an example:

The rapid accumulation of capital in oil-exporting countries of the Middle East after 1973 led to a massive investment in infrastructure that required the importation of labour on a grand scale. With a few years, the Gulf States had joined the ranks of immigrant-receiving nations to form the core of an international migration system that steadily expanded its geographic reach away from sources in the Middle East towards the Indian subcontinent, East Asia, and South-East Asia. By the 1990s most migrants into the Gulf region were from Asia rather than the Middle East.

During the 1980s, Japan and the newly industrialized countries of Singapore, Taiwan, Hong Kong, South Korea, and Malaysia underwent a rapid shift from the exportation to the importation of labour, pulling in workers from poorer countries throughout Asia and the Pacific.

*Id.*

Barriers to the movement of labor were erected and enforced during the heightened suspicions of the Cold War, and a curious, inverse relationship developed between the emergence of internationally recognized human rights and the attempted legal immobilization of transborder human movement. This relationship manifests in asynchronous growth of international recognition of human rights simultaneously with the dehumanization of “the other” when the non-national dares to transgress national boundaries uninvited.<sup>114</sup> Depending on the type of immigrant, the dehumanization may be state-facilitated or private. Private dehumanization (racism, ethnic prejudice) serves to preserve the way of life and homogeneity of the culture. State-based dehumanization (through limitations on the rights of “the other” and the obligations owed by legal institutions) defends the state’s figurative and physical boundaries. The potential abuses that might arise with this Article’s proposal for the contemporary global liberalization of labor would be checked, in part, by greater state adherence to and enforcement of international human rights and domestic civil rights norms.

### 3. Resulting Disjuncture

Nation states have been complicit in laying the foundations and preconditions of the modern traffic in human beings.<sup>115</sup> There is a deep conflict between state-centered ways of thinking<sup>116</sup> and the globalization

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<sup>114</sup> See JOHANNES FABIAN, *TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT* x–xi (1983) (discussing the anthropological concept of “the other”).

<sup>115</sup> For example, A. Yasmine Rassam claims that:

The rise of modern forms of slavery is partially attributable to economic globalization that allows capital to find the cheapest labor possible. Official corruption also plays a role in enforcing and facilitating slave labor. Although globalization of economic forces is hardly a new phenomena [sic], modern technology and rapid communications allow for greater “economic interdependence, deregulation, and a dominance of the marketplace that includes a shifting of responsibilities from state to non-state actors.” Globalization facilitates multinationals’ expansion into less-developed countries where they are increasingly complicit in forced and slave labor through the involvement of subcontractors.

Rassam, *supra* note 53, at 825 (citation omitted). The corruption of government officials and business people who appropriate for themselves the proceeds of national patrimony deepens the effects of economic dislocations and helps stimulate the transborder movement of vulnerable groups and individuals. *Id.*

<sup>116</sup> For example, as explained by Willem van Schendel and Itty Abraham:

[M]any states pursue the neo-liberal dream of a borderless economy and at the same time barricade their borders to keep out the specter of international organized crime networks, terrorist organizations, and individuals trafficking in illegal objects, substances, human beings and ideas. The contradictions between state ideology and border praxis, between the border as a categorical divide and the border as an interactive process, can be startling. Here the state criminalizes certain forms of mobility but clashes with other state practices condoning or encouraging such border crossings. An example is the United States’ spectacular surveillance of the Mexico border, ostensibly to

inspired by trade liberalization, and the integrative forces that it unleashes against the state structures and political organization. States lay the foundations for the thriving market in human labor represented by illegal immigration and its most exploitative form—human trafficking—by creating the preconditions for human smuggling, and by extension human trafficking, together with their failure to deploy consistent internal and international policies regarding the movement of peoples.

Individual migrants (a key source of trafficked persons) seek to exchange their labor for value and to respond to market forces that promise higher prices for their labor if they cross either internal or international borders. However, in public discourse and in contradiction of historical norms,<sup>117</sup> human labor providers attempting to respond to the transborder labor market are peculiarly despised.<sup>118</sup> The evolution of the nation state and the increase in the legislative and other barriers to the movement of peoples has driven and continues to drive the movement of people (and their labor) underground. In seeking to sell that labor and to navigate the state-created barriers (borders) to the market, individuals become more vulnerable to the predations of exploiters such as the traffickers.<sup>119</sup>

State complicity also comes from the collision of the implementation of an incomplete trade liberalization model with an increasingly restrictive

throttle the supply of "illegal aliens," but without taking effective measures to dampen domestic demand for these immigrants (e.g., by penalizing employers of cheap "unauthorized" labor).

Willem van Schendel & Itty Abraham, *Introduction: The Making of Illicitness, in ILLICIT FLOWS AND CRIMINAL THINGS: STATES, BORDERS, AND THE OTHER SIDE OF GLOBALIZATION* 1, 23–24 (Willem van Schendel & Itty Abraham eds., 2005).

<sup>117</sup> See discussion *infra* Part II.B.2.

<sup>118</sup> See HAYTER, *supra* note 82, at 1 (providing an example in the term of abuse most frequently used against refugees themselves, that they are in reality "economic refugees," rather than political ones and therefore "bogus," abusing the system). Yet, the growth of the United States and other industrialized nations was based on the movements of just such economic migrants.

<sup>119</sup> Anderson and O'Connell Davidson list and explain the factors:

The factors that expose migrants to exploitation are linked to questions about immigration/citizenship status, lack of access to support networks and economic status. . . . Both internal and international migration can create dependence on employers, whether they are private householders, pimps, gangsters, entrepreneurs, or business operators. Regular migrants may require employers to validate their immigration status, but when they are undocumented they require their cooperation to not reveal their status. In some sectors this may cause particular problems for the migrant, for instance when the employer has the potential to exercise a high degree of personal power over the worker either because the work is unregulated or even illegal, or because workers are isolated, or depend on the employer for other needs such as accommodation, food, and so on. . . . Dependence is heightened by lack of access to support, and migrants, internal and international, often do not have kin or friendship networks to fall back on.

ANDERSON & O'CONNELL DAVIDSON, *supra* note 16, at 44.

domestic immigration regime.<sup>120</sup> The contradictory orientation of two legal regimes that, logically, should complement each other lays the groundwork for exploitation.<sup>121</sup> Guestworker programs and other forms of “managed migration”<sup>122</sup> implement ad hoc state policymaking that attempts to cure the labor market disequilibrium resulting from the contradictions of the overarching trade and immigration legal regimes.<sup>123</sup> However, those programs serve to enshrine the exploitation of the transborder worker in the domestic legal regime, domestic labor market, and domestic social norms.<sup>124</sup>

Nation states allow nationalist fervor to overcome economic logic.<sup>125</sup> The increasing use of barriers to movement of humans (and their labor) is based, among other things, on concern for national security. Also present is the fear

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<sup>120</sup> The restrictive immigration policies evidence the conflict between political forces and economic realities on the ground. See Norimitsu Onishi, *Enclave of Brazilians Test Insular Japan*, N.Y. TIMES, Nov. 2, 2008, at A9 (summarizing Japanese hostility to immigration despite the economic and other challenges caused by Japan’s aging population).

<sup>121</sup> Bridget Anderson discusses the relationship between restrictive immigration laws and exploitability:

It is particularly difficult for a person who is undocumented to exercise her rights, because she may be deported if she comes to the attention of the authorities. Rights given with one hand are effectively taken away with the other. This is most clearly revealed in the practice of dependent immigration status prevalent in the USA and Europe. While employers do not “own” their workers and cannot legally do so, in the USA, for example, the visas given to domestic workers require them to work only for the employers who sponsor them. *Effectively, then, the actual experience of the worker may be similar to that of a slave. The “civilized” state both limits and reinforces the power of the employers, who may take advantage of this to the extent they choose.*

BRIDGET ANDERSON, *DOING THE DIRTY WORK? THE GLOBAL POLITICS OF DOMESTIC LABOUR* 138 (2000) (emphasis added).

<sup>122</sup> See VEENA VERMA, NORTH SOUTH INST., *THE MEXICAN AND CARIBBEAN SEASONAL AGRICULTURAL WORKERS PROGRAM: REGULATORY AND POLICY FRAMEWORK, FARM INDUSTRY LEVEL EMPLOYMENT PRACTICES, AND THE FUTURE OF THE PROGRAM UNDER UNIONIZATION* (2003).

<sup>123</sup> See generally Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 BRANDEIS L. J. 967 (2002) (summarizing the use of U.S. immigration policy to satisfy labor market demands).

<sup>124</sup> See Preston, *supra* note 33 (reporting on claims of exploitation and the hunger strike by Indian metalworkers recruited to the United States who allege that they had been trafficked into the country). See also *Hunger Strike*, *supra* note 33 (providing an example of the interaction between the restrictive U.S. immigration policy, the transnational labor market, and the creation of legal dependence on the employer). The sad irony is inescapable in view of the U.S. stance as a “global sheriff” that polices and punishes other states for infractions related to human trafficking. See generally Janie Chuang, *The United States As Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437 (2006) (analyzing the impetus for U.S. extraterritorial anti-human trafficking efforts and their consequences). At the same time, U.S. domestic immigration laws create the preconditions for human exploitation, including the trafficking in humans.

<sup>125</sup> See discussion *infra* Part II.B.1 regarding the projected economic benefits of labor liberalization.

that to allow the unconstrained movement of humans and to allow them to share in the wealth of Western states might result in the West's loss of that wealth and its advantages as a result of, among other things, lowered compensation levels to Western labor providers.<sup>126</sup>

Economic projections indicate that those fears are incorrect and based on a misunderstanding of the consequences of labor liberalization. A number of sources report that the liberalization of labor would result in increases in global wealth and wellbeing as a result of the unleashing of global resources that remain untapped.<sup>127</sup>

### III. THE STATUS QUO: EXISTING REFORM PROPOSALS

Despite the reluctance of states to negotiate or commit to labor liberalization within the context of trade liberalization, a robust transborder trade in labor already exists. States, individuals, and groups are already responding to the economic realities of existing transborder labor market demand and available supply. Those responses take advantage of loopholes and interstices in domestic immigration laws of individual states, including state-encouraged and state-sanctioned transborder temporary employment programs, to engage in both prohibited and permitted movements of labor providers.<sup>128</sup>

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<sup>126</sup> See NAT'L FOREIGN TRADE COUNCIL, *supra* note 98, at 3 ("Due to highly politicized national debates fueled by security concerns, labor protectionism, and concerns about collective identity, commitments filed by countries under GATS Mode 4 (Movement of Natural Persons) have been fewer and more limited than under the other modes of supply."). See also Walters, *supra* note 99, at 106–07 (discussing misperceptions and political maneuverings surrounding the perceived economic threats from labor liberalization).

<sup>127</sup> See Winters et al., *supra* note 97, at 1138 (estimating that an increase in the movement of labor equivalent to 3 percent of the unskilled and skilled workforces of developing countries "would generate an estimated increase in world welfare by US \$156 billion, shared fairly equally between developed and developing countries"). Winters and his co-authors also note that earlier projections about such liberalization report "large potential economic gains from labor mobility." *Id.* Joy Katagekwa reports a similar finding from the U.N. Conference on Trade and Development (UNCTAD). See Kategekwa, *supra* note 100, at 3.

<sup>128</sup> For example, the government of the Philippines encourages the education and transborder movement of its nationals to provide labor in other countries. See Jason DeParle, *Sending it All Back Home: A Good Provider is One Who Leaves*, N.Y. TIMES MAG., Apr. 22, 2007. See generally RHACEL SALAZAR PARRENAS, *SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION AND DOMESTIC WORK* 51–59 (2001) (reporting on the Philippines' deployment of its "unprotected migrant citizenry"). The governments of Jamaica and of Pakistan also provide government agency support to programs that facilitate the temporary export of their nationals' labor to the United States, Canada, and the Gulf States, respectively. See Luke Douglas, *Thousands Clamour for Overseas Hotel Jobs*, JAMAICA OBSERVER, Jan. 24, 2008; *18 J'can Women Get Jobs as Seafood Packers in Canada*, JAMAICA OBSERVER, May 8, 2008; *Hospitality Workers Warned to Be on Best Behaviour*, JAMAICAN OBSERVER, Mar. 29, 2008 (describing warnings by the Jamaican Minister of Labour and Social Security issued to Jamaican labor providers heading to the U.S. hospitality industry; the Minister's address noted "that immediately upon discovery of unruly behaviour, it will be an imposition of punishment with them being 'out' after the second strike."). Such programs usually confer more limited benefits and rights to the individual transborder labor providers than to their domestic employers. VERMA, *supra* note 122, at ix–xii, 32, 39

The transnational labor market is framed by and arises within the intricate interweaving and contradictions of multilevel legal regimes. The institutions of the multilateral trading system have taken a hands-off approach<sup>129</sup> while the domestic legal systems too often demonstrate indifference to international human rights laws and deference to hard-edged domestic immigration legal regimes.<sup>130</sup> Coupled with an international human rights standard-setting system that is unenforceable (employing, for the most part, publicity and naming-and-shaming to encourage compliance)<sup>131</sup> the transborder labor market has become increasingly inhumane, stripping migrants of legal personhood, while border crossings have become increasingly dangerous.

The status quo in the transnational labor market is a system of exploitation that is fatal to the poor, vulnerable, and unskilled,<sup>132</sup> existing alongside a more flexible and open regime for highly skilled labor. The contemporary transnational labor market is marked by the rhetoric of exclusion and rejection of the foreign worker, coupled with legal guestworker programs and lack of enforcement of applicable labor standards that together facilitate the migrant worker's exploitation through commoditization and dehumanization.<sup>133</sup> The lines between labor exploitation, migrant smuggling, and human trafficking are not clear. However, it is clear that labor exploitation and migrant smuggling are the seedbed from which human trafficking grows.

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(summarizing failure to protect rights of the migrant workers and the dominant role of employers in setting applicable standards and policies for the Canadian program).

<sup>129</sup> Labor and the movement of natural persons is the least liberalized area of multilateral trade liberalization. Winters et al., *supra* note 97, at 1137; Charnovitz, *supra* note 96, at 247.

<sup>130</sup> See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) (applying lower standards when undocumented employees are injured at work). The operation of stringent immigration laws also leads to violations of domestic civil rights laws and other legal protections. See ERIK CAMAYD-FREIXAS, *INTERPRETING AFTER THE LARGEST ICE RAID IN U.S. HISTORY: A PERSONAL ACCOUNT* (2008), available at [http://graphics8.nytimes.com/packages/pdf/national/20080711\\_IMMIG.pdf](http://graphics8.nytimes.com/packages/pdf/national/20080711_IMMIG.pdf) (describing the conditions surrounding the criminal prosecution and sentencing of undocumented immigrants seized in the raid of an Iowa meatpacking plant, and alleging violations of fundamental rights of those seized, tried, and sentenced).

<sup>131</sup> For discussion regarding the inadequacy of the human rights regime, see *supra* Part II.A.2.

<sup>132</sup> For example:

Illegal migrants risk their lives to better themselves. Europeans are more aware of Africans drowning in the summer holiday season, but boats are wrecked all year round. In mid-December 51 migrants drowned off the Greek island of Samos . . . . Mexicans dying in Arizona's desert rarely make headlines anymore. And not a lot is heard about the 600,000 people a year, perhaps more, who the UN says are trafficked and often forced into prostitution. Bonded labor, too, is dismally common.

*Open Up*, *ECONOMIST*, Jan. 3, 2008, at 5.

<sup>133</sup> This may reflect conventional perceptions of the threat and inconvenience that would arise from labor as bearers of human rights.

### A. *The Transnational Market for Labor*

Both Western and less developed countries participate in the transborder trade in labor on the transnational labor market.<sup>134</sup> Some labor-rich economies, whose comparative advantage is the availability of an untapped labor supply, foster and support an extensive transnational trade in the labor of their nationals through bilateral and multilateral agreements and/or understandings (some longstanding) with labor-poor countries that need the labor for the functioning of their domestic economies.<sup>135</sup> Those trading arrangements, formal and informal, between labor-rich sending countries and labor-poor host countries, rest upon a central premise. The migrant worker will always be a creature, i.e., national, of his/her home country, except in extraordinary circumstances where a path to legal residence and/or citizenship in the host state may be created. To that end, it is intended that the migrant worker may never achieve the status nor enjoy the rights of a national of the host country, and may not demand from the host country the rights and privileges arising from membership.<sup>136</sup>

A striking feature of the majority of contemporary and post-World War II state-sponsored attempts to cure domestic labor market disequilibrium is the deployment of *temporariness*. Permanent outsider status is achieved through the mechanism of imposed temporal restraints<sup>137</sup> and barriers to legal transformation or assimilation of the outsider into the privileged citizenry. During the colonial and imperial eras, the labor migration flows sanctioned by dominant political entities were not characterized by mandatory

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<sup>134</sup> Pradip Bhatnagar, *Liberalising the Movement of Natural Persons: A Lost Decade?*, 27 WORLD ECON. 459, 468 (2004) (“[B]oth developed and developing countries are increasingly resorting to *ad hoc* imports of foreign workers to solve the problem of domestic labour shortages in order to sustain their economic growth.”).

<sup>135</sup> In countries such as the Philippines, the reliance on the transborder export of human labor providers resulted from the dislocations attendant to incorporation of those countries into the global economy—an incorporation fostered by application of the policies of global financial institutions such as the International Monetary Fund (“IMF”) and the World Bank. See PARRENAS, *supra* note 128, at 51.

<sup>136</sup> The German guestworker program provides a useful example:

The main case of temporary foreign worker recruitment, or the ‘guestworker’ system, was in the Federal Republic of Germany. . . . The system established a clear distinction between the civil rights of foreigners and those of citizens. Foreigners had no voting rights and, because their work and residence permits usually tied them to a particular employer, they were forced to work in the worst jobs in the worst conditions and could do little to improve these conditions.

HAYTER, *supra* note 82, at 11–12.

<sup>137</sup> At the extreme, permanent outsider status is also achieved through double temporariness. See, e.g., Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N.C. J. INT’L L. & COM. REG. 465, 469–70 (2002) (discussing the “double requirement of temporariness” of the U.S. H-2B visas—workers are temporarily present to fill only temporary jobs).



temporariness. For example, the massive flow of migrants from India to the rest of the British colonial empire<sup>138</sup> did not mandate the return of the migrant worker to the sending country.<sup>139</sup> Today, against a backdrop of legal recognition of international human rights, the migrant worker is made vulnerable through exclusion from the more privileged status of “citizen-national.”<sup>140</sup> Further opportunities for exploitation and conditions of inequality are created in the formal and informal transnational labor market as less powerful states transmit their unequal bargaining status to their nationals.<sup>141</sup>

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<sup>138</sup> Hayter explains:

The second major migration was of indentured or bonded labour, or temporary slaves, from India and China, again to remedy the lack of cheap or available labour in the places of destination. In theory the indentured workers signed a contract with employers and labour agencies of their own free will. In practice for most of them the choice was little greater than that presented to slaves transported from Africa, and their contracts provided them with no political or human rights. Thirty million indentured workers left India during the colonial period and up to the First World War. They provided a workforce for the mines and plantations of Burma, Sri Lanka, Malaysia, Singapore, Mauritius, South Africa, Guyana and Jamaica.

HAYTER, *supra* note 82, at 9. Other destinations included Fiji, Trinidad, Kenya, and Uganda. See U.K. NATIONAL ARCHIVES, UNFREE LABOUR: FAMILY HISTORY SOURCES FOR INDIAN INDENTURED LABOUR OVERSEAS RECORDS INFORMATION 21 (2007), available at <http://www.nationalarchives.gov.uk/catalogue/RdLeaflet.asp?sLeafletID=400&j=1> [hereinafter INDIAN INDENTURED].

<sup>139</sup> An argument may be put forward that contemporary ethnic conflict in Fiji and Guyana, for example, indicate that the return of 19th Century migrants should have been mandatory. Such a stance is contrary to human rights ideals. In addition, such conflicts result where the assets of the state are reserved to particular ethnic groups to the exclusion of others. Liberalization of labor together with adherence to and enforcement of contemporary human rights and civil rights protections should decrease such conflicts.

<sup>140</sup> See discussion *infra* Parts III.A.4, III.B.1 (outlining the exploitative effects of temporal restraints).

<sup>141</sup> For further discussions on state transmission of inequality to their migrants, see *infra* notes 159–160, 187 and accompanying text. Worthy of further inquiry, but not fully explored in this Article, is the relationship among the rise in concepts of national citizenship and the decline in the acceptability (political and social) of legal and legally enforced racism, sexism, and other forms of discrimination as mechanisms for maintaining otherness and exploitability, and the use of the mechanism of temporariness to achieve the exploitation that human rights and civil rights norms no longer overtly permit.

### 1. States Trade in Human Labor<sup>142</sup>

Although not openly characterized as a trade good, service, or market, the transnational trade in human labor—a simultaneously legitimate and illegitimate industry—is thriving. States that participate in this transnational trade span the gamut of the development spectrum, from the United States and Canada to the Philippines and Pakistan. While the United States and Canada are net recipients of labor, labor-rich countries such as the Philippines and Pakistan are net suppliers.

These examples of state participation in the transnational labor market were selected for examination because each illuminates different aspects of the market. The United States, the quintessential immigrant-receiving country, has adopted a less welcoming attitude toward the entry of migrants while simultaneously committing to liberalization of other factors of production. On the one hand, the United States has taken the lead against the egregious exploitation of human trafficking, and has employed the rhetoric of civil and human rights. On the other hand, the guestworker programs utilized to supply temporary workers to the U.S. domestic labor market are fraught with types of exploitation similar to those endured by trafficked persons.<sup>143</sup> Canada, also a traditional receiving country, is perceived as a more sincere adherent to human rights norms and as more welcoming than the United States. However, its guestworker programs also foster and exhibit exploitation of the mobile human labor provider. The Philippines was selected because of the centrality of labor exportation to its development model and economic health. Pakistan's experience with labor migration illustrates that labor movements are directed not only toward the West, that labor migration and labor exploitation do not only affect females, and that not only traditional sending countries are participating in this market.

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<sup>142</sup> Some challenges may be raised to the characterization of inter-governmental labor supply arrangements as "trade." While cash is not exchanged directly between the governments involved, the arrangements fall within a broad definition of trade. Each of the sending and receiving states receive both tangible and intangible benefits from the exchange of the sending-state labor providers within the context of the program. For example, among other things, the host receives a cheaper and more compliant workforce than might be readily available within its borders. The sending state, on the other hand, receives the effects of remittances returned by the labor providers, as well as the creation of employment opportunities for otherwise unemployed or underemployed categories of workers. Benefits to the sending and receiving states accrue not from legal ownership of the human labor providers, but from *control* over the providers and over the labor supply arrangements. For an analysis of guestworker programs and their treatment of labor as a commodity, see generally Ruben Garcia, *Labor as Property: Guest Workers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27 (2006).

<sup>143</sup> For example, the lack of freedom of movement and limited ability to effectively enforce human and/or civil rights through appeal to relevant authorities. See generally SOUTHERN POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES, available at <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf> [hereinafter CLOSE TO SLAVERY].

a. *The United States*

The U.S. immigration regime has become more hostile to the permanent entry of labor (permanent entry categories are dominated by family reunification and other categories of migrants) than in other periods.<sup>144</sup> However, the regime continues to include an active guestworker program,<sup>145</sup> which maintains a relatively lower profile than the more anti-immigrant policies and rhetoric.

The largest and most significant of the United States' guestworker programs, the *Bracero* program, which brought millions of temporary Mexican farm workers to U.S. agricultural fields, ended in the 1960s.<sup>146</sup> The H-1 and H-2 programs have continued.<sup>147</sup> Using the H-1B program, the United States fruitlessly attempts to satisfy the domestic demand for skilled transborder workers. Although Congress has adjusted the quota of such workers in an attempt to keep up with demand, those adjustments have generally been insufficient to satisfy the requirements of the domestic labor market.<sup>148</sup> The inability of this state-interposed mechanism to respond flexibly to the economic demands of the U.S. labor market may have consequences for the health of the U.S. economy and its technological leadership as well as for the unsanctioned entry of skilled and unskilled human labor providers.<sup>149</sup>

The H-2A and H-2B visas allow U.S. employers in low-paying seasonal industries to satisfy their labor demands through the import of temporary

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<sup>144</sup> See, e.g., Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 284, n.171 (“[F]amily preference categories dominate the ‘legal permanent resident’ admissions categories, as well as admissions more generally.”).

<sup>145</sup> Indeed, as noted by Professor Cristina Rodriguez: “The allure of the temporary worker has exerted a strong pull on [U.S.] labor-based admissions in particular. Today, more of the labor needs of the United States are filled by workers on temporary visas than by lawful permanent residents.” *Id.* at 258.

<sup>146</sup> For history and analysis of the *Bracero* program, see generally KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992).

<sup>147</sup> See DAVID GRIFFITH, *AMERICAN GUESTWORKERS: JAMAICANS AND MEXICANS IN THE U.S. LABOR MARKET* 30–39 (2006) (describing the origins and evolution of temporary worker programs in the United States, including the H-2 and the *Bracero* programs). See also *id.* at 7 (describing the differences between the H-2A and H-2B programs). H-2A visas are issued to seasonal agricultural workers, while H-2B workers supply temporary labor to non-agricultural industries, such as “seafood processing, shrimping, hotels, ornamental stone quarries, racehorse stables, and forestry.” *Id.*

<sup>148</sup> See, e.g., Julia Preston, *Many Visas Are Sought for Skilled*, N.Y. TIMES, Apr. 11, 2008, at A9 (describing the disparity between the number of H1B visa applicants and the number of such visas issued annually pursuant to U.S. immigration law).

<sup>149</sup> See, e.g., Patrick McGeehan & Nina Bernstein, *Businesses Say New York’s Clout is Emigrating. With Visa Policies to Blame*, N.Y. TIMES, Mar. 24, 2008, at B1; Nathan Thornburgh, *How Not to Treat The Guests*, TIME, June 4, 2007 (discussing, *inter alia*, the inability of the existing program to respond flexibly to labor demands).

workers from the Caribbean and Mexico.<sup>150</sup> The industries to which the majority of workers are destined are agriculture, hospitality/hotels, and seafood packaging.<sup>151</sup> The U.S. guestworker program is characterized by endemic exploitation of workers, a lack of accountability of employers,<sup>152</sup> and privatization. Private recruiting companies act as the middlemen, finding and transporting workers from their countries of origin to the host state employer,<sup>153</sup> often with the assistance of the host governments.<sup>154</sup> Other mechanisms through which the United States acquires labor power in the transborder labor market include the direct recruitment of foreign workers by governmental units or by private parties deputized by the government.<sup>155</sup> Some examples include the targeted recruitment of teachers and nurses from the Caribbean by the New York City school system.<sup>156</sup>

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<sup>150</sup> GRIFFITH, *supra* note 147, at 30–31 (noting the program's increasing shift from Caribbean to Mexican labor providers).

<sup>151</sup> *Id.* at 7.

<sup>152</sup> See *id.* at 68–74, 205–08. See generally CLOSE TO SLAVERY, *supra* note 143 (analyzing the slavery-like conditions endured by foreign guestworkers in the United States).

<sup>153</sup> For example, private recruiters in the United States advertise their services and workers on the Internet. See CLOSE TO SLAVERY, *supra* note 143, at 9 (“U.S. employers almost universally rely on private agencies to find and recruit guestworkers in their home countries . . .”). Sites like [www.get-a-worker.com](http://www.get-a-worker.com), [www.labormex.com](http://www.labormex.com), [www.landscapeworker.com](http://www.landscapeworker.com), and [www.mexican-workers.com](http://www.mexican-workers.com) advertise the availability of temporary workers. The use of recruiter middlemen, who often use exploitative mechanisms, shields the governmental entities from direct obligation and liability, making workers more vulnerable to exploitation, including trafficking. See, e.g., *id.* at 32 (“Many large employers who rely on guestworkers increasingly are attempting to avoid responsibility for unlawful practices by obtaining workers indirectly through a sub-contractor. This use of labor brokers puts workers at greater risk of abuse and makes enforcement of their rights even more difficult than it is already.”). See also Steven Greenhouse, *Low Pay and Broken Promises Greet Guest Workers in U.S.*, N.Y. TIMES, Feb. 28, 2007, at A1 (reporting on widespread abuses in the U.S. guestworker programs and the increased vulnerability of workers when labor-brokers are involved in recruiting them for work in the United States).

<sup>154</sup> Both the host state and the home state are involved in vetting the workers prior to movement. See Thornburgh, *supra* note 149 (describing the backlog in the U.S. consulates in Mexico). See also PARRENAS *supra* note 128 (regarding the selection process for workers for the overseas market). See *infra* Part III.A.1.c–d.

<sup>155</sup> Some European countries, for example. The United Kingdom recruits doctors and nurses from Malawi because of its good healthcare system. See, e.g., Daniel Morris, *Giving Aid With One Hand, Taking MDs With The Other*, COM, Aug. 7, 2007, <http://www.thestar.com/printArticle/243777>; Malawi: Donors and Gov't Pool Funds Against Brain Drain, INTEGRATED REGIONAL INFO. NETWORKS, May 28, 2007, available at <http://www.irinnews.org/Report.aspx?ReportId=72414>.

<sup>156</sup> See, e.g., *Regional Education Ministers to Discuss Teacher Recruitment*, JAMAICA OBSERVER, May 27, 2002; *Commonwealth Countries Reach Agreement on Teacher Recruitment*, JAMAICA OBSERVER, Sept. 8, 2004.

b. *Canada*

Canada, while appearing to have more welcoming immigration policies than the United States overall,<sup>157</sup> also uses a temporary employment program to satisfy seasonal demands for agricultural labor. The Canadian Seasonal Agricultural Workers Program allows for the recruitment of workers from the Caribbean and Mexico to work on farms in Ontario, Canada.<sup>158</sup>

The Canadian program, unlike the U.S. H-2A and H-2B programs, does not outsource the recruitment of workers. Instead, the governments of the labor-rich sending states are actively involved in recruiting and vetting their nationals for work in Canada's agricultural fields.<sup>159</sup> However, the Canadian program is also characterized by exploitative conditions endured by workers, dependence on the employer, and inadequate and often ineffective monitoring by the governments involved.<sup>160</sup> The unequal bargaining positions of their home states vis-à-vis the host state is replicated in the workers' relationship with their employers,<sup>161</sup> further increasing their vulnerability.

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<sup>157</sup> See, e.g., Bruce Cheadle, *Immigration Fuelling Canada's Growth*, GUELPH MERCURY, Mar. 14, 2007 (discussing the growth in Canada's population as a result of high immigration rates, and stating that "Canada's net migration, per capita, is among the highest in the world").

<sup>158</sup> See VERMA, *supra* note 122, at 1–12 (describing the Canadian Seasonal Agricultural Workers Program ("CSAWP"), its history, rationale and institutional framework).

<sup>159</sup> Describing the CSAWP as:

[A] "government to government" managed program of migration. Private actors and any role they may have in the CSAWP are defined and regulated by government . . . . Government agents from Mexico and the Caribbean act as Government Agents in Canada between the workers and the Canadian government and growers.

*Id.* at vii. See also *id.* at 43–45 (describing the vetting process performed by the sending states).

<sup>160</sup> See *id.* at xiv (describing long hours and dangerous conditions, as well as exclusion from Canadian domestic labor standards); *id.* at x, 32–39 (describing mechanisms such as "naming" (selection of specific individual transborder workers by Canadian employers) and threatened repatriation, through which employers' power over workers is maintained); *id.* at xiii (describing "hands off 'approach'" of provincial authorities); *id.* at xv (describing the inability of sending state agents to effectively police and maintain housing conditions); *id.* at xi (describing reluctance of sending state agents to too ardently represent workers' interest against the employer for fear of losing the contract for their country).

<sup>161</sup> Indeed, it is interesting to observe the mechanisms through which both the United States and Canadian programs attempt to harness "competition," a centerpiece of free market theory. The Canadian program fosters competition among sending state representatives, and the U.S. program fosters competition among the private recruiters. Neither the United States nor the Canadian program allows the worker to compete on an open market or forces employers to compete, but instead maintains employer dominance over the worker. Such competition as the system allows, then, serves to enhance the situation of host state capital to the detriment of the sending state worker. Verma describes the competitive relationships among sending states participating in the CSAWP as follows:

The Government Agents also ensure that their respective country's [sic] receive as many placements as possible in order to maximize the return of remittances. Combined with the employers [sic] right to select the supply

According to Douglas S. Massey and J. Edward Taylor, “[r]ecognizing how vital migrant remittances are to their economies, some labor-abundant developing nations have designed and implemented policies to train and place workers abroad and to harness more of the income they earn for development.”<sup>162</sup> The Philippines and Pakistan are labor-rich sending states that encourage and manage their nationals’ participation in the transborder labor market to foster domestic economic development. This mode of economic development gives the sending state the benefit of the provision of employment to the more entrepreneurial of its citizens and the multiplier effects of the flow of remittances from the overseas workers into the domestic economy.<sup>163</sup>

### c. *The Philippines*

The Philippine model of participation by the state in the transborder labor market places Philippine nationals of all skill levels in both developed and relatively wealthier developing nations.<sup>164</sup> So pervasive is this mode of accessing the transborder labor market and the opportunities available in the transnational economy that the Philippines is known to specialize in the export of certain skills and professions.<sup>165</sup> In addition, the way of life of long-term temporary transborder departure for work, followed by return, is entrenched in family life<sup>166</sup> and governmental systems.<sup>167</sup>

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country of workers, there is a competitive structure among the consulates. This has been encouraged by the Canadian government. This structure undermines the Government Agent’s ability to pursue workers’ grievances.

VERMA, *supra* note 122, at xi.

<sup>162</sup> Douglas S. Massey & J. Edward Taylor, *Introduction in INTERNATIONAL MIGRATION: PROSPECTS AND POLICIES IN A GLOBAL MARKET 1* (Douglas S. Massey & J. Edward Taylor eds., 2004).

<sup>163</sup> See INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (IFAD), *SENDING MONEY HOME: WORLDWIDE REMITTANCE FLOWS TO DEVELOPING COUNTRIES 2* (2007) (reporting that US \$300 billion was sent home to developing countries by nationals living abroad). According to the IFAD study, US \$14.6 billion, representing 12.5 percent of its GDP, was sent to the Philippines; and US \$6.2 billion, representing 4.5 percent of its GDP, was sent to Pakistan. *Id.*

<sup>164</sup> See generally PARRENAS, *supra* note 128 (discussing and comparing the situation of mostly skilled Philippine migrant women working as domestic servants in the United States and Italy). See also *id.* at 51 (“The Philippine economy relies on the deployment of workers to ease high unemployment and underemployment rates, provide workers with additional skills training, and generate foreign currency from the remittances of foreign-employed workers.”).

<sup>165</sup> For example, Filipina nurses travel worldwide, including to the United States and to the Gulf States, while Filipina domestic workers flow to the Gulf States and Europe. See generally CATHERINE CENIZA CHOY, *EMPIRE OF CARE: NURSING AND MIGRATION IN FILIPINO AMERICAN HISTORY* (2003).

<sup>166</sup> See PARRENAS, *supra* note 128, at 80–196. See also DeParle, *supra* note 128 (describing the effect of the migratory model on familial and other societal structures).

<sup>167</sup> See, e.g., DeParle *supra* note 128 (describing the focus of the Philippine government on the outward migration of its citizens in search of employment). See also Kevin O’Neil, *Labor Export as Government Policy: The Case of the Philippines*, *MIGRATION POLICY INST.* 1 (2004) (describing the formation of the Philippines Overseas Employment Administration “to provide contract labor

The Philippine government is committed to protecting its nationals who work outside the country and to welcoming them as heroes upon their return.<sup>168</sup> Nevertheless, stories abound of the exploitative experiences of Philippine nationals working abroad. These experiences, much like the exploitation encountered in the U.S. and Canadian contexts, stem from the legal empowerment and dominance conferred to the employer-exploiter by the institutional frameworks of the temporary worker programs under host state domestic law and by the temporariness and dependence on the employer that is required by the programs. Indeed, the experiences of some overseas workers whose movements were facilitated by the relevant governments are often no different from the experiences of the typical trafficked person.<sup>169</sup>

#### d. Pakistan

Like the Philippines, Pakistan is labor-rich but its domestic economy is unable to provide sufficient economic opportunities and employment for its domestic labor providers. Pakistan has therefore outsourced to a quasi-governmental entity, the Pakistan Overseas Employment Corporation, the task of recruiting and vetting Pakistani nationals, matching them with employers, and exporting them on the transnational labor market.<sup>170</sup>

Unlike the Philippines, the majority of Pakistan's overseas workers are destined for the Gulf States<sup>171</sup> and to other developing countries that are wealthier than Pakistan. Such workers often endure exploitative

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directly to employers" and the increase in the migrant protection focus of the agency following publicity surrounding exploitative conditions).

<sup>168</sup> See Ryszard Cholewinski, *International Labour Law and the Protection of Migrant Workers: Revitalizing the Agenda in the Era of Globalization*, in GLOBALIZATION AND THE FUTURE OF LABOUR LAW 409, 431–32 (John D.R. Craig & S. Michael Lynk eds., 2006) (describing some of the migrant protection mechanisms adopted by the Philippine government); see also DeParle, *supra* note 128.

<sup>169</sup> See DeParle, *supra* note 128 (reporting tacit complicity in and later condemnation by the Philippine government in the trafficking of Philippine nationals into the Japanese sex industry); see also Preston, *supra* note 33 (regarding trafficking charges made by U.S.-based legal transborder labor providers from India).

<sup>170</sup> See Overseas Employment Corporation, The Official Gateway of the Government of Pakistan, [www.oec.gov.pk/English/en\\_about.php](http://www.oec.gov.pk/English/en_about.php) (last visited Mar. 3, 2009) ("The Corporation is mandated to promote employment of professionals, highly skilled, skilled, semi-skilled and un-skilled manpower in foreign countries. In fulfillment of its mandate, the Corporation has so far provided more than 1,28,000 [sic] workers to foreign employers in the public and private sector from 53 different countries of the world.")

<sup>171</sup> See Fred Arnold & Nasra Shah, *Asian Migration to the Middle East*, 18 INT'L MIGRATION REV. 294–318 (1984) (noting that of the 2 million–3 million Asian workers in the Gulf States, 800,000 of each came from Pakistan and India). See also Abid Qaiyum Suleri & Kevin Savage, *Remittances in crises: a case study from Pakistan* 12 (HPG Background Paper, 2006) (reporting that in the subject areas of study, 64 percent, 32 percent, and 10 percent of emigrants reported living in Saudi Arabia, United Arab Emirates, and Muscat, respectively). See also *id.* at 6 (noting Pakistani government report on Pakistan's expatriate population of approximately seven million located "in rich countries of the West and the Persian Gulf").

conditions.<sup>172</sup> However, like the Philippines, Pakistan provides temporary workers of all skill levels to the domestic labor markets of the host states.<sup>173</sup> Also like the Philippines, the temporary migrant way of life has become entrenched in Pakistani family and social life, giving rise to concerns regarding the effects on family members left behind.<sup>174</sup> In sharp contrast to the Philippines, the gender of exported workers is almost 100 percent male, stemming, perhaps, from Pakistan's dominant culture and religion, which frowns upon women working outside the home.<sup>175</sup>

The official mechanism of transborder movement is inadequate to meet the pressures of Pakistan's economy and population. As a consequence, significant numbers of Pakistanis (and Afghans) are smuggled and trafficked to destinations in the West, the Middle East, Southeast Asia, and Central Asia, as well as within Pakistan's domestic market.<sup>176</sup>

The implications of heavy state involvement in the export of domestic labor are daunting. Some potential dangers include the subordination of the sending state's education system to ensure the steady supply of transborder labor, economic dependence of the sending state on remittances, which may also become state-controlled, and government control of migration opportunities.

## 2. Capital Trades in Labor (Human Capital)

Capital enthusiastically participates in the transborder labor market. While states primarily manage trade in the labor of their unskilled nationals, capital (e.g., multinational corporations) trades principally in skilled labor. This trade is facilitated by both the multilateral trading regime and the domestic law of individual states. The GATS distinguishes between "natural

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<sup>172</sup> See, e.g., Christy Hoover, *Migrant Workers Exploited While U.A.E. Prospers*, ETHICAL TRAVELER.ORG, Mar. 2007, [http://www.ethicaltraveler.org/news\\_story.php?id=158](http://www.ethicaltraveler.org/news_story.php?id=158). But see Jason DeParle, *Fearful of Restive Foreign Labor, Dubai Eyes Reforms*, N.Y. TIMES, Aug. 7, 2007, at A1 (describing exploitation of migrant workers and pressures for reform).

<sup>173</sup> See Overseas Employment Corporation, *supra* note 170 (describing the occupation/categories of Pakistanis for whom the OEC had found employment abroad, including surgeons, nurses, engineers and IT professionals, among others).

<sup>174</sup> See Arnold & Shah, *supra* note 171, at 306–07 (discussing some of the effects on wives and children of migrant workers).

<sup>175</sup> See, e.g., Sally Baden, *The Position of Women in Islamic Countries: Possibilities, Constraints and Strategies for Change*, INST. OF DEV. STUDIES 28 (1992), available at [www.bridge.ids.ac.uk/reports/re4c.pdf](http://www.bridge.ids.ac.uk/reports/re4c.pdf) (discussing low rates of employment among women in Islamic societies). See also Charnovitz, *supra* note 96, at 247 ("Bangladesh, India, Indonesia, and Pakistan often prohibit women from taking jobs abroad as domestic workers.")

<sup>176</sup> See Khalid Koser, *Why Migrant Smuggling Pays*, 46 INT'L MIGRATION REV. 3, 7 (2008). Table 1 depicts various types of human trafficking and migrant smuggling that originate in Pakistan. Koser notes that "at the government level, irregular migrants are often viewed as just as valuable a source of remittances as legal emigrants and are not necessarily viewed as problematic." *Id.*



persons” and “juridical persons,”<sup>177</sup> and imposes restrictions on the provision of services (labor) by natural persons, which are not similarly imposed on juridical persons.<sup>178</sup> The institutional framework of the GATT/WTO and limitations on the obligations that member states assume or accept confer to capital the ability to trade freely and to obtain the desired skill profile of human labor providers.<sup>179</sup>

The trade is conducted as a transnational transfer within a corporate entity or among related corporate entities, or through the relocation of capital from one state to another.<sup>180</sup> Further, capital may depend, for its success and profitability, on the ability to price-discriminate among competing domestic markets. Corporations search transnationally for skilled labor and, through relocation of production facilities, have the ability to discriminate against relatively immobile, unskilled, and semi-skilled labor.<sup>181</sup> Capital also participates through privately owned entities that recruit and supply the skilled and unskilled labor that is sought in an individual domestic market but only readily available in a transborder location. Examples include the private recruitment entities who supply the H-2A and H-2B temporary workers who are allowed to enter under U.S. immigration law.<sup>182</sup>

It is fundamental to the interests and profitability of at least some forms of capital that the disjuncture between the multilateral trading system and

<sup>177</sup> Article XXVIII of the GATS defines juridical persons as “any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.” GATS, *supra* note 21, art. XXVIII.

<sup>178</sup> For example, as revealed by Steve Charnovitz’s comparison of WTO members’ obligations to liberalize labor and capital, while only the temporary presence of natural persons as labor suppliers is provided for under the GATS, capital is freed from temporal constraints on residence. See generally Charnovitz, *supra* note 96.

<sup>179</sup> As discussed in this Article *supra* Part II.B.1, the commitments made thus far by WTO members are limited to highly skilled labor providers and, in some cases, to intra-company transfers. See also Charnovitz, *supra* note 96, at 24. Reporting that:

The existing Mode 4 commitments by over one hundred countries are heavily tilted toward high-skilled persons. About 42 percent of horizontal commitments . . . relate to intra-company transferees; 28 percent relate to executives, managers and specialists; 13 percent are visitors for sales negotiations, 10 percent are other business visitors. The remaining percent are independent contractors and others.

*Id.* It is clear from this summation that liberalization fulfilling the needs and desires of for-profit juridical persons are privileged by existing GATS provisions and member state commitments.

<sup>180</sup> Thus, trading in higher-cost labor for lower-cost models.

<sup>181</sup> See, e.g., William J. Holstein, *The American Multinational, Unbowed*, N.Y. TIMES, June 29, 2008, at BU5 (reviewing GLOBALITY by Harold L. Sirkin et al., which celebrates the ability of American corporations to compete transnationally for human capital). See generally Special Feature, *Working Borders: Linking Debates About Insourcing and Outsourcing in Capital and Labor*, 40 TEX. INT’L L.J. 691 (2005) (discussing interconnections between the transnational flows of labor and capital).

<sup>182</sup> For a discussion of private labor recruiters in the United States, see *supra* note 153.

domestic immigration laws should continue. This Article argues, however, that maintenance of the status quo does not best serve the interests of states or individual human labor providers.

### 3. Humans Trade in Human Labor

Finally, human smuggling and human trafficking arise and grow in response to the labor market disequilibrium and other economic forces.<sup>183</sup> Would-be migrants who are unable to access state-sanctioned mechanisms that allow movement are forced to utilize the services of potentially exploitative middlemen in order to traverse the increasingly barricaded borders of nation states.<sup>184</sup> The interposition of domestic immigration laws and policies, including temporariness, and permanent second-class status, creates vulnerability to trafficking and other forms of exploitation. Temporal and portability constraints create exploitability and vulnerability, which extend to both legal and illegal transborder labor providers.

### 4. Characteristics of the Transnational Labor Market

The transnational labor market is characterized by the illegality and temporariness that is assigned by states to mobile human labor providers. While the demands of the globalized transnational economy require the movement of labor from one domestic economy to another, individual nations' domestic immigration law and the near-silence of multilateral trade law<sup>185</sup> barricade domestic economies from access by transborder labor providers.

States, capital, and humans work to supply the market from within the interstices and gaps created by formal and informal programs, "illegal" transborder movement, and bilateral agreements and arrangements.<sup>186</sup>

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<sup>183</sup> See Emmert, *supra* note 69, at 155 ("Restrictive rules in the E.U. and U.S. have created large numbers of illegal workers and thriving industries exploiting their unprotected status"). See generally Chacón, *supra* note 42 (discussing the interaction between restrictive immigration laws and migrant smuggling and human trafficking industries).

<sup>184</sup> For example, Indian transborder labor providers who used the services of middlemen to legally enter the United States allege that they were trafficked. See Preston, *supra* note 33; see also *Workers from India Sue, Charging 'Modern-day Slavery,'* CNN, Mar. 11, 2008, available at <http://h2bpresswatch.wordpress.com/2008/03/11/cnn-workers-from-india-sue-charging-modern-day-slavery/>; *Indian Men in U.S. 'Slave' Protest*, BBC NEWS, Mar. 27, 2008, available at [http://news.bbc.co.uk/2/hi/south\\_asia/7316130.stm](http://news.bbc.co.uk/2/hi/south_asia/7316130.stm). Guatemalan landscapers who used middlemen to enter illegally into the United States have made similar claims. Nina Bernstein, *Suit to Charge That Nursery Mistreated Laborers*, N.Y. TIMES, Feb. 8, 2007, at B2.

<sup>185</sup> That is, the failure of the GATT/WTO multilateral trading system to address the liberalization of labor. See discussion *supra* Part II.B.1.

<sup>186</sup> For example, the H-2B temporary labor system in the United States and Canada's CSAWP are facilitated by intergovernmental arrangements or agreements. See GRIFFITH, *supra* note 147, at 32 (discussing the British West Indies Temporary Labor Program); see also VERMA, *supra* note 122, at 13–16 (describing the Memoranda of Understanding between Canada and Mexico, and between Canada and individual Caribbean states, establishing the legal framework for transborder supply of temporary workers).

However, these means of access are merely narrow exceptions to the non-access default mode. The human labor providers are intentionally cabined and constrained by their dependence on employers, retention of the sending state's unequal bargaining power and status,<sup>187</sup> and restricted access to the applicable civil rights regime of the host state. The disjuncture and disequilibrium foster illegal movement—both migrant smuggling and human trafficking—and result in the vulnerability of human labor providers to trafficking and other forms of human exploitation.<sup>188</sup>

Other characteristics of the status quo in the transnational labor market include a two-tier system that privileges skilled labor<sup>189</sup> and the imposition of unequal status on both the legal and illegal migrant worker. This inferior status is based on temporariness and lack of access to real legal redress. The conflicts between the international human rights conception of humans and the multilateral trade regime's failure to fully address legal labor mobility<sup>190</sup> foster the vulnerability and exploitability of the individual would-be mobile human labor provider.

### B. Proposed Reforms

The disequilibrium in the transnational labor market has not gone unnoticed. Confronted with the disjuncture in legal regimes and the disequilibrium in the labor market, together with the consequent exploitation of human labor providers, several suggestions for change have emerged. The proposals for reform include (1) expansion and enhancement of domestic guestworker programs, (2) liberalization of labor within the context of regional trade arrangements, and (3) expansion of GATS Mode 4. None of the suggested reforms proffered thus far would address both the disjuncture and contradiction of the overarching legal systems—trade liberalization and domestic immigration law—nor adequately undermine the economic

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<sup>187</sup> See GRIFFITH, *supra* note 147, at 40 (describing the reluctance of government representatives from small Caribbean states to pursue redress for workers' grievances). Griffith reports that one of the representatives explained his quandary as follows: "If I advocate too hard for that worker, I'm liable to lose that placement to Mexico or Jamaica." *Id.*

<sup>188</sup> While the United States has led the charge, internationally, against human trafficking, some allege that U.S. military contractors in Iraq utilized trafficked labor to build the new U.S. embassy facility and in other capacities. See, e.g., Yochi J. Dreazen, *U.S. Investigates Firm Building Embassy in Iraq*, WALL ST. J., June 7, 2007, at A1; Cam Simpson, *Iraq War Contractors Ordered to End Abuses*, CHI. TRIB., Apr. 26, 2006.

<sup>189</sup> This privileged status is given to skilled workers despite the comparatively greater demand for unskilled labor in the domestic economies of high skilled post-industrialization states. See, e.g., Kategekwa, *supra* note 100. States and capital perceive that allowing the access of skilled labor may create more wealth and benefits for the domestic economies and polity of their states, and ignore the needs that would be filled by and the benefits that would accrue from the liberalization of *all* labor. See discussion *supra* Part II.B (regarding the projections of the economic growth benefits that would be harnessed through the liberalization of labor).

<sup>190</sup> Together with the immigration law and protectionist view of the migrant as a threatening profit or benefit-devouring Pac-Man-like economic unit.

foundations of the human-to-human exploitation of which trafficking in humans is among the most egregious.

### 1. Expansion and Enhancement of Guestworker Programs

Prior to September 11, 2001, the momentum was growing to expand and enhance guestworker programs in the United States. Much of the impetus behind these proposals, supported by various interest groups and by President George W. Bush,<sup>191</sup> was the U.S. economy's unmet demand for unskilled labor stemming from the conflict between the labor market's demands and the United States' restrictive immigration laws. An enhanced and expanded guestworker program was seen as a mechanism to regularize existing migration and to more closely align the demands of the economy with the flow of incoming labor providers. Discussion and support for such expansion and enhancement re-emerged in 2006, both from the White House and in the reform proposals submitted by Senators John McCain and Edward Kennedy.<sup>192</sup>

In her analysis of transborder labor, Professor Jennifer Gordon summarizes some features proposed by advocates of guestworker programs to ameliorate concerns about the programs' risks of exploitation:

The visa would need to be portable, rather than tied to a particular employer, because the potential for exploitation increases dramatically once an employer controls a worker's immigration status. The program would have to provide guest workers with full rights in the workplace, including the right to unionize, and it would need to contain multiple enforcement mechanisms for those rights, including access to federally funded legal service attorneys. It would have to allow guest workers to be accompanied by their families. Finally—and most controversially—most insist that it would have to create a path to permanent residence, permitting guest workers who wished to become permanent residents to apply for a green card after a time in temporary status. So long as these conditions are met, pro-guest worker unions say, it is far better to have a legal population of workers than one hidden in the shadows.<sup>193</sup>

Addressing the disequilibrium and disjuncture in the U.S. labor market, Professor Howard F. Chang analyzed the implications of the expansion of U.S. guestworker programs, pointing to safeguards that should be

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<sup>191</sup> See Rodriguez, *supra* note 144, at 219. See also Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 508 (2007).

<sup>192</sup> Rodriguez, *supra* note 144, at 224, n.12.

<sup>193</sup> Gordon, *supra* note 191, at 558.

implemented in order for the programs to satisfy liberal ideals.<sup>194</sup> Because discrimination against transborder workers would continue and because the consequent inequality conflicts with liberal ideals, Professor Chang acknowledged that the expansion of programs that grant temporary access would be the second best alternative to open access for migrant labor.<sup>195</sup> Nevertheless, Professor Chang pointed out that, given the current political climate and attitudes toward immigration, such expansion would be more feasible than open entry to foreign laborers.<sup>196</sup>

In support of this hypothesis, Professor Chang asserted that temporary or other limited access is preferable to current policies of exclusion.<sup>197</sup> He also argued that concerns regarding further prospective entrenchment of exploitation as a result of expansion of temporariness would be allayed in the United States. Because the birthright citizenship provision of the Fourteenth Amendment to the U.S. Constitution<sup>198</sup> does not allow for the inheritance of temporary status by the U.S.-born children of such guestworkers, Chang argued that any exploitation resulting from temporariness would not be perpetuated.<sup>199</sup>

Pursuant to Professor Chang's analysis, an expanded U.S. guestworker program could be enhanced through "liberalizing or eliminating labor certification requirements, quotas, and restrictions on the duration of guestworker employment or on their stays in the United States."<sup>200</sup> In addition, pursuant to his proposal, other revisions could include removing the restrictions on the industries and types of employment to which guestworkers

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<sup>194</sup> See generally Chang, *supra* note 137.

<sup>195</sup> *Id.* at 475, 478.

<sup>196</sup> *Id.* at 467–69.

<sup>197</sup> *Id.* at 477–80.

<sup>198</sup> Section 1 of the Fourteenth Amendment provides that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

<sup>199</sup> Chang, *supra* note 137, at 473. In this regard, U.S. law contrasts with those of other receiving countries, which have failed to confer status on children of guestworkers. In Germany, for example:

[a]lthough settled and maybe even born in Germany, most of those who came to the country under the *gastarbeiter* system are not eligible for German citizenship, which is based on the principle of *ius sanguinis*. A baby born in Germany of "Turkish" parents (who themselves were born in Germany) is not represented in official statistics as a birth, but as a migrant of one day's stay. Under current legislation, were the baby in fifteen years time, say, to commit what the German government deemed an offence, the child and parents would be liable for deportation. Indeed, the birth of the baby itself might constitute a reason for deportation, since migrants have to prove that they occupy a minimum number of square metres per residence.

ANDERSON, *supra* note 121, at 183.

<sup>200</sup> Chang, *supra* note 137, at 469–70.

would have access and, crucially, the addition of the freedom to leave a specific employer and seek alternative employment without violating the terms of the guestworker's visa.<sup>201</sup> Professor Chang contended that such expansion and enhancement of the program would benefit the economies of both the United States and the sending countries as well as the economic prospects of individual guestworkers, while increasing the workers' protection from exploitation.<sup>202</sup>

Newly-elected U.S. President Barack Obama has not yet addressed the comprehensive immigration reforms proposed in 2007. However, if President Obama's Administration does address such reforms, the proposals regarding guestworker programs remain on the table as a possible, albeit flawed and ad hoc, mechanism to resolve the U.S. domestic labor market disequilibrium.<sup>203</sup>

## 2. Liberalization of Labor Within Regional Trade Agreements

Another suggested model for dealing with the disjuncture and disequilibrium in the transnational labor market is the liberalization of labor within the context of regional trade arrangements.<sup>204</sup> I have argued elsewhere in favor of regional labor liberalization as a second best alternative and one that is more politically feasible than the prospect of multilateral labor liberalization.<sup>205</sup> There, I also argued that the factors in favor of such liberalization are strengthened where the member states are geographically contiguous or proximate.<sup>206</sup> Further, extant examples of labor liberalization within the context of regional trade arrangements, such as the European Union, may provide potential guidance to implementation methodologies and the flaws of such programs.

Pursuant to this proposal, member states of regional trade arrangements that purport to liberalize trade should include the liberalization of labor as a subject of their legal instruments. The quintessential example of such liberalization is the European Union, which has removed many barriers to the movement of nationals of its member states within EU borders. Other examples of such attempted liberalization include the Agreement Between

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<sup>201</sup> See *id.* at 470–71 (also arguing that freedom to leave the employer would help to protect workers from abusive situations).

<sup>202</sup> *Id.* at 480.

<sup>203</sup> For a strong criticism of guestworker programs based on their commodification of human beings and their labor, see Garcia, *supra* note 142. Professor Garcia opines that “[t]heir inherently temporary nature makes guestworkers unable to enforce their legal rights.” *Id.* at 28.

<sup>204</sup> Indeed, at least one commentator has suggested that the GATS might use as a model the liberalization of labor attained within some regional trade arrangements. See Winters et al., *supra* note 97, at 1152 (suggesting multilateral use of the NAFTA model).

<sup>205</sup> See generally Bravo, *Regional Trade Arrangements*, *supra* note 7 (arguing that regional trade arrangements in the Western Hemisphere have neglected the liberalization of labor, but that the neglect can and should be remedied).

<sup>206</sup> *Id.* at 85, 108–09.

Japan and the Republic of the Philippines for an Economic Partnership (“JPEPA”), a treaty executed by the two governments, but not yet ratified by the Philippine legislature.<sup>207</sup> The trade agreement provides, among other things, for the liberalized movement of certain categories of Philippine professionals to Japan, so long as specified certification requirements are fulfilled.<sup>208</sup> Other regional trade arrangements that have made incremental steps toward the liberalization of labor among member states include the Caribbean Community (“CARICOM”) and the Common Market of the Southern Cone (“MERCOSUR”).<sup>209</sup>

### 3. Expansion of Mode 4 of the GATS

The proposals for expansion of the scope of GATS Mode 4<sup>210</sup> take the following forms: creation of a GATS visa; expansion of the concept of service supplier; and expansion of the breadth and depth of commitments by member states. For example, Ryan Walters has suggested that the United States should champion the introduction and expansion of GATS visas that would provide multilateral transborder access to visa-bearers.<sup>211</sup> The benefits of such visas would include the expansion of the number and type of workers who possess the ability to undertake legal movement in response to transborder stimuli<sup>212</sup> and the streamlining of administrative barriers to entry.<sup>213</sup> An alternate proposal would more closely link “trade and . . . labor” concerns by offering enhanced labor liberalization in return for recognition and enforcement of minimum labor standards.<sup>214</sup>

Others suggest an expansion of the concept of a service supplier under the GATS,<sup>215</sup> so that the number and types of employment and industries

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<sup>207</sup> See, e.g., Veronica Uy, *Proposed ‘Conditional Concurrence’ on JPEPA Hit*, INQUIRER.NET, July 18, 2008 (discussing the Philippine legislature’s opposition to ratification of the proposed treaty).

<sup>208</sup> The JPEPA would lower barriers to the movement of some categories of Philippine nationals to Japan, so long as specified certification requirements were fulfilled. See *Agreement Between Japan and the Republic of the Philippines for an Economic Partnership*, Japan-Phil., ch. 9, Sept. 9, 2006. Other categories that would be liberalized include intra-corporate transferees and short-term business visitors. *Id.* ch.7.

<sup>209</sup> See Bravo, *Regional Trade Arrangements*, *supra* note 7, at 90–92 (discussing the treatment of labor liberalization by CARICOM and MERCOSUR).

<sup>210</sup> A number of scholars have written in favor of expansion of Mode 4 of the GATS. See, e.g., Charnovitz, *supra* note 96, at 250; Winters et al., *supra* note 97; Bhatnagar, *supra* note 134; Walters, *supra* note 99 (advocating for the United States to promote the global standardization of a GATS visa system).

<sup>211</sup> See Walters, *supra* note 99, at 116.

<sup>212</sup> *Id.*

<sup>213</sup> Charnovitz, *supra* note 96, at 250.

<sup>214</sup> See Emmert, *supra* note 69, at 154–56.

<sup>215</sup> For example, the inclusion of foreign natural persons who are employed by domestic firms. See, e.g., Winters et al., *supra* note 97, at 1153.

covered by its provisions would increase.<sup>216</sup> Yet others have proposed increasing liberalization of labor by expanding the commitments made by member states to include already existing ad hoc guestworker programs and subcontracting service arrangements.<sup>217</sup> Expansion of any of these categories would increase the number of human labor providers whose transborder movement is legally facilitated.

### C. *Critiques of Proposed Reforms*

Each of the proposed reforms offers the prospect of increased legal movement of human labor providers in response to transborder economic incentives. For example, if an expanded guestworker program were adopted unilaterally by each WTO member state, the effects on labor might be similar to those anticipated from the multilateral liberalization proposed in this Article. However, such individual adoptions would lack harmony; the scope of each individual domestic program would differ, as would the protections offered to individual labor providers.

In addition, the proposed reforms suffer from a number of flaws that would create obstacles to the multilateral labor liberalization proposed by this Article. That is, the reforms offer the prospect of continuing the failures of conceptualization and the economic disequilibrium that characterize the contemporary transnational labor market. As a result, the existing preconditions for exploitation, including the traffic in human beings, would continue. The proposed reforms offer the continued interposition of non-omniscient states obstructing market forces even as they attempt to respond to those forces. In addition, the proposals maintain the structures and mechanisms of exploitation, and continue to recognize and facilitate inadequate agency in individual human labor providers.

#### 1. Continuation of Existing Disjunctures

Each of the proposed reforms would continue the disjunctures identified in this Article. They do not recognize or enforce the equal status of labor as a factor of production under economic and trade theories. Further, they perpetuate the interposition of the state to interpret the demands of the market. For example, the guestworker program expansion, which prior to September 11, 2001, had gained some political traction, including the support of President Bush,<sup>218</sup> would have been limited to Mexican human labor

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<sup>216</sup> *Id.*

<sup>217</sup> See, e.g., *id.* at 1153–54. To date, GATS commitments made by individual WTO member states have been limited to highly skilled individuals subject to transfer requests by MNCs. Solomon, *supra* note 89, at 112. See also Kategekwa, *supra* note 100, discussing Least Developed Country (“LDC”) proposals regarding expansion of commitments to include additional sectors, industries and skill levels.

<sup>218</sup> See Press Release, White House, President Bush Proposes New Temporary Worker Program, Remarks by the President on Immigration Policy (Jan. 7, 2004), available at



providers. Such temporary worker programs do not offer a permanent structural solution. Instead, they provide examples of the inefficiency of the interposition of domestic policymaking and objectives into the global labor market as well as sclerotic bureaucratic implementation. This inefficiency is exemplified by the gap between the number of available visas and number of applicants for highly skilled visas for immigration to the United States.<sup>219</sup>

Like the guestworker programs, the proposed and actual experimentation with labor liberalization in the context of regional trade arrangements can only be transitional. As demonstrated by the European Union's experience, the liberalization within regional trade arrangements serves to move the border outward, but the perspective is essentially as inward-looking as was the status quo.<sup>220</sup> The EU experience with human trafficking is stark and salutary: continuing, higher barriers to outsiders, such as non-EU nationals,<sup>221</sup> leads to greater levels of vulnerability and of trafficking of those ineligible "others."<sup>222</sup> If human trafficking is to be attacked multilaterally,

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<http://web.archive.org/web/20040110025417/http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>; see also Michael A. Fletcher & Darryl Fears, *Bush Pushes Guest-Worker Program*, WASH. POST, Nov. 29, 2005, at A02.

<sup>219</sup> See *supra* notes 147–148 (discussing the mismatch between the number of workers needed and requested by U.S. employers and the number of visas issued by authorities).

<sup>220</sup> Instead of looking inward to the territory and interests of the state, policymakers look inward to the territory and interests of the region. See, e.g., Jan Silva, *EU Sets Rules for Deporting Illegals*, INDIANAPOLIS STAR, June 19, 2008, at A9; Caroline Brothers, *EU Passes Tough Migrant Measures*, N.Y. TIMES, June 19, 2008, available at <http://www.nytimes.com/2008/06/19/world/europe/19migrant.html?partner=rssnyt&emc=rss>.

<sup>221</sup> Ginette Verstraete, *Technological Frontiers and the Politics of Mobility in the European Union*, in UPROOTINGS/REGROUNDINGS: QUESTIONS OF HOME AND MIGRATION 225, 233 (Sarah Ahmed et al. eds., 2003):

What mediates the Union's "four freedoms" of movement is the contradictory concept of a European space without internal borders, inhabited by a subject entitled to absolute mobility only insofar as he or she is firmly territorialized and identifiable as the *national* subject from a participating state. *Mobility in Europe is without internal frontiers only to the extent that this limitless travel is firmly grounded in national territory and national identity.* It is the nation state which grants or withholds the citizenship that allows the individual to go/live/work elsewhere in the EU, thereby relinquishing some of its powers over those citizens while extending its social divisions on a European scale.

*Id.* (emphasis added).

<sup>222</sup> See, e.g., *id.* at 229:

With the free movement of goods and citizens in a European space without frontiers came the problem of how to detain those who, as non-E.U. citizens "*sans papiers*" posed a threat to this borderless territory. In other words, new frontiers had to be implemented to be able to distinguish between Europeans and non-Europeans, and between (authorized) travel and (unauthorized) migration. The freedom of mobility for some (citizens, tourists, business people) could only be made possible through the organized exclusion of others forced to move around as illegal "aliens", migrants, or refugees. So with the production of a mobile citizenship in a Europe without (symbolic and literal)

and exploitation not merely shunted outside of individual state borders or to internally located "others," the EU example indicates that a multilateral labor liberalization solution is preferable to a regional solution. Incentives for unsanctioned transborder movement will continue outside the borders of the regional trade arrangements. Those excluded from the limited number of mobile categories defined in regional treaties will continue to attempt to enter, and to be vulnerable to exploitation.

Further, domestic guestworker or temporary labor programs, no matter the specifics of their institutional framework, have historically failed in their dual purposes of filling a temporary demand for labor and stemming the inward flow of illegal movement into the territory of the state.<sup>223</sup> Instead, experience indicates that guestworker programs will achieve the opposite effect.<sup>224</sup>

## 2. Trade Diversion

A regional labor liberalization solution will exhibit the trade diversion flaws of regional trade arrangements.<sup>225</sup> To the extent that labor is liberalized in a covered region, human labor providers who, under a multilateral labor liberalization framework, might have been better compensated outside that region may instead be limited in their option to seek "legal" economic opportunities. Further, capital may be attracted to the larger pool of liberalized labor within the regional trade arrangement to the detriment of equally qualified and otherwise competitive labor located outside the borders of a particular regional trade arrangement.

Nevertheless, as a second best alternative in a non-ideal world, and to overcome social and political barriers through the lens of experience, member states in regional trade arrangements should be encouraged to experiment with the liberalization of labor.

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"internal frontiers" came the tightening up of checks for immigrants and refugees at the "external borders."

*Id.*

<sup>223</sup> See, e.g., Gordon, *supra* note 191, at 560 ("As a historical matter, guest worker programs in the United States and Europe have led to increased migration, including undocumented migration."). See also Rodriguez, *supra* note 144, at 221 ("As studies of guest worker programs consistently reveal, however, though a guest worker program may address labor market demands, it will do so at the risk of compounding the illegal immigration problem and perpetuating the poor treatment of migrant workers.").

<sup>224</sup> See Gordon, *supra* note 191, at 560.

<sup>225</sup> See, e.g., Helena Marques, *Migration Creation and Diversion in the EU: Are CEECs Immigrants Crowding Out the Rest?*, (Loughborough Univ. Discussion Paper No. 2005-01, 2005) (posing this question with respect to the European Union, and analyzing empirical data). The debate regarding the trade diversion or trade promotion effects of regional trade agreements has generated a great deal of scholarly thought. See, e.g., Jagdish Bhagwati, *PTAs: The Wrong Road*, 27 L. & POL'Y INT'L BUS. 865, 869 (1995).

### 3. Conflict with Liberal/Human Rights Values

Other concerns include the proposed reforms' continued conflict with human rights and liberal ideals.

#### *a. Continued Opportunities for Exploitation*

According to Professor Cristina Rodriguez, safeguards offered by proponents of expanded and enhanced guestworker programs perpetuate the fundamental inequality in transborder labor relationships that facilitates exploitation (including the exploitation designated as "human trafficking"). Professor Rodriguez notes that:

On the face of things, guest worker programs might seem to promote reciprocity. The receiving society has engineered for itself and the guest worker an apparent bargain. Workers send money home they otherwise would not have had, and the receiving society saves as well. . . . [However,] [b]y creating a temporary laboring class without full participation rights, or even the prospect of full participation rights, such programs introduce opportunities for exploitation and inequalities into social, political, and economic relations that are unacceptable in a democratic society that depends on the ongoing consent of its subjects and an absence of castes.<sup>226</sup>

The balance of power will remain with the employer<sup>227</sup> or the state<sup>228</sup> so that transborder labor providers will remain exploitable.

#### *b. Permanent "Other"-ness*

Guestworker programs create a permanent underclass. As noted by Professor Gordon, even if individual workers change, the programs provide for legal affirmation of the inferiority and exploitability of a specified class—one whose individual members may change.<sup>229</sup> That affirmation rests upon the fungibility of the human labor providers, and maintains their exploitability. Moreover, if the guestworkers are racially or ethnically "other" than the receiving society, historical and contemporary experiences

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<sup>226</sup> Rodriguez, *supra* note 144, at 281–82.

<sup>227</sup> See discussion, *supra* Parts II.A.1.a, b.

<sup>228</sup> Rodriguez, *supra* note 144, at 283 (noting "the power of the state looms tyrannically over guest workers in the form of the constant threat of deportation . . .").

<sup>229</sup> See, e.g., Gordon, *supra* note 191, at 561 ("From a societal perspective, it is not an answer to concerns about second-class citizenship that any one migrant's time in that status may be brief. The class itself is permanent, even if its composition changes over the years.").

demonstrate that racist attitudes will develop and become entrenched based on the guestworkers' inferior and subordinate status under the program.<sup>230</sup>

c. *Perpetuation of Involuntary "Temporariness"*

Finally, instead of allowing human labor providers the choice to react freely to economic realities, guestworker programs are an ad hoc solution to a systemic problem.<sup>231</sup> Such programs perpetuate constrained temporariness, subordinating human goals, desires, and economic activity to the state's interpretation of its economic needs. The autonomy and agency of the human labor provider continue to be subject to the interposition of national political and economic policy, which is too often misguided and shortsighted. The labor provider continues to be temporary, instead of having the option to remain permanently.

d. *Inadequacy of Coverage*

Despite calls for enhancement and expansion of the GATS Mode 4 (which applies to the movement of natural persons to provide transborder services), the GATS is fundamentally ill-equipped to fulfill the role of liberalizing labor that would be provided by the General Agreement on Trade in Labor proposed by this Article.<sup>232</sup> GATS Mode 4, due to its internal temporal constraints, is inadequate to the task of liberalizing labor. As stated by Solomon, the GATS Mode 4 covers only "a subset of a subset of a subset" of the transnational labor market.<sup>233</sup> The GATS encapsulates WTO member states' negotiated agreement regarding liberalization of trade in *services*. The human labor provider who has not secured transborder employment, who, in fact, is moving transnationally *in search of* such employment, falls outside of the GATS' auspices.<sup>234</sup> In order to truly undermine the economic foundations of human trafficking, human labor must be as liberalized as the other factors of production, and that liberalization must include more than the temporary movement of labor.

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<sup>230</sup> The inferior status and exploitability of Mexican migrant workers under the *Bracero* program helped to entrench racist attitudes toward Mexicans in the areas of the United States where the program operated.

<sup>231</sup> Rodriguez, *supra* note 144, at 280 ("In the end, guest worker programs offer an ad hoc solution to a persistent problem.").

<sup>232</sup> See *infra* Part IV.B.

<sup>233</sup> See Solomon, *supra* note 89.

<sup>234</sup> See, e.g., Tomer Broude, *The WTO/GATS Mode 4, International Labor Migration Regimes and Global Justice*, INT'L L.F. 5 (Hebrew Univ. of Jerusalem, Research Paper No. 7-07 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=987315](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987315) ("[T]he GATS applies only to labour-migration that is service related and does not establish free movement of yet unemployed labour."). Professor Broude concludes "the GATS Mode 4 does not appear to be the appropriate model" for the establishment of an international migration regime that is "morally permissible, politically possible and likely to be effective." *Id.* at 31.

In order to undermine the economic foundations of human trafficking, labor must be brought front and center instead of being subsumed into other inputs in production. None of the other proposals for addressing the transnational labor market disequilibrium attempts to rethink and facilitate the role of labor in economic activity. Furthermore, the proposals perpetuate the fundamental source of the disequilibrium from which human trafficking emerges: the interposition of the state between the human labor provider and the economic stimuli to which the provider attempts to respond.

From the human rights perspective, the constraint of temporariness counters the autonomy and agency of human labor providers, and is fundamentally contradictory to the liberalization advocated in this Article. From a political perspective, renegotiation of the GATS<sup>235</sup> to broaden the inclusiveness of its provisions presents such a difficulty that it is preferable to aim for the most effective strategy, even though that strategy may be equally difficult to achieve. Rather than tinkering with the GATS, which addresses only “a subset of a subset of a subset”<sup>236</sup> of the transnational labor market, this Article advocates that the difficult task of multilateral labor liberalization should be unconstrained by temporal limitations on the mobility of human labor providers.

#### IV. SOLUTION: MULTILATERAL LABOR LIBERALIZATION

*Nobody is master of the world and I think that people should be free to live where they want, there shouldn't be borders, we have needs and they ought to give us our chance to be able to earn enough to live . . . . But they return you, simply and purely because they don't want you to stay.*<sup>237</sup>

Restrictive immigration policies do not work to constrain the flow of labor.<sup>238</sup> Instead, they serve to facilitate the exploitation of the migrant and

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<sup>235</sup> See, e.g., Winters et al., *supra* note 97, at 1149; Bhatnagar, *supra* note 134.

<sup>236</sup> See Solomon, *supra* note 89, at 111.

<sup>237</sup> Peruvian domestic workers quoted in ANDERSON, *supra* note 121, at 33.

<sup>238</sup> Anderson explains:

*Immigration restrictions do not stop movement, and once migrants have entered a country only a minority are deported. The difficulty with stringent and restrictive immigration laws is that since they cannot stop migration, they mean that migration is forced to come through irregular channels and that state control over patterns and directions of migrant labour is relinquished rather than increased. This is clearly apparent when one contrasts Spain, where it is possible for domestic workers to enter legally, with Greece and France, where this is not so.*

*Id.* at 178 (emphasis added).

would-be migrant,<sup>239</sup> such that entire industries, both legitimate and illegal, grow from lucrative and fruitless border enforcement.<sup>240</sup>

The fight against the modern traffic in humans would be enhanced by recognizing labor's role in the international economic system and acknowledging that, within the world trading system, labor (human capital) should be given status analogous to other inputs into production, such as capital and intellectual property. The comparative advantage of some states—usually developing countries—is their abundance of available labor. Individuals and organizations from those countries should be able to trade their labor freely across borders within the institutional framework of the GATT/WTO system. The negotiation and entry into force of a multilateral agreement on trade in labor offers the prospect of achieving the goals of both human rights—by successfully combating the trade in humans—and trade liberalization—through the efficient use of economic resources with welfare-enhancing effects.

Negotiation, execution, and entry into force of a General Agreement on Trade in Labor would also demand reform of individual states' domestic immigration laws to reflect economic needs and reality, as well as enforcement of international human rights and domestic civil rights standards. Further, this proposal demands no less than a holistic rethinking of labor so that labor has the freedom to freely pursue economic goals in a global market that recognizes and enforces fundamental human rights.

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<sup>239</sup> See, e.g., HAYTER, *supra* note 82, at xxv ("Suffering is an inevitable consequence of immigration control.").

<sup>240</sup> Verstraete provides an example:

[N]ot only is border control a burden for private enterprises, it can also be a gain. Lots of money is to be made in the implementation of strict borders, ranging from high-tech surveillance systems to the deployment of security guards to the deportation of illegal "aliens" by commercial airlines. Furthermore, the harder the external border, the more attractive the unofficial routes circumventing it. Smuggling people in has become a lucrative business, and not only in the countries of departure. Since the possibility of people migrating legally has become minimal, several European truckers are getting rich through organized trafficking networks.

Verstraete, *supra* note 221, at 235.

### A. *Re-Conceptualizing Labor*

*At some future point in world civilization, it may well be discovered that the right to free and open movement of people on the surface of the earth is fundamental to the structure of human opportunity and is therefore basic in the same sense as is free religion, speech, and the franchise.*<sup>241</sup>

In Part III, this Article elaborated on the disjuncture and consequent human exploitation that the gap between the rhetoric and reality of the contemporary model of trade liberalization creates. Here, the Article explains why a re-conceptualization of human labor is necessary.

The conceptual framework that permits human trafficking thrives within the intersection of the conceptualization of labor and its providers purely as commodities. The framework is evidenced by, for example, references to “human capital” and the accepted premise that capital owes very little to labor—evidenced in developed countries by movement away from pension plans, toward mass layoffs, and away from healthcare plans for retirees. This emphasis on cheapness, efficiency, increasing returns, and lower-cost inputs could lead, at the extremes, to the conception of humans (and not only their labor and its products) as trade objects.<sup>242</sup>

At the same time, and in contradiction, the absence of a general agreement on trade in labor and the failure to recognize such a role for labor in existing WTO arrangements convey the message that the multilateral trading system eschews conferring on labor the status of a factor of production. That message contradicts the existing economic reality. The current system allows labor’s exploitation as a factor of production while denying labor full autonomy to explore economic opportunity. In order for human labor to claim its proper place in the world trading system (equal to the other mobile factors of production), and to enjoy the human rights promised by the international human rights regime and by some domestic civil rights regimes, labor must be recognized as an autonomous economic unit and liberalized to perform as such.

This Article recognizes the fundamental moral, philosophical, and ethical truth that labor is not merely a commodity. However, this Article seeks to point out and to provide a solution that is based on the reality that, while more than a unit of production or economic input, human labor providers are also just that—economic units and factors of production. A holistic re-conceptualization and implementation of that human role is absolutely necessary to successfully combat human trafficking and other forms of profitable human-to-human exploitation.

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<sup>241</sup> Roger Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 212, 218 (1971).

<sup>242</sup> See, e.g., Garcia, *supra* note 142, at 28 (articulating the view that guestworker programs lead to the commodification of the worker).

Some have questioned whether the trade law regime is inconsistent with human rights.<sup>243</sup> A thorough response to this question is outside the scope of this Article, but the Article identifies as a contributing factor the gaps in conceptualization of humans under human rights law and under international trade law. Neither international human rights law nor international trade law recognizes or implements the full array of human attributes. Consequently, while under human rights law the individual is more than an economic unit, under domestic immigration law human labor providers are *treated as* economic units (often in contravention of human rights law)<sup>244</sup> and the same is true, implicitly, under international trade law.<sup>245</sup> In fact, the international trade system *treats* and relies upon humans as functioning economic units—producers and consumers<sup>246</sup>—without explicitly recognizing and implementing the necessary steps for their liberalization.

### B. *General Agreement on Trade in Labor*

In order to attack the structural foundations of human trafficking, the transnational economic disequilibrium that facilitates this exploitation must be addressed. The most appropriate mechanism for this task is the establishment of full labor mobility in a cosmopolitan mode. This Article's proposed liberalization of labor would make both the international human rights and multilateral trade regimes more consistent with human rights ideals. Liberalization of the movement of labor will give labor more economic power—the ability to respond freely and autonomously to economic

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<sup>243</sup> See, e.g., Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51, 64–76 (1999) (discussing the apparent and seemingly inherent conflict between market globalization and human rights). Professor Garcia rejects the conflict, however, noting that “[t]he linkage debates currently underway in trade law and policy reveal to us that international economic law is fundamentally about justice, as are human rights law and other linkage issues.” *Id.* at 95–96.

<sup>244</sup> Anderson explains the tension:

The migrant worker is framed by immigration legislation as a unit of labour, without connection to family or friends, a unit whose production costs (food, education, shelter) were met elsewhere, and whose reproduction costs are of no concern to employer or state. In this respect, the worker who moves across continents may seem the logical result of capitalism's individual subject, the juridical person, torn from all social contexts, selling her labour power in the global market place. But while states and capitalists want workers, what they get is people. This tension between 'labour power' and 'personhood' is particularly striking with reference to migrant domestic workers, and I believe it has broader repercussion for migrants and for women.

ANDERSON, *supra* note 121, at 108.

<sup>245</sup> The four Modes of the GATS implicitly recognize that role, whereby humans provide labor service under Modes 3 and 4. See *supra* Part II.B.1.

<sup>246</sup> For example, a central tenet of the GATT/WTO jurisprudence is based on the notion of consumer choice, that is, humans as the creators of economic trends and competitive realities in their role as *consumers*.



conditions. Further, the right to enter and exit competing domestic labor markets will exert pressure, creating competitive conditions and market discipline that will enhance the recognition and enforcement of labor and other human rights standards. That ability of the human labor provider will add substantive content to human rights in a manner that a static population currently cannot achieve.<sup>247</sup> As a result, labor liberalization will foster the enforcement of human rights.

Additionally, movement of labor providers from today's labor-rich countries would not exhibit the exploitative features of mass labor movements of the colonial era.<sup>248</sup> Contemporary international human rights and domestic civil rights laws provide a baseline of minimum treatment that did not exist in the colonial era.<sup>249</sup> The liberalization of labor will enhance the capacity to implement and enforce that baseline of minimum standards within competing domestic markets. Moreover, the baseline must be enforced through renewed implementation of existing monitoring and enforcement mechanisms aimed at upholding human rights standards. The application of credible enforcement standards, in particular, would invigorate this process. The relationship is symbiotic—liberalization would not enhance enforcement in the absence of a baseline of recognition and enforcement of full personhood; without liberalization the baseline is inadequately enforced.

The baseline is, in large part, embodied in the four dominant anti-trafficking conceptual and legal frameworks discussed in Part II. The structural economic- and trade-based solution offered here can succeed only if coordinated with enforcement and entrenchment of the dominant frameworks' anti-trafficking norms and mechanisms. This Article's structural liberalization framework seeks to decrease or eliminate vulnerability to trafficking. However, where such exploitation does take place, the trafficked persons' rights must be vindicated, and the trafficker prosecuted.

There is some ironic justice in the proposed labor liberalization solution. It may produce a flow of labor opposite to that of the colonial era. Instead of the European movement outward to facilitate the development and industrialization of Western economies, it may produce a movement from former colonies to those Western economies.<sup>250</sup> The prerequisites for growth of the formerly colonized territories and the world economy demand the liberalization of labor. The General Agreement on Trade in Labor ("GATL") would acknowledge the roles of human labor in transnational trade and provide meaningful global autonomy to the individual human labor provider.

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<sup>247</sup> That is, the power to exit will impose market discipline on would-be autocrats seeking to oppress the populations within their national borders.

<sup>248</sup> For example, indentured servants moved from India to the West Indies, Fiji, and Africa within the British colonial empire. See *INDIAN INDENTURED*, *supra* note 138.

<sup>249</sup> Examples include human rights recognized and obligations assumed by states under the Universal Declaration of Human Rights, the ICESCR, and the ICCPR.

<sup>250</sup> See *MASSEY ET AL.*, *supra* note 2, at 91–92, 95–96.

## 1. Rationale

The new GATL would create a framework for recognition and increasing liberalization of labor under the auspices of the World Trade Organization ("WTO"). As envisaged here, the GATL would be negotiated and adopted as a new Annex to the WTO Agreement—a multilateral agreement creating obligations for all members of the WTO.<sup>251</sup> Similar to the TRIPS and the GATS, a transitional period would be applied to accession by WTO developing and least-developed members.

By advocating a new GATL, analogous to the GATS and the TRIPS and having equal force, this Article rejects the dominant conceptualization of the role of human labor in the international trading system. It also rejects the piecemeal approach of gradual expansion of Mode 4 of the GATS because that approach is inadequate to this Article's goal of undermining the economic foundations of human trafficking through transnational labor liberalization.<sup>252</sup> The proposal also brings to the fore and gives substance to an attribute of labor that is crucial to combating the traffic in humans—labor's transnational mobility.

Inherent in this Article's advocacy of a multilateral instrument is the view that regional experiments with labor liberalization are transitional. The multilateral trading system incorporates domestic economies into a global economy. The economic forces that stimulate dislocations and the responsive movement of human labor providers are global in scope. Experiments within regional trade arrangements will contribute knowledge and experience toward building a multilateral legal framework. However, labor must be liberalized to act *globally* in response to global economic forces.

The GATL would un-tether the transnational trade in labor from the constraints of Mode 4, including the mandated temporariness of the transborder labor movement contemplated by Mode 4.<sup>253</sup> It would also un-tether human movement from the irrational nativist constraints of domestic immigration laws that too often lay the foundation for exploitation, of which human trafficking is but one extreme example.

## 2. Why the WTO?

The GATT/WTO framework is the most appropriate venue for effectuating this transformation. It might appear that the principle of labor liberalization or labor mobility might be addressed more appropriately under the auspices of some alternative international regime, such as human

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<sup>251</sup> Status as a plurilateral agreement, in which participation would be optional for WTO member states, would not achieve the purposes sought through this agreement.

<sup>252</sup> See discussion *supra* Parts III.B, III.C.

<sup>253</sup> As discussed in *supra* Part III.A., the constraint of temporariness is a key source of exploitability and vulnerability for human transborder labor providers.

rights<sup>254</sup> or labor rights.<sup>255</sup> However, both of those regimes have proved and will continue to prove unable to implement the principle of the liberalization of labor as a factor of production, so that labor may act as an autonomous economic unit in the world trading system.

Perhaps even more persuasive is the fact that the explicit incorporation of labor into the multilateral trading system would coincide with the vision of the original drafters of the Havana International Trade Organization Charter (“ITO Charter”). The ITO Charter would have created the (stillborn) International Trade Organization<sup>256</sup> whose provisions were intended to supersede the provisions of the 1947 GATT (the original instrument of multilateral trade liberalization).<sup>257</sup> The instrument included several provisions that addressed labor standards and employment issues as an essential part of multilateral trade liberalization.<sup>258</sup>

Not only does labor liberalization sit squarely within the trade liberalization *raison d’être* of the WTO, the equity rationale of the GATT/WTO system<sup>259</sup> also speaks in favor of utilizing the WTO’s institutional framework to further the liberalization of labor. According to Charnovitz, certain features of the WTO institutional and treaty obligation framework—such as “special and differential treatment,”<sup>260</sup> and almost certainly, the longer transitional periods for least developed countries—indicate the existence of the equity rationale. As such, the WTO provides an appropriate framework for the mechanism of labor liberalization—a mechanism aimed at combating human trafficking by more widely disseminating the benefits of trade liberalization.<sup>261</sup>

Further, the GATL, as part of the GATT/WTO system, would offer the advantage of the flexibility incorporated within that framework. Within the

<sup>254</sup> Labor liberalization may be better addressed in the human rights regime by, for example, expansion of the recognition of the individual right to freedom of movement.

<sup>255</sup> The International Labor Organization (“ILO”) is one example of an alternative international regime that may more appropriately address labor liberalization.

<sup>256</sup> See BHALA & KENNEDY, *supra* note 88, at 1–3.

<sup>257</sup> *Id.* at 2.

<sup>258</sup> See, e.g., ITO (Havana) Charter arts. 2 (Importance of Employment, Production and Demand in Relation to the Purpose of this Charter), 3 (Maintenance of Domestic Employment), *reprinted in* RAJ BHALA, *INTERNATIONAL TRADE LAW HANDBOOK* (2d ed. 2001).

<sup>259</sup> As identified by Charnovitz, for example. See Charnovitz, *supra* note 96, at 242 (“The equity rationale for the WTO is further justification for reducing barriers to the movement of people.”).

<sup>260</sup> GATT Part IV and a number of the Annexes to the WTO Agreement (TRIPS and TRIMS, for example) provide for special and different treatment between the legal obligations of WTO member states. The distinction, which is based on the development status of member states, provides certain legal advantages to developing and less developed countries, without triggering the non-discrimination provisions of the GATT/WTO system.

<sup>261</sup> See Bravo, *Regional Trade Arrangements*, *supra* note 7, at 110 (arguing that labor liberalization will democratize access to the benefits of trade liberalization).

overarching obligations and principles negotiated by the member states, the commitments made by individual members may be tailored to individual states' circumstances so as to slow down or speed up the transitional challenges anticipated from the liberalization of labor.

The GATT/WTO system offers the power to sanction, a power that is missing from both the general human rights and labor rights regimes.<sup>262</sup> The Understanding on Rules and Procedures Governing the Settlement of Disputes<sup>263</sup> of the GATT/WTO system offers an avenue for effective mutual member state enforcement of GATT/WTO obligations. Finally, as this Article advocates for the recognition and implementation of labor's role in the global trading system, it is appropriate that such recognition and implementation be incorporated into the treaty architecture of the existing multilateral trading regime.

### 3. Principal Provisions

This Article offers a preliminary structure for the GATL, but will not provide a fully drafted example of the proposed treaty.<sup>264</sup> Instead, some necessary provisions will be discussed. Some of the key provisions that are fundamental to the functioning of the GATL and the implementation of the labor liberalization that it would put in motion include: elaboration of the fundamental obligations of WTO members; recognition of the applicability of the nondiscrimination provisions already employed within the GATT/WTO system; and enumeration of permitted exceptions to the overarching obligation.<sup>265</sup>

Elaboration of the member state obligations would include language that provides for a commitment on the part of member states to the principle that labor should be liberalized to respond to transborder economic forces. It would also allow access to the domestic labor markets of member states. Crucially, the provisions would make clear that member states would not

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<sup>262</sup> See discussion *supra* Part II.A.2.

<sup>263</sup> WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1125 (1994).

<sup>264</sup> In his new book advocating labor mobility, leading international trade scholar, Joel Trachtman, proposes and drafts a model labor liberalization agreement. See JOEL P. TRACHTMAN, *THE INTERNATIONAL LAW OF ECONOMIC MIGRATION: TOWARD THE FOURTH FREEDOM* (2009). For another example of a proposal to liberalize labor, see also World Comm'n on the Social Dimension of Globalization Proposal: General Agreement on Movement of People, [http://www.ilo.org/dyn/idea/ideasheet.display?p\\_idea\\_id=21](http://www.ilo.org/dyn/idea/ideasheet.display?p_idea_id=21) (last visited Mar. 28, 2009).

<sup>265</sup> This enumeration would be key in order to avoid the evisceration of the obligation to liberalize labor through, for example, application of the National Security exceptions of Article XXI of the GATT. Despite the nondiscrimination obligations that prohibit more favorable treatment on the basis of country of origin (National Treatment and Most Favored Nation), GATT 1947 creates exceptions to member states' obligations, including protection of national security, health of plants, animals and humans, and public morals. See also *infra* notes 266–271 and accompanying text.

impose temporal constraints on the transborder movement of labor, but instead would allow human labor providers to respond freely to changing labor markets and other economic stimuli. Second, the GATL's recognition of the established nondiscrimination doctrines would expressly invoke both the national treatment and most favored nation obligations.<sup>266</sup>

Third, the provisions governing exceptions applicable to the principle of labor liberalization would be crucial. The GATT and the multilateral

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<sup>266</sup> Article I of the GATT 1947 spells out the Most Favored Nation obligations of member states. Article I:1 specifies that:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT 1947 art. I.

Article III of the GATT 1947 lays out the National Treatment obligation. Article III:1–2 and 4 specify that:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

...

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

GATT 1947 art. III. These provisions are echoed in the GATS and the TRIPS. For details, see Articles II (Most Favored Nation) and XVII (National Treatment) of the GATS and Articles 3 (National Treatment) and 4 (Most Favored Nation) of the TRIPS. *But see* Broude, *supra* note 234 (arguing that the applicability of National Treatment and Most Favored Nation Obligations are barriers to liberal migration because they undermine state incentives to allow increased access).

agreements previously referenced in this Article provide for a number of exceptions to the application of their trade liberalization provisions. Those exceptions include, for example, anti-dumping provisions,<sup>267</sup> health and safety of humans, plants, and animals,<sup>268</sup> and national security,<sup>269</sup> among others.<sup>270</sup> In order to provide for the full implementation of the GATL, the provisions of that agreement would need to specify the applicability of existing exceptions, including the non-applicability of some of those provisions,<sup>271</sup> as well as interpretive guidelines governing the application of allowed exceptions.<sup>272</sup>

In addition, the GATL and its interpretation will be subject to existing GATT/WTO jurisprudence and to nondiscriminatory criminal and other public order legal regimes of individual member states. Member states would not be obligated to allow the entry of individual labor providers who intend to participate in illegal and/or illegitimate endeavors. For example, the GATL would not require the entry of individual labor providers destined for the illegal sex trade or other industries that are illegal under the laws of the host member state. In addition, activities that are *malum in se*, such as the movement of underage children for sexual or other types of exploitation, would not be facilitated by the provisions of the GATL.

Professor Kevin R. Johnson, in advocating an open border policy for U.S. domestic immigration laws,<sup>273</sup> has specified a number of potential limitations on that policy. These include restrictions on the entry of individuals based on threats to health and safety, prior criminality, and state security (e.g., terrorism).<sup>274</sup> The restrictions that Professor Johnson proposes provide a good starting point for the negotiation of exceptions that would be applicable to the multilateral obligation to liberalize labor.

In confronting non-tariff barriers to the liberalization of labor, the GATL would need to address areas such as the transferability of national

<sup>267</sup> GATT 1947 art. VI; Multilateral Trade Agreements on Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Implementation of Article VI of the GATT, 33 I.L.M. 1125 (1994). Anti-dumping mechanisms allow a state to take action to protect its economy and producers against the sale of products in its domestic markets at below production cost. See, e.g., BHALA & KENNEDY, *supra* note 88, at 649–51.

<sup>268</sup> GATT 1947 art. XX(b).

<sup>269</sup> *Id.* art. XXI.

<sup>270</sup> See generally *id.* art. XX (General Exceptions).

<sup>271</sup> For example, the “public morals” exception of Article XX(a) of GATT 1947 may lead to the construction of barriers to entry that may, in fact, be rooted in xenophobic sentiments. GATT 1947 art. XX(a).

<sup>272</sup> In the absence of such restraints, the domestic markets of individual member states might be re-structured in reaction to liberalization so as to give preference to the member states’ citizens.

<sup>273</sup> See generally JOHNSON, *supra* note 110 (calling for a fundamental reconceptualization of U.S. immigration policies and laws).

<sup>274</sup> *Id.* at 37.

educational and professional credentials, recognition of such credentials, and mechanisms for credentialing. Among existing regional trade arrangements, the European Union has gone furthest on the path of free movement of labor among member state nationals. Thus, the EU model would provide some guidance. Federal states, such as the United States, also have considerable expertise in the credentialing of professionals across internal state borders. The GATL would also need to address the interaction of credentialing with health and safety concerns (in the medical professions, for example) and circumvent the consequent temptation and opportunity for protectionist maneuvering.

Finally, the GATL should address the applicability of dumping and anti-dumping provisions. It is foreseeable that the entry of a large number of workers with specific skill sets, who accept lower wages than is the norm in a particular domestic market, might give rise to dumping charges and anti-dumping action by the receiving (host) state. The interaction of domestic labor standards and state obligations to enforce standards, including applicable minimum wage provisions, would be crucial to the functioning and implementation of the GATL and to the prevention of the negative effects of such "unfair competition" on domestic labor providers.

While the foregoing summary is an incomplete outline of the types of issues that the GATL must address, it identifies the key mechanisms necessary to enshrine the principle that labor should be free to respond to transborder market forces. At the same time, it leaves to member states of the WTO and their negotiators the task of shading in subtleties of implementation without eviscerating the fundamental obligation to liberalize labor.<sup>275</sup>

### C. *Anticipated Critiques and Responses*

This Article employs an economics-based and trade-inspired lens that is not usually applied to the trafficking of human beings. Further, the solution proffered here, which is aimed at combating and undermining the economic pillars of modern human trafficking, appears to require radical rethinking and reorganizing of transnational and international relationships. As a consequence, the critiques of this proposal will be many and heartfelt. They will include accusations of overkill and inadequacy, conflict with human rights norms, challenges to and severe disruption of nation states and their sovereignty through floods of individual human labor providers from labor-rich to labor-poor states, and lack of political will, among others. The Article responds below to some fundamental arguments that will be advanced to contest the liberalization of labor, but argues that such counterarguments do not negate the analytical framework and proposal explored here. The

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<sup>275</sup> A key issue is the question whether developing and less developed countries will negotiate for the transitional application of the GATL obligations, analogous to the transitional application of the TRIPS Agreement, for example.

responses outlined in this Article are by no means complete, but each of the foregoing critiques is addressed below.

### 1. Inadequacy

This Article's analysis of the economic foundations of human trafficking is subject to the critique of inadequacy. That is, in evaluating the economic pillars of human trafficking, the discussion has focused on the supply side rather than the demand aspect of human trafficking. Given that lens, is the solution proposed here subject to the critique leveled against the War on Drugs and the attempted interdiction of other illicit substances?

The critique of a supply-side focus is not completely accurate. While primarily focused on the obstructed supply of individual human labor providers, the analysis has explicitly acknowledged the demand for cheaper labor. Indeed, this Article claims that demand for cheaper labor has led to the involvement in and framing of the transnational labor market by nation states, capital, and human suppliers.<sup>276</sup> However, this Article is based on the central thesis that, whatever the existing and future demands may be for human-to-human exploitation, it is the *vulnerability* of human labor providers to that demand that allows human trafficking to flourish. The pedophile or the consumer of cheap labor would demand their desired human merchandise in vain if the supply of such would-be victims were limited through deployment and harnessing of economic forces. Further, this Article does not claim that human nature will discontinue its tendency toward exploitative relations—incidents of such exploitation *will* continue. However, by eliminating or severely decreasing the potential supply, human trafficking can be re-made into the aberrational practice that anti-trafficking discourse now pretends that it already is.<sup>277</sup>

The supply focus of this Article's proposed solution differs fundamentally from that employed in the War on Drugs. The War on Drugs attempts to end the consumption of illicit and illegal substances by stamping out the supply, and thus destroy the market for those substances. This Article does not propose to end the transnational labor market; instead, it proposes that the flow of human labor providers be liberalized and that the transnational scope

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<sup>276</sup> See discussion *supra* Part III.A.1–III.A.3.

<sup>277</sup> The expressions of horror about “shocking” examples of human trafficking serve to mask the reality that such exploitation is, for too many, purely quotidian. Furthermore, such exploitation is all too frequently integrated in the “legitimate” economy. For example, child slaves may have picked the cocoa used to make high-end chocolate products; and onions available at the neighborhood grocer's may have been produced by exploited migrant labor. See U.S. STATE DEP'T, TRAFFICKING IN PERSONS REPORT 142, (2009) (describing trafficking of children in Ghana for labor on cocoa farms); Child Labor Coalition, Children in the Fields: The Inequitable Treatment of Child Farmworkers, <http://www.stopchildlabor.org/Consumercampaigns/fields.htm> (last visited Sept. 13, 2009) (describing, among other things, harvesting of onions by children as young as nine and 10 in Batesville, Texas).



of the market be openly recognized and facilitated under the legal framework of multilateral trade liberalization.

## 2. Overkill

The critique of overkill appears to be an obvious one. In view of the many forms of existing human rights violations, crimes, and global challenges, how and why would the traffic in human beings merit a response as disruptive and transformative as the multilateral liberalization of labor?

Human trafficking is an extreme form of endemic human-to-human exploitation. The economic forces and realities that give rise to the modern traffic in human beings also underlie other forms of exploitation, including labor exploitation and the hardships of migrant smuggling. The economic and trade-based solution that this Article advocates would result in multi-pronged benefits.<sup>278</sup> The resulting economic autonomy of individual humans would serve to decrease the vulnerability to human trafficking of far-flung individuals and groups as well as their vulnerability to those other violations. Although this Article's labor liberalization solution aims at the trafficking in humans—an extreme form of human-to-human exploitation—the ameliorative power of the transformative force of labor liberalization will also target other kinds of human rights violations.<sup>279</sup>

## 3. Floodgates

Another expected critique is the prospect of floods of migrants. If national borders may be legally and openly traversed, then unstoppable floods of economic migrants will overwhelm the domestic markets of the nation states that promise economic opportunity.

There *will* be a disruptive transition, but there are built-in checks to human movement even in the case of full labor liberalization.<sup>280</sup> These range from the economic costs of movement—not everyone will be able to afford to undertake transborder movement (even when costs are lowered as a consequence of liberalization)<sup>281</sup>—to emotional and other psychological bonds

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<sup>278</sup> Walters, *supra* note 99, at 93 (“Increasing global labor mobility has greater potential to benefit world wide development, peace, and prosperity than any other kind of reform.”). *See also id.* at 94–97.

<sup>279</sup> Think, for example, of the power of exit. If individual humans have the power to exit from exploitative conditions, with assurance that the new condition will be less exploitative, the prospect of losing population or of competing for population will increase the incentive of states to ameliorate exploitative conditions in their domestic markets.

<sup>280</sup> As a result of the built-in checks, the liberalization of labor may have a less disruptive impact than does the liberalization of capital. *See* Walters, *supra* note 99, at 100.

<sup>281</sup> HAYTER, *supra* note 82, at 154:

Most people cannot afford the fares, the loss of earnings when moving, and the expense of settling in a new country. Others might prefer to migrate for short periods, while they are young and strong, and to return when they have

to an individual's place of origin.<sup>282</sup> Such bonds include attachment to a particular environment or lifestyle or to individuals or groups who may not easily move.<sup>283</sup> Other economic factors include the reality that either upward or downward equalization of remuneration for labor will decrease the incentive of individual labor providers to move from even traditional sending states.<sup>284</sup> In addition, the recipients of remittances may be less inclined to leave their home state as the benefits of higher compensation are transferred to the home state and can be enjoyed by recipients in the state of origin. Note, however, that the built-in economic check may be less effective if there is too wide a disparity between the living conditions in the sending state and those anticipated in the receiving state.<sup>285</sup>

The ability to exit, created by the lowering of barriers to entry into potential host states, will fundamentally transform the relationship between labor and capital.<sup>286</sup> If states must openly compete for human labor and populace, that competition will affect the economic policies of sending states. Faced with the prospect of losing their populations, such sending states may choose to reform and more equitably distribute domestic resources to the entrenched have-nots instead of solely to the owners of capital.<sup>287</sup> However,

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saved enough or learnt enough without losing the possibility of migrating again and without being forced to settle and to move their families.

*Id.*

<sup>282</sup> See, e.g., R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV. 1265, 1280–81 (1994) (discussing the reluctance of “most people” to leave their countries of origin).

<sup>283</sup> HAYTER, *supra* note 82, at 154 (“On the whole most people do not want to uproot themselves, abandon their families, and suffer the hardships and risks of migration to a strange and possibly hostile place in order to do the dirty work of the natives. And . . . they like their own countries and cultures.”).

<sup>284</sup> Think of the example of Ireland, a traditional sending state. As economic conditions improved, descendants of prior waves of emigrants as well as immigrants from new sending states flocked to the opportunities offered by Ireland's booming domestic economy. See, e.g., MARTIN RUHS, MIGRATION POLICY INST., IRELAND: FROM RAPID IMMIGRATION TO RECESSION (2009), <http://www.migrationinformation.org/Profiles/display.cfm?id=260>.

<sup>285</sup> That is, if there is a wide disparity in living conditions there may be a greater incentive to move. However, labor liberalization will cause states to compete for population, thus encouraging improvements in living conditions, including economic conditions, and the civil and human rights that are recognized and enforced within domestic markets.

<sup>286</sup> The liberalization of labor outlined here does not require that potential host states must provide financial or other assistance to facilitate the entry or exit of transborder labor providers. The costs of transborder labor movement will be lowered by the removal of the middlemen who now provide services to facilitate unsanctioned entry or to navigate bureaucratic barriers to entry. Some economic barriers to entry will persist, however, based on an inability to pay transportation and other costs. These persistent costs, together with the other factors discussed in this subsection, will contribute to the built-in checks to the “threat” of opened floodgates.

<sup>287</sup> See Joseph E. Stiglitz, *Globalism's Discontents*, AM. PROSPECT, Jan. 1, 2002 (discussing the market discipline that would be introduced and maintained by the ability of skilled workers to respond freely to transnational market stimuli). However, Stiglitz addresses the movement of *skilled* workers only. *Id.*

some intransigent authoritarian regimes may view exit by their nationals as a convenient mechanism for siphoning away potential dissenters.

Other built-in checks include the possibility of reverse migration. Human labor providers in traditional receiving states might find it very attractive to move, whether temporarily or permanently, to a traditional sending state for lifestyle and other reasons.<sup>288</sup> Their presence, together with the skills brought home by returnees, would bring benefits such as the transfer of skills, capital, ideas, and culture with potentially transformative economic impact. In turn, the effect of stimulated economic opportunity in the domestic economies of traditional sending states would decrease the incentive of individual human labor providers to leave.<sup>289</sup>

#### 4. -Isms and Schisms<sup>290</sup>

This Article's proposed solution to liberalize labor employs the rhetoric of the autonomous economic human actor. However, questions arise with respect to the impact on the autonomy of the individual mobile labor provider of endemic racism, sexism, and other "isms" in the receiving states. This critique is based on an appreciation of the human tendency to create "in" and "out" groups: the tendency to de-humanize (or at least fear and despise) the "other" based on real or perceived differences, and on the other's perceived inferiority and/or powerlessness. Would the increased movement of labor lead to greater exploitation of the mobile "other" in the course of transit and in the receiving state, instead of decreasing the individual's vulnerability to exploitation?

In order for labor liberalization to be most effective, it should take place within a context that recognizes and enforces human rights standards. The mobile individual human labor provider would enjoy the human rights protections of the applicable domestic and international legal regimes on the

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<sup>288</sup> A robust transnational movement of retirees from receiving to sending states already exists. Examples include U.S. citizens to Costa Rica, Panama, Mexico, and other states with more temperate climates. See, e.g., David Dixon, Julie Murray, & Julia Gelatt, *America's Emigrants: U.S. Retirement Migration to Mexico and Panama*, MIGRATION POLICY INST., Sept. 2006, available at <http://www.migrationinformation.org/Usfocus/display.cfm?ID=416>; see also Jeremy Schwartz, *U.S. Retirees Flock South of the Border*, VENTURA COUNTY STAR, Sept. 14, 2008, available at <http://www.venturacountystar.com/news/2008/sep/14/us-retirees-flock-to-south-of-the-border/>.

<sup>289</sup> See JOHNSON, *supra* note 110, at 28–29. See also TUNCAY GULOGLU & GOKHAN GUDER, THE ENLARGEMENT OF EUROPEAN UNION AND LABOR MARKET: TRENDS AND CHALLENGES 8 (Cornell University ILR School Visiting Fellow Series, (2005)), available at <http://digitalcommons.ilr.cornell.edu/intlvf/8/> ("Spanish and Portuguese enlargements show that people tend to stay in their own countries especially if the [home country] begins to experience of [sic] economic recovery and growth.").

<sup>290</sup> BOB MARLEY, GET UP STAND UP, available at [http://www.lyricsfreak.com/b/bob+marley/get+up+stand+up\\_20021743.html](http://www.lyricsfreak.com/b/bob+marley/get+up+stand+up_20021743.html) ("we sick and tired of your ism-skism [sic] game").

same basis as the domestic human labor provider.<sup>291</sup> Further, the declining information asymmetries will allow human labor providers to learn of and respond to economic conditions, and to avoid domestic labor markets where exploitative conditions, sexism, racism, and other “isms” are prevalent.

The contemporary human rights framework may not be suited perfectly to the introduction of the transformative mechanism of labor liberalization. It is unlikely that such perfect timing may ever eventuate. The benefits anticipated from labor liberalization cannot wait for the perfect moment that may never arrive. Further, this Article argues that this very mechanism, labor liberalization, will give rise to greater recognition and enforcement of human rights.<sup>292</sup>

### 5. Sending State Perspectives

Would labor liberalization lead to declining economic wellbeing of sending states? Will such states not have an adverse reaction to this proposal, which suggests the loss of population, brain drain, and a loss of control over the remaining population?

Traditional sending countries already provide human labor to the transnational labor market. Indeed, some sending countries themselves actively engage in trading their nationals' labor on the transnational labor market.<sup>293</sup> The ability of more of those nationals to access the transnational labor market, and to do so without violating the domestic laws of receiving states, will enable the sending country governments to better protect the rights of their nationals abroad and to decrease those nationals' vulnerability to exploitation.

Further, within individual sending countries, the transfer of remittances from liberalized labor and the inflow of skills, new technologies, and new ways of economic endeavor will stimulate economies and widen the distribution of the benefits of trade liberalization and globalization.<sup>294</sup> Fears that labor liberalization would lead to an increase in the brain drain that is already affecting traditional sending countries can be mitigated through the deployment of preventive and ameliorative mechanisms. These include the transnational enforcement of obligations to repay (with interest) the costs of state-funded overseas higher education or the guarantee of transitional

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<sup>291</sup> Here, Professor Jennifer Gordon's concept of transnational labor citizenship would play a crucial role in maintaining transborder legal standards. See Gordon, *supra* note 191, at 561-78 (supporting transnational labor mobility conditioned upon migrant labor's commitment not to undermine the labor standards of host state economies).

<sup>292</sup> See discussion *supra* Part IV.A.

<sup>293</sup> See the above discussion of Pakistan's and the Philippines' participation in the transnational labor market. Part III.A.1.c. & d.

<sup>294</sup> Winters et al., *supra* note 97, at 1142 (stating that “[t]emporary workers abroad are likely to be a source of ideas, technology, markets or networks for those who remain, increasing their productivity and opportunities”).

above-market rate salaries and benefits to returning labor providers. Further, the facilitation of entry and exit will decrease the rates of permanent migration as movement between home and host states is normalized. The mobile human labor provider would no longer fear that a would-be temporary exit from the host state would lead to a permanent bar to reentry.

## 6. Receiving State Perspectives

Another potential challenge to the proposed mechanism of labor liberalization arises from the question of whether, while receiving states will gain the economic benefits of cheaper labor and avoidance of labor shortages, the cost of labor liberalization will be too high. Such costs would stem, for example, from the obligation to provide social entitlements to the migrant human labor provider. Such a prospective increase in costs would give national leaders pause.

However, it is possible to structure labor liberalization so as to minimize those costs. For example, access to social entitlements could be phased in by tying them to the length of time that the migrant labor provider has worked in the receiving state. Further, the increase in labor supply, the consumption patterns, and the demands of such migrant laborers will have an economic impact that will increase the contributions to government coffers from sources such as payroll contributions to social programs, payroll taxes, and consumption/retail taxes.<sup>295</sup> In addition, the consumption and migration pattern is such that young, healthy, migrant laborers infrequently access healthcare and other services of receiving states.<sup>296</sup>

Further, labor shortages and wage disparities in competing domestic markets create incentives for capital to relocate production and other facilities away from high-wage domestic markets. The availability of additional labor in these states and transnational wage equalization will reverse that incentive so that production facilities will be less likely to re-

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<sup>295</sup> See, e.g., Howard F. Chang, *The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism*, 52 DEPAUL L. REV. 759, 763 (2003) (discussing reasons why immigrants' impact on domestic labor's wages and employment is not more negative: "One reason is that the demand for labor does not remain fixed when immigrants enter the economy. Immigrant workers not only supply labor, for example, they also demand goods and services, and this demand will translate into greater demand for locally supplied labor."). See also MICHAEL J. TREBILCOCK, THE LAW AND ECONOMICS OF IMMIGRATION POLICY 8 (2003):

An offsetting increase in the demand for labour is in fact quite plausible, since immigrants are consumers of goods and services, and the increased demand for and provision of goods and services inevitably associated with their presence ought to result in a corresponding increase in labour demand by domestic suppliers of goods and services.

*Id.*

<sup>296</sup> See, e.g., Alan L. Gustman & Thomas L. Steinmeier, *Social Security Benefits of Immigrants and U.S. Born*, in ISSUES IN THE ECONOMICS OF IMMIGRATION 309–50 (George J. Borjas ed., 2000).

locate purely for the purpose of arbitrating wage differentials. Migrant labor access to the same human and civil rights as domestic labor is crucial if such standards are to be enforced.

Through multilateral labor liberalization, receiving states can resolve the dichotomy between the economic reality of their labor market and their protectionist domestic social and political sentiments. In addition, labor liberalization that protects the human dignity of human labor providers will close the gap between the liberal human rights ideals of many of those societies and the reality of the human exploitation that the restrictive immigration and right-to-work policies those same societies facilitate.

## 7. Lack of Political Will

The liberalization of labor may have transformative effects on the current political and economic structure of both participating and nonparticipating states. Political resistance to such changes can be expected from national governments, entrenched interests that fear loss of power and influence, some categories of capital that might lose the ability to price-discriminate in labor compensation rates, and the populations of both sending and receiving states who fear changes to their way of life.

Nor would the resistance to the GATL be limited to the domestic politics of individual member states. The continuing failure of the WTO Doha Development Round of negotiations<sup>297</sup> strongly suggests that, as presently constituted, the WTO may have reached an impasse in the multilateral trade liberalization project.<sup>298</sup> However, it is possible that the member states whose interests have prevented resolution of agricultural subsidy issues at the heart of the Doha negotiation challenges<sup>299</sup> would adopt different and more welcoming positions toward the prospect of liberalizing labor.<sup>300</sup>

Honest conversations and a long-term viewpoint about the expected benefits would help to overcome the reluctance. Also essential is a transnational perspective that transcends local and domestic interests and encompasses global concerns.<sup>301</sup>

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<sup>297</sup> See, e.g., Stephen Castle & Mark Landler, *After 7 Years, Talks Collapse on World Trade*, N.Y. TIMES, July 30, 2005, at A1.

<sup>298</sup> See Raj Bhala, *Doha Round Schisms: Numerous, Technical, and Deep*, 6 LOY. UNI. CHIC. INT'L L. REV. Part VIII (4 Qs Plus Faith in a Resurrection) (forthcoming 2009).

<sup>299</sup> See, e.g., Stephen Castle & Keith Bradsher, *China Key to Deadlock Over Trade*, N.Y. TIMES, July 31, 2008, at A1.

<sup>300</sup> Both developed and developing countries are projected to benefit from labor liberalization. See Winters et al., *supra* note 97 and accompanying text; Kategekwa, *supra* note 100.

<sup>301</sup> See Bravo, *Regional Trade Arrangements*, *supra* note 7, at 113 (discussing the need for a transformed global/transnational viewpoint and extreme political courage when embarking on labor liberalization policies even within the more limited context of regional trade arrangements).

## 8. Global Financial Crisis

The global financial crisis, which emerged in the latter half of 2008, may lead to additional critiques of this Article's prescription. The crisis has highlighted the transnational economic interdependence of states and, perhaps, a perception that the domestic economic turmoil stems from that interdependence. That proven interdependence strengthens, rather than weakens, this Article's analysis and the prescription that it offers. Facilitating the movement of mobile labor in response to economic incentives will improve the prospects for economic recovery in interdependent domestic markets.<sup>302</sup>

## V. CONCLUSION

This Article proposes the deployment of free market and trade liberalization principles to help resolve a human rights nightmare. It proposes that the fight against the modern traffic in humans would be enhanced by a re-conceptualization of labor's role in the international economic system. In so doing, this Article uses trade liberalization concepts to argue that human capital be given a status similar to that conferred on capital and intellectual property by international trade law. The comparative advantage of some countries, usually developing countries, is their abundance of available labor; individuals and organizations from those countries should be able to trade their labor freely internationally within the institutional framework of the GATT/WTO system. If the contemporary trade liberalization model and the form of globalization that it stimulates are not to be viewed as purely creatures of state entities and of corporate enterprises, the forces untapped by globalization must benefit both natural and juridical persons—both capital *and* labor.

In addition to suggesting a new, structural mechanism for combating modern trafficking in human beings, this Article's prescription attempts to facilitate the agency of individual human labor providers and to increase their ability to respond to market forces in order to decrease their vulnerability to human trafficking and other forms of exploitation. The proposal would liberalize labor multilaterally under the auspices of the WTO and thereby confer legally recognized and enforceable autonomy (true freedom of movement) to individual labor providers who seek to respond to transborder market forces. The proposed multilateral annex to the WTO Agreement, a General Agreement on Trade in Labor, would provide a mechanism for negotiation of the gradual liberalization of the trade in labor. Individual labor providers would be allowed to trade their labor freely across borders for their own benefit pursuant to the dictates of the market, much as the providers of goods and services already do.

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<sup>302</sup> The Obama Administration has rejected the isolationism that proved disastrous in the 1930s. Cheryl Gay Stolberg, *Obama Makes Overtures to Canada Prime Minister*, N.Y. TIMES, Feb. 19, 2009, at A10.

Labor must be liberalized to add to the array of weapons deployed against human trafficking. Human labor providers are economic actors and economic resources, just like state and profit-seeking juridical entities. Liberalized and legal movement will eliminate the need for labor-providing individuals to resort to smugglers and traffickers as a means of access to transborder labor trading opportunities. Liberalized labor would be a self-owned resource, no longer relegated to relatively passive economic exploitation by other entities. Further, the liberalization of labor would integrate labor-rich economies into the global economy while according more choices for labor providers as autonomous economic actors. The integration of labor-rich and labor-poor economies will facilitate and democratize access to economic opportunities, rather than impede the economic forces unleashed by globalization.

Political, economic, and rights-based counterarguments will be proffered to oppose the liberalization of labor, including the question of whether the implementation of the proposal would be an overreaction to the traffic in humans. Some moral and ethical questions also will arise regarding whether the proposal to liberalize labor would lead to the commoditization of persons such that the trade in humans would become a state-sanctioned phenomenon, worsening the exploitation of individual labor providers. With the adoption of adequate safeguards, such as the transnational labor citizenship program proposed by Professor Jennifer Gordon,<sup>303</sup> the implementation of multilateral labor liberalization will enhance individual autonomy and decrease vulnerability to exploitation, including human trafficking.

The time frame for implementation of this proposed solution no doubt has a long horizon. However, to eliminate (or, at the very least, to substantially constrain) trafficking in human beings, the economic foundations of this industry must be undermined as proposed by this Article.

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<sup>303</sup> See Gordon, *supra* note 191.