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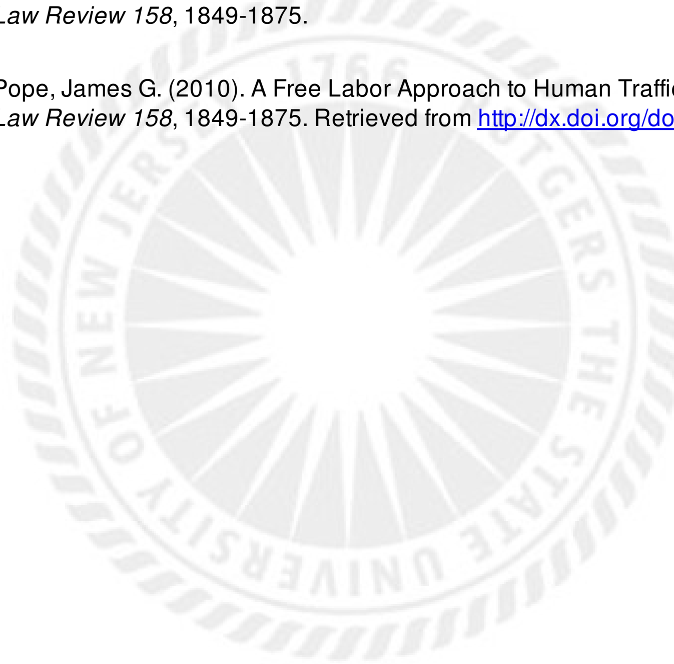

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ARTICLE

A FREE LABOR APPROACH TO HUMAN TRAFFICKING

JAMES GRAY POPE[†]

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INTRODUCTION

In theory, an unwanted thing or condition can be eradicated by the negative means of attacking it directly or the positive means of nurturing a nemesis, or a combination of the two. In the field of pest control, for example, a given pest can be attacked directly with pesticides, or a nemesis species can be introduced into the environment. In the latter case, the nemesis species does the work of extermination either by attacking the pest or by outcompeting it for food and other resources.[1] In the field of antislavery, both approaches may be found in the law developed under the Thirteenth Amendment to the United States Constitution.[2] On the one hand, various statutes take the nega-

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[1] ROY G. VAN DRIESCHE & THOMAS S. BELLOWS, JR., BIOLOGICAL CONTROL 6-7 (1996).

[2] U.S. CONST. amend. XIII.

tive approach of prohibiting slavery and involuntary servitude directly.[3] This method may be stated as granting a right—namely, the "right to be free from involuntary servitude"[4]—but the focus remains on the condition to be negated, "involuntary servitude." Because this method centers on the direct prohibition of slavery and involuntary servitude, I call it the "prohibition approach."

The United States Supreme Court has read the Thirteenth Amendment to mandate a positive strategy as well. *Pollock v. Williams*,[5] decided in 1944, crowned a series of rulings in which the Court struck down various southern state laws that established debt peonage under the guise of punishing workers for fraudulent borrowing. Pollock had accepted a loan of five dollars in exchange for his promise to repay the money through labor.[6] When he quit work before completing repayment, he was convicted of "[o]btaining property by fraudulent promise to perform labor or service."[7] The Court's opinion, penned by Justice Robert Jackson, set forth a free labor interpretation of the Amendment. Jackson observed that the Amendment aimed not only at ending slavery, but also at "maintain[ing] a system of completely free and voluntary labor throughout the United States."[8] He then explained why the state could not criminalize the quitting of work without violating the Amendment and the Peonage Act passed under its authority:

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[3] For example, 18 U.S.C. § 1584 (2006), mandates the criminal punishment of "[w]hoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term." Section 1584 is one of the building blocks of the Trafficking Victims Protection Act (TVPA). *See, e.g.*, TVPA, Pub. L. No. 106-386, § 112(a)(1)(A), 114 Stat. 1466, 1486 (2000) (codified in scattered sections of 18 U.S.C.) (doubling the maximum prison sentence for violations of § 1584). Similarly, 18 U.S.C. § 241 forbids conspiracies to interfere with rights secured "by the Constitution or laws of the United States." In the words of the Court, this language "incorporates the prohibition of involuntary servitude contained in the Thirteenth Amendment." United States v. Kozminski, 487 U.S. 931, 940 (1988).

[4] *Kozminski*, 487 U.S. at 934, 936.

[5] 322 U.S. 4 (1944).

[6] *Id.* at 6.

[7] *Id.* at 5 n.1.

[8] *Id.* at 17; *see also* Bailey v. Alabama, 219 U.S. 219, 245 (1911) (noting the Amendment's purpose "to safeguard the freedom of labor upon which alone can enduring prosperity be based"). These judicial statements echo similar assertions by the Amendment's framers. *See* CONG. GLOBE, 38th Cong., 1st Sess. 1202-03 (1864) (Statement of Sen. Wilson); *id.* at 1313 (Statement of Sen. Trumbull); *id.* at 1369 (Statement of Sen. Clark); *id.* at 1439 (Statement of Sen. Harlan); *id.* at 1459-60 (Statement of Sen. Henderson); *id.* at 2615 (Statement of Rep. Morris); *id.* at 2979 (Statement of Rep. Farnsworth); *id.* at 2990 (Statement of Rep. Ingersoll).

> [I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.[9]

On this view, the free labor system operates as a nemesis to slavery and involuntary servitude. By exercising their Thirteenth Amendment right to change employers, workers exert the "power below" necessary to give employers the "incentive above" to avoid slavery and servitude. The right at issue is formulated positively as "the right to change employers," not negatively, as "the right to be free from involuntary servitude." On the logic of this approach, the Amendment protects not only rights that, by their absence, *define* the conditions of slavery and involuntary servitude, but also all rights necessary to provide workers with the "power below" and employers the "incentive above" to prevent those conditions.[10] A worker may be free to quit, for example, but if she does not also enjoy the right to change employers, then she cannot be considered free.[11] Because this approach centers on nurturing the free labor system as a nemesis to slavery and involuntary servitude, I call it the "free labor approach."

These two methods can be seen in discussions of human trafficking, defined broadly to be roughly equivalent to "the new slavery."[12]

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[9] *Pollock*, 322 U.S. at 18.

[10] *Cf.* Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 576-77 (1951) (applying this approach to the question whether the Amendment protects the right to strike). This point is discussed at length in James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1516-20 (2010).

[11] Shaw v. Fisher, 113 S.C. 287, 292 (1920) (invalidating, on Thirteenth Amendment grounds, the tort of employing a laborer who was under contract to another employer); Pope, *supra* note 10, at 1531-33.

[12] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 15 (2009) (rejecting definitions that limit "trafficking" to international movement and concluding that "in essence, [it] is a modern-day form of slavery" that "involves exploitation and forced servitude"). Despite the popular association of "trafficking" with international movement, the principal legal definitions encompass the "harboring" or "maintenance" as well as the recruitment and transport of a person for purposes of slavery or involuntary servitude. *See* TVPA § 103(8), 22 U.S.C. § 7102(8) (2006) (defining "severe forms of trafficking" to include "harboring . . . a person . . . for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery"); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, art. 3(a), U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter Unit-

Currently, negative approaches predominate. The United Nations Protocol, for example, calls on member states to criminalize "trafficking in persons" and to provide protection and assistance to victims of that practice.[13] Similarly, the TVPA prohibits various forms of trafficking, strengthens previously enacted statutes criminalizing peonage, slavery, and involuntary servitude, provides protections for victims of "severe forms of trafficking," and contains provisions designed to encourage other nations to prohibit and punish severe forms of trafficking.[14]

Some analysts, however, have proposed adding a positive component to the negative attack. Kevin Bales, who generally stresses the distinctive evil of slavery, nevertheless joins with Ron Soodalter in proposing that the protections of the National Labor Relations Act (NLRA) (which guarantees the rights to organize and engage in concerted activities) be extended to all American agricultural and domestic workers on the ground that "otherwise, as recent history has shown, they will continue to be more susceptible to enslavement than other workers in America."[15] Jennifer Chacón goes further, suggesting that "[m]any instances of trafficking could be effectively addressed through three simple steps," the first of which is to "allow all workers to seek remedies under Commerce Clause–based and Thirteenth Amendment–based laws."[16]

ed Nations Protocol] (defining "trafficking in persons" to include "harbouring" of persons by specified means for purposes of exploitation); Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789, 814 (2009) (observing that the United Nations Protocol defines trafficking to include "both the bringing of a person into exploitation as well as the maintenance of that person in a situation of exploitation" for purposes of the requirement of national criminalization). For a definition of "the new slavery," see *infra* notes 17-19 and accompanying text.

[13] United Nations Protocol, *supra* note 12, at arts. 5-8. The status of the Protocol as a supplement to the Convention Against Transnational Organized Crime highlights the centrality of criminal prohibition.

[14] TVPA, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified in scattered sections of 18 and 22 U.S.C.).

[15] KEVIN BALES & RON SOODALTER, THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY 263 (2009). Agricultural laborers and domestic workers are currently excluded from the Act's protections. *See* National Labor Relations Act, 29 U.S.C. § 152(3) (2006).

[16] Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3024 (2006); *see also* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008) (explaining how undocumented workers and other vulnerable, low-wage workers can utilize the Fair Labor Standards Act and other labor laws to foster self-organization and resist untrammeled employer domination).

The purpose of this Article is to focus attention on the potential role of the free labor approach in the struggle against human trafficking. It attempts to draw out the systemic logic of proposals that, like Chacón's and Bales and Soodalter's, supplement the prohibition of slavery with support for selected labor rights. Part I discusses some strengths and limitations of the prohibition approach. Part II sets forth corresponding limitations and strengths of the free labor approach. Part III applies the free labor approach to the problem of immigration as it relates to slavery. Part IV explores the problem of sex trafficking from a free labor perspective.

I. Strengths and Limitations of the Prohibition Approach

Bales and Soodalter define slavery as consisting of three elements: (1) "the complete control of one person by another, through the use of violence—both physical and psychological"; (2) "hard labor for little or no pay"; and (3) "economic exploitation—making a profit for the slaveholder."[17] It is the first of these elements that separates slavery from other forms of labor exploitation: "All three . . . are vital to the definition, but the most crucial is violent control and the resultant loss of free will. When we aren't sure if someone is, in fact, a slave, we can ask one basic question: 'Can this person walk away?'"[18] The U.S. and international legal definitions of trafficking are more complex, but they incorporate this emphasis on loss of free will.[19]

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[17] Bales & Soodalter, *supra* note 15, at 13.

[18] *Id.*

[19] The U.N. Protocol seeks to eliminate "trafficking in persons," which is defined as

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

United Nations Protocol, *supra* note 12, art. 3(a) (emphasis added). The TVPA focuses on "severe forms of trafficking in persons," which is defined to include

> (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 act has not attained 18 years 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.*

TVPA § 103(8), 22 U.S.C. § 7102(8) (2006) (emphasis added).

This definition is well suited to separate out a set of practices for moral condemnation and prohibition. In the global economy, hundreds of millions of workers engage in hard labor for little or no pay and are objects of economic exploitation, thus meeting the second and third criteria of Bales and Soodalter's definition. But there is no consensus that economic exploitation is a moral wrong (as opposed to a fact of life in a world economy characterized by scarcity) or that employers (as opposed to structural forces beyond their control) are to blame. By contrast, almost everyone agrees both that labor coerced by physical or psychological violence is a moral evil and that the people who deploy the violence or knowingly assist in or benefit from the violence are morally blameworthy.

With this definition of slavery and trafficking, the prohibition approach has a number of important political advantages. Its three-step sequence—(1) define the unwanted activity,(2) punish the perpetrators, and (3) assist the victims—is easily understood. The sharp line between trafficking (or slavery) and other, less egregious forms of labor exploitation, like failure to pay wages or violations of health and safety regulations, fits the moral fervor of the antitrafficking campaign. Trafficking is an unambiguous moral evil, traffickers are "bad people" who deserve severe punishment, and trafficking victims clearly merit our sympathy. The moral depravity of the perpetrators and the heart-wrenching misery of the victims make it possible for activists to shock and shame politicians, media figures, and ordinary people into action. Not only does the focus on "trafficking" or "slavery" facilitate the mobilization of supporters, but it also tends to neutralize or isolate potential opposition. It carves out a marginal form of labor exploitation that is not vital to the power or prosperity of any important economic or political elite. Trafficking is already illegal (at least on paper) in every country of the world. It has no public defenders. In sharp contrast to nineteenth-century chattel slavery, it does not predominate in a single important legal industry or nation.[20]

However, the same features of the prohibition approach that make it so attractive also limit its effectiveness in at least three ways. First, the search for morally blameworthy perpetrators does not necessarily lead to the heart of the new slavery. The moral clarity of the "slavery" definition in the realm of theory is not matched by legal or economic clarity on the ground. Unlike nineteenth-century chattel

[20] *See* KEVIN BALES, ZOE TRODD & ALEX KENT WILLIAMSON, MODERN SLAVERY: THE SECRET WORLD OF 27 MILLION PEOPLE 146 (2009).

slavery, the new slavery is not a distinct system of labor exploitation. Rather, it consists in the addition of physical or psychological violence to an underlying capitalist labor market. As Bales and Soodalter point out, it is "capitalism at its worst."[21] The new slavery typically exists alongside other practices of labor exploitation that do not involve violence sufficiently immediate or intense to amount to slavery. Slave and nonslave laborers toil in close proximity, for example, in U.S. agriculture and domestic service, in the Brazilian charcoal industry, and in Pakistani brick manufacturing.[22] The same drive for cheap labor that pushes many employers to violate protective legislation like minimum-wage laws and health-and-safety laws, can—extended one step further—lead to slavery. As one activist put it, slavery is "at the end of a spectrum of labor violations."[23]

How many beatings does it take before a wage laborer is transformed into a slave? And how can "psychological coercion" be defined in a way that takes into account the vulnerabilities of particular workers while simultaneously providing a standard of guilt clear enough to put employers on notice as to potential criminal liability?[24] Judges routinely deal with difficult borderline questions like these, but legal resolutions cannot impose moral clarity on a muddy reality. The moral horror of slavery—so useful in mobilizing opposition—can be an obstacle when juries are asked to convict otherwise respectable business people of slavery on the basis of a definition that hinges on matters of degree.[25] In the case of *United States v. Kozminski*, concerns about the need for clear notice of criminal liability led the U.S. Supreme Court to narrow the statutory ban on "involuntary servitude" to

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[21] BALES & SOODALTER, *supra* note 15, at 6.

[22] *Id.* at 13; KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 140, 165 (rev. ed. 2004).

[23] BALES & SOODALTER, *supra* note 15, at 54 (quoting Laura Germino, member of the Coalition of Immokalee Workers). As Bales and Soodalter observe, "When the philosophy is 'The less you pay, the more you make,' the ultimate objective is to pay nothing. And what better way to achieve this goal than to enslave the workforce?" *Id. See also* Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 48-50 (2009) (presenting examples to show the difficulty of differentiating trafficking from other forms of labor exploitation).

[24] For a revealing discussion of the line-drawing difficulties, see Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting* United States v. Kozminski *and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941, 972 (2007).

[25] *See* Chacón, *supra* note 16, at 3035 ("[P]rosecutors may be reluctant to attach the harsh penalties and high stigma of the TVPA to all but the most unpopular and politically powerless offenders.").

physical or legal coercion, excluding psychological coercion.[26] The TVPA subsequently broadened the definition, but it remains unclear whether prosecutors and courts will overcome their initial reluctance to go beyond the relatively bright line of physical and legal coercion.[27]

Even after lawmakers have determined that a particular set of practices amounts to slavery, it may be difficult to ascertain who can be held responsible for this conduct. In place of the proud slave masters of yore, we now have layers of small-time labor procurers and contractors (sometimes with colorful labels like "gatos" and "coyotes") who work for what appear to be respectable business people who, in turn, work for others in a chain that often leads to multinational corporations.[28] The people at the bottom do the actual enslaving; they are clearly culpable, but also easily replaced. The people at the top, who have the power to end the practice, often lack provable culpability.[29] Unlike the nineteenth-century planter, who consciously and openly chose to employ slave labor, the corporations that buy the products of slave labor merely extend ordinary market logic one step further: "Why pay $20 an hour for a factory worker in Europe when one will work for $1 an hour or less in India? Why buy sugar from U.S. farmers when it is much cheaper from the Dominican Republic (where enslaved Haitians do the harvesting)?"[30] Compounding these problems, present-day slaveholders deploy a variety of tactics to cover their tracks. They hide slavery behind apparently valid labor contracts, share profits and services with law enforcement officers, and manipulate slaves to develop feelings of loyalty toward their masters. Enslaved individuals often deny or acquiesce in their slavery, and many are reluctant to testify against their masters.[31]

This brings us to the second limitation of the prohibition approach. Although these obstacles can—at least in theory—be overcome within a prohibition framework, the costs are steep. It takes

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[26] 487 U.S. 931, 952 (1988).

[27] *See* Kim, *supra* note 24, at 970-71 ("Absent specific guidance, difficulties in evaluating coercion persist at the investigation and enforcement level of the TVPA's implementation, which may be resulting in the under-enforcement of psychologically induced trafficking crimes.").

[28] *See, e.g.*, BALES, *supra* note 22, at 142-43, 236; *see also* Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 986-92 (2002) (reporting examples of American corporate involvement in slavery).

[29] BALES, *supra* note 22, at 237.

[30] *Id.* at 236.

[31] For examples from Thailand, Mauritania, and Brazil, see *id.* at 62-63, 84-85, 106-07, and 137-38.

time, money, and energy for prosecutors to penetrate slaveholders' deceptions. In many cases, prosecutors must work carefully with reluctant victims in order to secure their testimony. As a result, trafficking cases require considerably greater resources than most other criminal prosecutions.[32] Moreover, trafficking prosecutions often entail collateral damage to human rights. Examples include detention of trafficking victims, prosecution of victims for immigration violations, expulsion of victims who face reprisals in their home countries, "crack downs" that trample the rights of suspects and bystanders, and unfair trials of accused individuals.[33]

These difficulties pose a test of commitment for proponents of the prohibition approach. One could simply dig in and push for more resources, both for the primary purpose of ending trafficking and for the secondary purpose of minimizing human rights externalities. But the marginal benefits from each dollar spent can be expected to decline. In the United States, for example, prosecutors reject a high proportion of potential trafficking cases based on weak evidence, anticipated difficulties in proving criminal intent, problems with witnesses, and the low deterrent value of the case.[34] If antitraffickers persuade them to take more, we can expect that each new prosecution will tend to be a little less cost effective than the last. The necessary commitment of resources will increase, as will the temptation to take shortcuts around the rights of victims and suspects. At some point, the question arises as to whether resources might be better spent on another approach to the problem.

Finally, and more fundamentally, the prohibition approach—by itself—does nothing to ensure that freed slaves have somewhere to go. Consider Bales's case study of Mauritania, where slavery was formally abolished in 1980 but nevertheless lives on today.[35] Many slaves decline to escape because jobs are scarce, employers tend to refrain from hiring the allegedly emancipated slaves, and a full complement

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[32] BALES & SOODALTER, *supra* note 15, at 246; *see also* Free the Slaves et al., *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47, 64 (2005) (quoting a U.S. Department of Labor spokesperson as saying, "These cases take a lot of resources to get the evidence needed to try perpetrators. And when we do have a criminal case, we lose an investigator for a long period of time").

[33] Gallagher, *supra* note 12, at 831.

[34] ANTHONY M. DESTEFANO, THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED 133-34 (2007).

[35] BALES, *supra* note 22, at 81. Even Anne Gallagher, who defines slavery narrowly, agrees that the Mauritanian system amounts to chattel slavery. Gallagher, *supra* note 12, at 810, 815.

of beggars already lines the streets. "Under these conditions, most masters do not need to force their slaves to stay. It is just as easy for them to say, 'Go if you like,' for they know the slaves have nowhere else to go and nothing else to do."[36] Under Bales and Soodalter's definition of slavery, however, it is not clear that Mauritanian laborers are enslaved. The key defining feature of slavery is "the complete control of one person by another, through the use of violence—both physical and psychological."[37] Yet, there is no immediate violent penalty for escaping; the Mauritanian laborer is "free" to choose between starvation and a life of unpaid labor for a master who treats her as a chattel. If this meets the criterion of violence, it is only because of the background violence that sustains the system as a whole.[38] But if background violence is enough, then the criterion of violence does not provide a bright-line distinction between slavery and exploitative wage labor. Even a wage worker could be enslaved if, for example, she faced the practical alternatives of starvation or total submission to an employer.[39]

To summarize, the prohibition approach runs up against three limitations as a strategy for eliminating the new slavery. First, the focus on morally blameworthy perpetrators may direct antislavery efforts toward low-level operators, who can easily be replaced, and away from higher-level beneficiaries of slavery, who have the power to end the practice. Second, trafficking prosecutions entail high costs, in both resources and human rights externalities—costs that rise as prosecutors move beyond the easiest targets. Third, and finally, the prohibition approach does not—by itself—ensure that freed slaves have access to nonservile jobs, increasing the danger that they will slip back into slavery.

II. STRENGTHS AND LIMITATIONS OF THE FREE LABOR APPROACH

The strengths and limitations of the free labor approach are roughly inverse to those of the prohibition approach. Consider Kevin Bales's story of a village in northern India where enslaved workers toiled in a stone quarry. Although they enjoyed the formal legal right

[36] BALES, *supra* note 22, at 87-88.

[37] *See* BALES & SOODALTER, *supra* note 15, at 13.

[38] Where labor is sold on the market, it is compelled by violence in the sense that property rules, backed by the state's monopoly of violence, prevent workers from obtaining sustenance by means other than selling their labor, such as by farming unused land. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472-73 (1923).

[39] *See* Shaw v. Fisher, 102 S.E. 325, 327-28 (S.C. 1920); *infra* text accompanying note 92.

to quit and walk away, they were held to the quarry by the threat of violence and the absence of any wage-labor jobs in the impoverished area.[40] Workers from Sankalp, an antislavery organization, visited the villagers and alerted them to the fact that they were not without rights under the law. With this encouragement, the villagers conceived the idea of obtaining a mining lease and working for themselves. Though illiterate and poverty-stricken, they were experts at operating a quarry. After weathering violent retaliation, eviction from the quarry, and months of surviving on weeds and roots, they were granted a lease. Soon, they were working their new quarry at a level of productivity and profit unheard of under the slave system. Impressed with this success, Sankalp workers spread the idea to other slave villages.[41]

This story illustrates three strengths of the free labor approach, each of which corresponds to a limitation of the prohibition approach. First, the free labor approach does not insist that morally blameworthy individuals be identified and punished. Instead, it focuses first on the workers, seeking to provide them with the rights necessary to secure their economic independence or, failing that, to supply the "power below" to give employers the "incentive above" to provide nonservile employment. Second, the free labor approach relies not primarily on government money and enforcement, but on worker self-activity. Where the conditions for a free labor approach are present, a relatively small infusion of resources can enable workers to win and keep their own freedom. For example, a grant of $3000 enabled Sankalp to purchase motorcycles for three of its workers, doubling the number of villages they could reach.[42] Finally, the free labor approach centers on the creation and sustenance of an alternative to slavery; workers must enjoy not only the right to walk away from their employers, but also all rights that are essential to participation in the free labor system. In the case of the quarry workers, Indian law—which failed utterly to protect the villagers against slaveholder violence—nevertheless gave them access to the mining lease despite their status as Kols, a group low in the Indian caste and ethnic hierarchy. Armed with the hope of obtaining their own quarry, the villagers were able to survive retaliation without government assistance.

These strengths of the free labor approach carry with them a danger, namely, that the goal of free labor could dilute the focus of the

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[40] KEVIN BALES, ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES 63-64 (2007).
[41] *Id.* at 64-68.
[42] *Id.* at 56.

movement, sacrificing moral clarity and risking defections by allies who support the elimination of violent enslavement but are opposed or undecided about free labor rights and practices. Consider the case of Domestic Workers United (DWU), an organization of American domestic workers. In the spring of 2009, DWU held a rally in New York's Central Park to push for a New York State "Domestic Workers Bill of Rights."[43] The rally brought together women who had experienced a wide variety of labor violations including subminimum wages, outright wage theft, sexual harassment, psychological abuse, physical assaults, and even enslavement.[44] This graduated spectrum of abuses is characteristic of the problems faced by domestic workers in the United States. In a survey of 240 domestic workers in the San Francisco area, 90% reported not receiving time and a half for overtime work, 16% reported wage theft, 9% reported sexual harassment, and 9% reported physical violence.[45] The domestic-workers movement, which includes DWU and a number of similar organizations spread across the country, addresses all of these concerns. The New York State Assembly has passed a DWU-supported bill that provides for overtime pay, a weekly day of rest, and protection for the rights to organize and bargain collectively. DWU and other groups have assisted domestic workers in lawsuits over issues ranging from wage and hour infractions to involuntary servitude. Employers who underpay or abuse domestic workers may awaken to find lively crowds of workers and supporters protesting outside their homes.[46]

If the goal is to end *slavery*, what is the best approach to the broad set of workers' rights demands pressed by organizations like DWU? At least three possibilities come to mind: (1) decline to support any

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[43] Lizzy Ratner, *The New Domestic Order*, THE NATION, Sept. 28, 2009, at 13, 13.

[44] *Id.* at 13-14.

[45] MUJERES UNIDAS Y ACTIVAS ET AL., BEHIND CLOSED DOORS: WORKING CONDITIONS OF CALIFORNIA HOUSEHOLD WORKERS 5 (2007). The authors suggest that the rate of abuse might have been underreported: "More than one-third (35%) of workers did not respond to survey questions about workplace abuse, a substantially higher non-response rate than the rest of the survey that indicates a high level of discomfort with the questions (corroborated with survey collectors)." *Id.* at 5; *see also* Mary Romero, *Nanny Diaries and Other Stories: Imagining Immigrant Women's Labor in the Social Reproduction of American Families*, 52 DEPAUL L. REV. 809, 843-44 (2003) (listing abuses endured by domestic workers, including low wages, long hours, lack of privacy, restrictions on movement and communication with outsiders, passport confiscation, threats of deportation, assault and battery, sexual assault, servitude, and torture).

[46] *See* Evelyn Nieves, *Domestic Workers Sue, Lobby, Organize for Workplace Rights*, ASSOCIATED PRESS, June 4, 2008, *available at* LEXIS; Ratner, *supra* note 43, at 13-15; Elissa Strauss, *The Invisible Workers*, AM. PROSPECT, June 2009, at 24, 24-26.

workers' rights (other than the negative right to be free from slavery) in order to keep the focus on the distinctive evil of slavery; (2) include the full set of free labor demands in the antislavery program in the hope that efforts to enforce them will result in the freeing of slaves; and (3) selectively include demands that are closely related to the liberation of slaves.

As the reader might guess, this set of alternatives harks back to the three bowls of porridge in the story of Goldilocks. The first is too pure; as will become apparent below, experience suggests that the combination of support for workers' rights with antislavery prohibition can be far more effective than an exclusive reliance on prohibition. The second is obviously too diffuse; the antislavery movement would lose its focus altogether if it added all workers' rights to the program. The third is, unsurprisingly, just right; it holds the potential to realize synergies with workers' rights while maintaining the focus on slavery. Unfortunately, the third also leaves open more questions than it resolves. How many workers' rights should be supported, and what kind? This Article attempts only a preliminary discussion.

An example of the third approach can be found in the work of Kevin Bales. Generally, Bales focuses heavily on defining slavery and distinguishing it from other forms of labor extraction. Slavery "is the theft of an entire life," he explains.[47] "It is more closely related to the concentration camp than to questions of bad working conditions."[48] He stresses that antislavery organizations must "*focus* on slavery" as distinct from prison labor, nonslave child labor, or "being very poor and having few choices."[49] Consistent with the prohibition approach, most of his proposals call for the identification, exposure, and punishment—whether by criminal sanctions, adverse political action, private disinvestment, or consumer boycotts—of slaveholders and beneficiaries of slavery, along with relief for the victims.[50]

But Bales does not believe that slavery can be eliminated without changing the social and economic conditions that sustain it, namely, the ready supply of impoverished, vulnerable victims and the strong

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[47] BALES, *supra* note 22, at 7.

[48] *Id.*

[49] *Id.* at 259; *see also* Kevin Bales, *Preface* to JOEL QUIRK, UNFINISHED BUSINESS: A COMPARATIVE SURVEY OF HISTORICAL AND CONTEMPORARY SLAVERY 9, 11 (2008) (warning against diluting the antislavery appeal by "stretching the meaning of the word 'slavery' to include such issues as all forms of prostitution, incest, all forms of child labour, [and] all prison labour").

[50] BALES, *supra* note 22, at 235-51; BALES & SOODALTER, *supra* note 15, at 253-67.

demand for labor at the lowest possible cost. On the supply side, he warns that, "[i]n the long term, wiping out slavery requires helping the world's poor to gain greater control over their lives."[51] And to cool the lust for ever-cheaper labor on the demand side, "we must convince the world that human rights need even more protection than property rights," including "priority over the free market in goods."[52]

These observations might appear to put Bales on a slippery slope toward diluting the antislavery program with a broad array of antipoverty rights. In terms of specific proposals, however, he avoids this problem by focusing on a few rights that have clear synergies with the antislavery objective. In their program for eliminating slavery in the United States, for example, Bales and Soodalter single out the rights of self-organization and concerted activity and call for them to be extended to all farm workers and domestic workers.[53] Their proposal reflects the free labor theory that when workers have rights, they can exert the "power below" to give employers the "incentive above" to avoid slavery and servitude.[54]

Consider Bales and Soodalter's case study of tomato pickers in Immokalee, Florida. The harvesting process is "brutal," requiring the pickers to labor "bent over in the southern sun for hours on end, straightening only long enough to run 100 to 150 feet with a filled thirty-two-pound bucket and literally throw it up to the worker on the truck."[55] Until recently, the pickers risked beatings for the offense of pausing to take a drink. When permitted, they gulped down water out of ditches, ingesting pesticides and fertilizer along with the water. The work day dragged on until the crew chief decided it was over. Then the pickers returned to overcrowded quarters in "broken-down trailers, enclaves of tiny huts, and depressing little apartments."[56] For their labor, the pickers received a fraction of the minimum wage to which they were legally entitled.[57] Although these workers led a hard life, they were lucky compared to another group of pickers—those who had fallen into debt bondage. These workers had become in-

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[51] BALES, *supra* note 22, at 235.

[52] *Id.* at 249.

[53] BALES & SOODALTER, *supra* note 15, at 262-63.

[54] The quoted language is from *Pollock v. Williams*, 322 U.S. 4, 18 (1944). I have suggested elsewhere that workers enjoy the constitutional rights to organize and strike under *Pollock*, a conclusion that conflicts with the results in numerous cases but has never been considered on the merits by the U.S. Supreme Court. *See* Pope, *supra* note 10, at 1540-65.

[55] BALES & SOODALTER, *supra* note 15, at 45.

[56] *Id.*

[57] *Id.* at 45-46.

debted to smugglers known as "coyotes," who helped them cross the border into the United States.[58] Once in Florida, the coyote would sell the worker to a labor contractor, and the worker would owe the contractor. But the contractors charged for living expenses and, no matter how hard a worker toiled, his debt would grow.[59] Any thoughts of escape would be squelched with threats of violence, both to the worker himself and to his family back home.[60] The net result of this system is enslavement; the worker labors without compensation or hope of escape.

In 1993, a group of low-wage laborers formed the Coalition of Immokalee Workers (CIW) as a vehicle to improve conditions and compensation.[61] The CIW is a textbook example of the free labor approach in action. Instead of relying primarily on government enforcement, the CIW brings workers together, develops rights consciousness through education and action, and creates the space for workers to develop strategies for improving their conditions. After a series of discussions among the 80 to 100 most active workers, the CIW decided to launch a boycott of the Taco Bell chain—a subsidiary of Yum! Brands, the world's largest restaurant corporation—demanding that the chain pay one cent more per pound of tomatoes with the proceeds going to raise wages.[62] The notion that a group of immigrant workers could successfully pressure such a large, multinational corporation might appear quixotic. But the CIW activists did not believe that the local labor contractors could significantly improve conditions as long as big buyers like Taco Bell continued to demand the lowest possible prices. It seemed that the alternatives were to give up or take a long-odds gamble. Over the next four years, the CIW enlisted a broad range of allies among labor, students, and faith-based groups to support the consumer boycott and other pressure tactics including a hunger strike. The gamble eventually paid off in 2005, when Yum! Brands agreed to the CIW's demands.[63]

As Immokalee's tomato pickers organized, their emerging system of free agricultural labor began to function as a nemesis of slavery. In sharp contrast to most low-wage immigrant workers, the CIW's 3000

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[58] *Id.* at 51.

[59] *Id.*

[60] *Id.* at 52.

[61] Elly Leary, *Florida Farmworkers Chop Up Burger King*, MONTHLY REV., May 2008, at 5, 5.

[62] Elly Leary, *Immokalee Workers Take Down Taco Bell*, MONTHLY REV., Oct. 2005, at 11, 11.

[63] *Id.*

members have learned about labor rights and experienced the benefits of organization. These members are, in the words of a CIW activist, "well-placed to understand, analyze, investigate, and operate within the parallel and totally separate world that captive workers and their employers inhabit in rural agricultural communities."[64] The truth of this observation has been demonstrated by the CIW's repeated success at spotting agricultural slavery and assisting workers in bringing the perpetrators to justice.[65] But CIW members do not see legal action as a solution. No matter how many trafficking cases are won, new ones will arise as long as big food buyers like fast-food and megagrocery chains (Walmart being a prime example of the latter) continue to demand the lowest possible prices from suppliers. Accordingly, the CIW's goal is to persuade the big buyers "to take responsibility and say, 'We are no longer going to tolerate sweatshop conditions and slavery.'"[66] In the Yum! Brands settlement, for example, the company agreed not only to pay the extra penny per pound, but also to cease buying tomatoes that had been harvested by workers in a condition of involuntary servitude.[67] Since then, the CIW has reached similar agreements with McDonald's, Burger King, Whole Foods, and Subway.[68]

Like the prohibition approach, the free labor approach poses tests of commitment for its supporters. If worker organization is to serve as a nemesis of slavery, for example, then workers who are threatened by slavery or in close proximity to it must enjoy rights that are effective in practice, and not merely promises on paper. The rights to organize and strike are formally recognized in all of the first-wave industrialized nations and protected in international law as fundamental human rights.[69] But formal protection will not be enough. In the case of the CIW, for example, coverage under the NLRA might or might not improve the situation of the tomato pickers. The workers would gain statutory protection for their rights to organize and to bargain collectively—the reason why Bales and Soodalter endorsed this reform. But the value of that protection is open to question. To begin with, employers who violate the NLRA rights of undocumented workers face

[64] BALES & SOODALTER, *supra* note 15, at 59.

[65] *Id.* at 54-60.

[66] *Id.* at 61 (quoting CIW member Laura Germino).

[67] *Id.* at 62.

[68] *Id.* at 62-65.

[69] *See* HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 13-14 (2000); TONIA NOVITZ, INTERNATIONAL AND EUROPEAN PROTECTION OF THE RIGHT TO STRIKE, at General Editors' Preface (2003).

no penalty other than posting a piece of paper promising not to do it again; the workers get nothing.[70] Even the standard remedies of the Act, which include reinstatement and back pay, are too weak and too slow to provide employers with an effective incentive to respect the statutory rights of their employees.[71] Worse yet, the NLRA bans the CIW's most effective tactic: the secondary boycott. Under section 8(b)(4), it is illegal for a "labor organization" to seek changes in the labor policies of one employer (e.g., the farm labor contractors who make the immediate decision between wage and slave labor) by boycotting another (e.g., Yum! Brands or McDonald's). Although large-scale buyers often exercise effective control over labor conditions by choosing the lowest-cost contractors regardless of labor conditions, the law insists that the contractor (termed the "primary" employer because it hires and pays the workers) is the only acceptable target for labor pressure while the buyer is an innocent "neutral."[72] Each of these limitations—the exclusion of undocumented workers from remedies, the delay-prone and weak remedies accorded to documented workers, and the flat ban on secondary boycotts—falls below the standards set by the International Labor Organization (ILO).[73]

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[70] Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 152-53 (2002). As a result, employers have no incentive to respect the rights of undocumented workers and every incentive to hire them as an effectively rights-less class of workers vulnerable to exploitation at will. *See id.* at 154 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); Christopher David Ruiz Cameron, *Borderline Decisions:* Hoffman Plastic Compounds*, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 4 (2003); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 753-54 (2003); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-*Hoffman *World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 658 (2005); *see also* Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 540 n.125 (2007) (documenting how employers have used *Hoffman Plastic* "as an excuse to squelch labor organizing or efforts to enforce workplace rights").

[71] HUMAN RIGHTS WATCH, *supra* note 69, at 9-10, 14.

[72] *See* BALES & SOODALTER, *supra* note 15, at 47 ("[T]he buyers—fast food giants . . . and market corporations . . . —are dictating the prices they are willing to pay for tomatoes and other crops."); JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 57-58 (2005); KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 209-12 (2004). The NLRA does permit unions to utilize nonpicketing forms of communication to request that consumers boycott secondary employers. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 580 (1988).

[73] HUMAN RIGHTS WATCH, *supra* note 69, at 41-42, 23 (reporting that the U.S. is obligated to ensure "that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy," but that recourse under the NLRA "is often delayed to a point where it ceases to provide redress," and that "remedies are weak and often ineffective"); *id.* at 210 ("The U.S. prohibition on solidarity action . . . runs

From an antislavery perspective, then, it might be worthwhile to support effective rights of association for low-wage workers who are especially vulnerable to slavery. Strong resistance can be expected from the many governments that seek to attract corporate investment by offering an undemanding and submissive workforce.[74] Given the current weakness of global human rights agencies like the ILO, progress may come first at the local and national levels.[75] Locally, social movements might deploy the freedom of association in antitrafficking initiatives. In the United States, for example, trafficked guest workers have organized an association with assistance from the New Orleans Workers Center for Racial Justice. A number of these workers recently obtained T visas (which are available to certain victims of "severe trafficking") after arguing that denial of the rights to organize and strike, combined with the H-2A guest visa's ban on changing employers, constitutes involuntary servitude under the Thirteenth Amendment to the U.S. Constitution.[76] At the national level, the Supreme Court of Canada recently held that the Canadian Constitution provides "at the least the same level of protection" for the right to bargain collectively as do the standards of the ILO.[77] A case involving the extension of this right to low-wage agricultural workers is currently before the court.[78]

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counter to principles developed by the ILO's Committee on Freedom of Association over many decades of treating cases under convention 87 and 98."); Ellen Dannin, Hoffman Plastics *as Labor Law—Equality at Last for Immigrant Workers?*, 44 U.S.F. L. REV. 393, 443 (2010) (reporting the ILO Committee on Freedom of Association's finding "that eliminating the back pay remedy [for undocumented workers] left the U.S. government with insufficient means for ensuring that undocumented workers are protected from anti-union discrimination," and providing documentation).

[74] Alan Hyde, *The International Labor Organization in the Stag Hunt for Global Labor Rights*, 3 LAW & ETHICS HUM. RTS. 153, 170 (2009) (observing that the freedom of association "requires special means of enforcement, because a country or region may indeed realize comparative advantage by repressing unions and collective bargaining," and its "tame or absent unions may well figure in its pitches to foreign investors"); Kevin Kolben, *The New Politics of Linkage: India's Opposition to the Workers' Rights Clause*, 13 IND. J. GLOBAL LEGAL STUD. 225 (2006) (explaining why India and many other developing countries are reluctant to recognize the freedom of association).

[75] Hyde, *supra* note 74, at 170. Hyde suggests, however, that regional subassemblies or small groups of nations at similar stages of development might succeed in enacting enforceable labor standards. *Id.* at 177.

[76] Letter from Jennifer Rosenbaum, New Orleans Workers' Ctr. for Racial Justice, to Thomas Pearl, Victims and Trafficking Unit, U.S. Dep't of Homeland Sec. (Feb. 1, 2010) (on file with author).

[77] Health Servs. & Support—Facilities Subsector Bargaining Ass'n v. British Columbia, [2007] 2 S.C.R. 391, ¶ 79 (Can.).

[78] Judy Fudge, *Brave New Words: Labour, the Courts and the Canadian Charter of Rights and Freedoms*, 28 WINDSOR Y.B. ACCESS JUST. (forthcoming 2010) (manuscript at 7), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1522545.

III. A FREE LABOR APPROACH TO IMMIGRATION AND CROSS-BORDER TRAFFICKING

Perhaps the biggest single supporting factor for the new slavery may be found in the partial and discriminatory globalization of economic activity. With impressive unanimity, the financial and political elites of the first-wave industrialized countries tout the benefits of transnational "free trade." The GATT, NAFTA, and other international trade regimes protect the rights of corporations to move capital and commodities across national borders unimpeded by governments, democratic or otherwise. But there is one factor of production that elites are content to wall away inside national borders: labor. "Now capital has wings," observes New York financier Robert A. Johnson. "Capital can deal with twenty labor markets at once and pick and choose among them. Labor is fixed in one place. So power has shifted."[79]

In this regime of mobile capital and trapped labor, impoverished workers predictably and desperately seek entry to countries with job opportunities. Immigration law inevitably serves as a form of labor control, theoretically walling workers off from jobs while actually creating an undocumented workforce of vast proportions.[80] As of 2008, for example, there were approximately 11.6 million unauthorized immigrants living in the United States.[81] Labor force participation rates are high, and as many as one in five cooks, one in four construction workers, and one in two farm workers in the United States are undocumented.[82] Although only a small proportion of undocumented workers are actually enslaved, the overwhelming majority are effectively denied important workers' rights, and thus lack full access to the system of free labor. As we have seen, domestic and agricultural workers—occupations with high proportions of undocumented work-

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[79] WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM 24 (1997).

[80] *See, e.g.*, Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1447 (2008) (observing that a strong immigration reform law could "reasonably be characterized as the most significant labor reform in a generation"). *See generally* Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 131 (2002) (documenting the use of immigration restrictions as a means of regulating the domestic labor pool in the United States).

[81] MICHAEL HOEFER ET AL., DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008, at 2 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf.

[82] Gordon, *supra* note 70, at 529.

ers—are excluded from the NLRA.[83] Even those who toil in covered occupations are deprived of any effective remedy under the *Hoffman Plastic* decision.[84] More fundamentally, undocumented workers are constantly haunted by the possibility of deportation, rendering them reluctant to enforce even rights guarantees that do, at least on the books, apply to them. These vulnerabilities are compounded by cultural isolation, unfamiliarity with American rights, and fear of employer retaliation against family members in their home country.[85] As a result, undocumented workers are attractive candidates for recruitment into the large and growing informal, or "underground," labor market that exists alongside the formal, regulated labor market.[86] Employers prize them as employees not only because their labor is cheap, but also because their vulnerability makes them pliable and subservient.[87]

The net result of all of this is a global economy without even the pretense of a global free labor system. For the antislavery cause, this is a disaster. It walls off the poverty-stricken workers of source countries, rendering them vulnerable to traffickers, while creating substantial populations of undocumented workers in destination countries. These effectively rights-less workers provide both a recruitment pool for enslavers and a largely silent buffer zone around slavery.[88]

The antislavery movement cannot, of course, singlehandedly bring a global free labor system into being. However, it can—at a minimum—avoid helping to delay the necessary reforms. In particular, it might be counterproductive to emphasize border control as a response to transnational trafficking. Reliance on border enforcement tends to spill over into broader enforcement against "human smuggling," which, from the viewpoint of many smuggled workers, is a

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[83] *See supra* note 15 and accompanying text.

[84] *See supra* note 70 and accompanying text.

[85] *See* QUIRK, *supra* note 49, at 55 (noting that employers in formal labor markets use isolation from an immigrant's place of origin and language barriers, among other things, to exploit such individuals); *see also* Romero, *supra* note 45, at 843-44.

[86] *See* IMMANUEL NESS, IMMIGRANTS, UNIONS, AND THE NEW U.S. LABOR MARKET 20-23, 26-27 (2005) (arguing that the decline of manufacturing and later rise in the services sector has dispersed work to small firms competing on the basis of cheap labor, resulting in an informal and unregulated economy); QUIRK, *supra* note 49, at 55 ("Unable to seek lawful employment, migrants gravitate towards informal labour markets, which offer fertile ground for many forms of exploitation . . . .").

[87] *See* Gordon, *supra* note 70, at 548 (observing that the preference for cheap labor "may run second to an employer's desire for subservient workers," and recounting examples of employer strategies for obtaining workers viewed as subservient).

[88] *See* QUIRK, *supra* note 49, at 55 (illustrating how circumstances of cultural isolation dramatically decrease a laborer's ability to escape even violent working conditions).

deeply flawed but essential method of adjusting to the global economy.[89] Workers are merely following the lead of economic and political elites, who insist upon unimpeded international mobility for their factors of production. Some antitraffickers acknowledge this problem but point out that, realistically, we are stuck with border control for the time being. From a free labor perspective, this sharp separation between ultimate goals and short-range policies is ill-advised. Tightened border controls tend to raise the cost of migration, thereby increasing the indebtedness of immigrant workers to labor smugglers and rendering them more vulnerable to workers' rights violations and debt bondage.[90] The inevitable result is to weaken the constituencies that oppose slavery while strengthening those that benefit from it, causing the goal of a global free labor system to recede further into the distance.

On a more immediate, practical level, the free labor perspective suggests that some guest-worker programs run afoul of bans on involuntary servitude. In the United States, for example, H-2A and H-2B guest-worker visas require that the holder remain with her original employer or face deportation. These workers may not be able to prove that they are held in slavery or involuntary servitude, as defined under certain statutes, but they are nevertheless deprived of "the right to change employers," which has been recognized by the U.S. Supreme Court as an essential feature of the free labor system guaranteed by the Thirteenth Amendment.[91] This right has been enforced even where the laborer involved was apparently free to move outside the jurisdiction. In *Shaw v. Fisher*, for example, the South Carolina Supreme Court struck down the tort of hiring a laborer who was under a contractual obligation to work for another, though there was no finding that the laborer could not have left the state.[92] It would seem

[89] *See* Chacón, *supra* note 16, at 2985-87 (distinguishing trafficking and smuggling); James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking,"* 49 VA. J. INT'L L. 1, 5 (2008) ("[M]ost smuggling has historically been a consensual and relatively benign market-based response to the existence of laws that seek artificially to constrain the marriage of surplus labor supply on one side of the border with unmet demand for certain forms of labor on the other side of that border.").

[90] *See* Hathaway, *supra* note 89, at 33-34 (arguing that criminalization of smuggling raises the cost of moving people across borders, which decreases their own funds and leaves them more vulnerable to exposure, exploitation, and enslavement).

[91] *See* Pollock v. Williams, 322 U.S. 4, 18 (1944).

[92] 102 S.E. 325, 327-28 (S.C. 1920); *see also* Thompson v. Box, 112 So. 597, 600 (Miss. 1927) ("[A] laborer may breach his contract (subject only to civil liability), and one may thereafter deal with him as a free man.").

that guest workers must, at a minimum, enjoy the right to change employers without facing deportation.[93]

In the long run, Jennifer Gordon's concept of transnational labor citizenship beckons as a solution consistent with antislavery goals. She proposes that labor citizenship be separated from political citizenship, so that trapped labor can be liberated without interfering with the power of nation states to define their own political communities.[94] Like political citizenship, labor citizenship would entail both rights and duties. Mexican workers, for example, would gain the right to migrate and "work for any employer in the United States with full labor rights and eventual conversion to permanent residence if the migrant so desired."[95] On the other hand, they would also be obligated to join transnational labor organizations in both Mexico and the United States, and to take a "solidarity oath" pledging to "take no job that violated basic workplace laws or that paid less than the minimum set by the transnational labor organizations, to report employer violators to their transnational labor organizations once discovered, and to uphold union solidarity with other workers (for example, by refusing to cross picket lines)."[96] The transnational labor organizations would be "grassroots groups" that "might emerge from existing NGOs, worker centers, or unions, or might be founded independently."[97] These groups would displace the current system of corrupt recruiters in the legal sector and smugglers in the underground, informing workers of their rights and obligations throughout the process.[98] The inspiration for Gordon's proposal came from the existing cross-border network formed by the Farm Labor Organizing Committee (FLOC), a union based in the United States with operations in Mexico.[99] As she acknowledges, it is unlikely to be adopted on a wide scale anytime soon, but she offers a "micro" version that could go forward without U.S.

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[93] *See* Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 64 (2006) ("The free labor system guaranteed by the Thirteenth Amendment is at odds with guestworker programs. The ability to quit at any time is illusory if that means that you will be deported."); Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guestworker programs*, 38 U. TOL. L. REV. 923, 927-29 (2007) (noting the argument that if visa workers cannot quit without facing deportation, the result would be involuntary servitude).

[94] Gordon, *supra* note 70, at 505-06.

[95] *Id.* at 567.

[96] *Id.*

[97] *Id.* at 568.

[98] *Id.* at 567-69.

[99] *Id.* at 574-75.

government involvement.[100] Such a pilot program, which could involve organizations like the Coalition of Immokalee Workers, might be worthy of inclusion in the antislavery program.

IV. A FREE LABOR APPROACH TO SEX TRAFFICKING

The notion of a free labor approach to sex trafficking is, on one view, a contradiction in terms. Catharine MacKinnon, for example, contends that the purported distinction between forced and "voluntary" prostitution has "dimensions of unreality":

> The point of the distinction is to hive off a narrow definition of force in order to define as voluntary the conditions of sex inequality, abuse, and destitution that put most women in the sex industry and keep[] them there. . . . [T]o distinguish trafficking from prostitution, as if trafficking by definition is forced and prostitution by definition is free, is to obscure that both use money to compel sexual use, that the whole point of sex trafficking is to deliver women and children into prostitution, and that not crossing a jurisdictional line does not make the unequal equal or the forced free.[101]

At the outset, it should be clear that MacKinnon's position leaves room for the free labor approach to play a fairly obvious and uncontroversial role. What makes prostitution involuntary, in her view, are "the conditions of sex inequality, abuse, and destitution" that push women into prostitution.[102] Although the free labor approach is no substitute for a focused attack on sex inequality, it can assist women in achieving economic independence or, failing that, nonservile employment. Women have, for example, formed domestic workers' organizations to enforce labor rights and defend against sex harassment and abuse.[103] When Indian quarry villagers managed to obtain and operate their own quarry, women who had suffered systematic sexual abuse at the hands of slaveholders were propelled into positions of leadership in local politics.[104] And when a micro-credit program was initiated in Bangladesh, women used it more effectively and in greater numbers than men.[105]

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[100] *Id.* at 570-79.

[101] Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993, 997-98 (2005).

[102] *Id.* at 997.

[103] *See supra* notes 44-46 and accompanying text.

[104] *See* BALES, *supra* note 40, at 69 (discussing the rise and empowerment of women in India who had been victims of slavery).

[105] *See id.* at 221 (describing how women in Bangladesh used microfinancing to start small businesses, which ranged from growing herbs to establishing factories).

In order to reap the full benefits of a free labor approach, however, the free labor system must be extended into the industries and localities where slavery is present. In the case of the Coalition of Immokalee Workers (CIW), for example, the population of empowered members lived and worked in the same kind of rural agricultural communities as the enslaved workers that they helped to liberate.[106] It was this industrial, geographic, and cultural overlap that made the CIW members "well-placed to understand, analyze, investigate, and operate within the parallel and totally separate world" of agricultural slavery.[107]

There is no reason to think that this dynamic would not operate in the sex industry. Whatever scholars might say about the possibility of voluntary prostitution, it is clear that many prostitutes believe and act as if there is. Consider the case of Sarah Schell, who took home $600 per day working in a massage parlor.[108] On an upper story of the same building was a similar operation offering older Asian women for a greatly reduced price.[109] Sarah used her money to pay for college where, among other things, she studied human trafficking. Gradually, she realized that the women upstairs were enslaved. She went to a local antitrafficking group and "let them know that I was friends with people in the sex trade and could serve as something of an expert."[110] In Sarah's case, college provided the rights education that, in the case of the Immokalee tomato pickers, was supplied by the Coalition. Whether Sarah's sex work was "voluntary" or not (clearly not, as it turns out, given that she was recruited when still a child), her moral agency cannot be doubted. She acted out of labor and gender solidarity: "I mean if they had to do this kind of work, then at least they should be paid for it, as women empowered."[111]

Granted, prostitution may well be an inherently destructive industry that should be eliminated altogether. There is little doubt that the provision of sexual services for money tends to inflict severe injuries on the provider. It has been suggested, for example, that in order to survive, prostitutes distance themselves from their own bodies and experiences in ways that are profoundly destructive to the self.[112] Even

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[106] BALES & SOODALTER, *supra* note 15, at 59-60.
[107] *Id.* at 59.
[108] *See id.* at 174.
[109] *Id.*
[110] *Id.* at 174-75.
[111] *Id.* at 175.
[112] *See* KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY 28-36 (1995) (describing the stages of dehumanization—specifically distancing, disengagement, dissocia-

Sarah Schell, who parlayed her $600 per day earnings into a college education, was later diagnosed with post-traumatic stress syndrome and now thinks of herself as a survivor "not of trafficking, but of exploitation."[113] Further, it is reasonable to assume that in a patriarchal world, "prostitution, with or without a woman's consent," functions as an "institutional, economic, and sexual model for women's oppression."[114] At the very least, prostitution brings commodification and economic pressure into a realm that should be preserved for autonomous expression.[115]

However, the questions whether, when, and how to abolish prostitution involve considerations that go beyond the harmfulness of the industry. Foremost among these, from a free labor perspective, are the availability of alternative work and the relative quality of that work in terms of economic rewards, dignity, and healthfulness. If the alternatives are worse than prostitution, then an attempt at abolition might be premature. Consistent with this possibility, a number of prostitutes and other sex workers have—despite their extraordinary vulnerability—courageously organized and struggled to bring workers' rights into the industry.[116] Like the CIW in U.S. agriculture, these organizations can help to identify and liberate enslaved individuals in the sex indus-

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tion, and disembodiment—whereby women dissociate "from their bodies and therefore their selves").

[113] BALES & SOODALTER, *supra* note 15, at 176.

[114] BARRY, *supra* note 112, at 24. Barry says that it is "the" model, but that contention is not essential to the argument against prostitution. *See also* CAROLE PATEMAN, THE SEXUAL CONTRACT 207-08 (1988) (arguing that men's and women's sexual identities are at stake in prostitution, and when "women's bodies are on sale as commodities in the capitalist market . . . , men gain public acknowledgment as women's sexual masters—that is what is wrong with prostitution").

[115] *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921-25 (1987) (discussing the dehumanization that results from the commodification of sex).

[116] *See* ANNA-LOUISE CRAGO, OPEN SOC'Y INST., OUR LIVES MATTER: SEX WORKERS UNITE FOR HEALTH AND RIGHTS 8 (2008) (describing the creative methods used by sex workers in eight countries to address health and social justice needs); GREGOR GALL, SEX WORKER UNION ORGANISING: AN INTERNATIONAL STUDY 13-14 (2006) (analyzing sex worker union organizing in seven first-wave industrialized countries); GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 167-226 (Kamala Kempadoo & Jo Doezema eds., 1998); Kate Hardy, *Incorporating Sex Workers into the Argentine Labor Movement*, 77 INT'L LAB. & WORKING-CLASS HIST. 89 (2010) (describing the organization of sex workers in Argentina); Ashwini Sukthankar, *Queering Approaches to Sex, Gender and Labor in India: Examining Paths to Sex Worker Unionism* (2009) (unpublished manuscript, on file with author) (recounting the development of three sex workers' organizations in India).

try.[117] Though far from perfect, they provide the best practical opportunity for sex workers to carve out a space for collective deliberation and action. As one sex worker recounted,

> We never dreamed of speaking up for ourselves. Never imagined that we ever had any rights that we could protect. But now we are sharing our joys and sorrows with each other. We speak about our rights. We dare to dream about the future.[118]

MacKinnon's methodology, if not her conclusions, support this effort. Even if women "are what they are made, are determined" by male power, the response is not to deny their agency.[119] To the contrary, MacKinnon holds out the hope that despite being "damaged" and suffering "distortion" by male power, women can and "must create new conditions, take control of their determinants."[120] Their method is group consciousness raising.[121] And if it is true that because "a woman's problems are not hers individually but those of women as a whole, they cannot be addressed except as a whole," then sex workers would seem to be an integral part of that project.[122] Surely this method would be violated by selectively spotlighting the antiprostitution narratives of some survivors while ignoring the workers' rights advocacy of others. In place of the bottom-up method of consciousness raising, we would have a top-down judgment either that sex worker activists are victims of false consciousness, or that their self-organization should be sacrificed to some greater good.[123]

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[117] *See, e.g.*, CRAGO, *supra* note 116, at 14 ("When empowered, sex workers are often the best placed and most able to assist trafficked persons and underage minors.").

[118] *Id.* at 16 (quoting Hazera Begum, former leader of a Bangladeshi sex worker organization).

[119] CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 103 (1989).

[120] *Id.*

[121] *See id.* at 83-84 (characterizing the feminist method as "consciousness raising," which collectively reconstitutes "the meaning of women's social experience, as women live through it").

[122] *Id.* at 95.

[123] Tracy Higgins makes this point with regard to the individual "choice" for sex work: "Whether MacKinnon thinks that women who defend sex work as a viable economic choice are deluded (suffering from false consciousness, perhaps) or simply have so few choices that this one need not be respected is unclear. If the former, MacKinnon does not explain how she identifies the falsely conscious (or worse, collaborating) woman. If the latter, it is not obvious why it is better for women with few choices to have their preferred choice eliminated in favor of even more dangerous, difficult, and poorly-paid work." Tracy E. Higgins, Are Women Human? And Other International Dialogues *by Catharine Mackinnon*, 18 YALE J.L. & FEMINISM 523, 540-41 (2006) (book review).

Conclusion

Human trafficking and slavery can be attacked not only negatively, through legal prohibition, but also positively, by nurturing the free labor system as a nemesis to slavery. In the realm of law, the free labor approach operates by guaranteeing workers a set of rights sufficient to achieve either economic independence or, failing that, the power below to give employers the incentive above to provide jobs that rise above servitude. It relies primarily on workers—not government enforcement—to achieve and sustain labor freedom. This approach appears to provide an indispensable and cost-effective way to move beyond the limitations of the predominant prohibition approach.